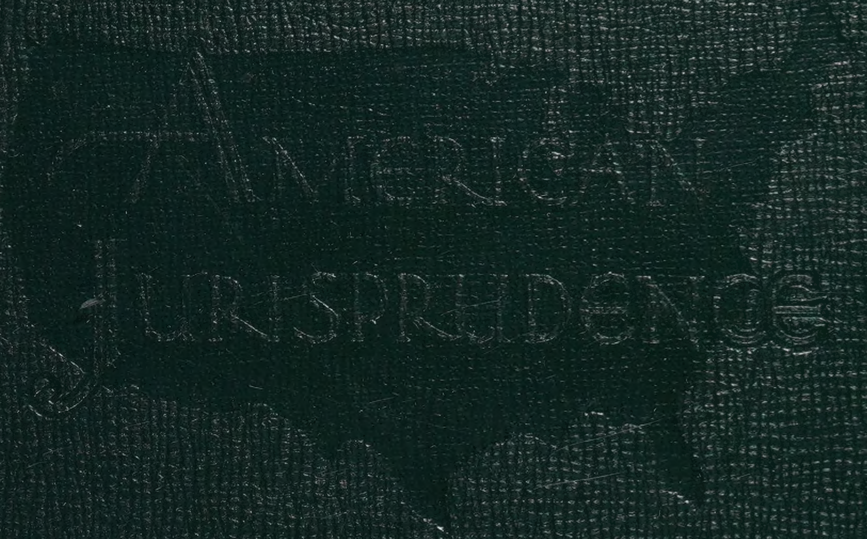

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AMERICAN JURISPRUDENCE

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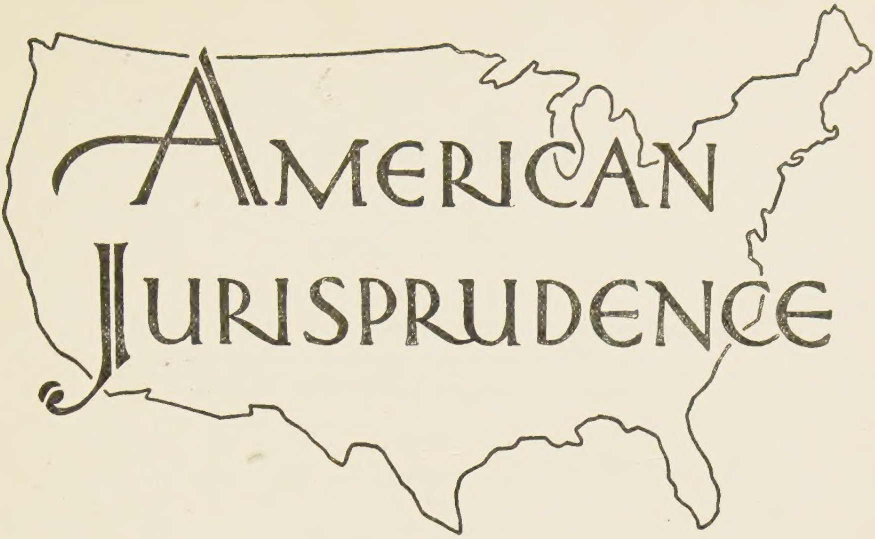

AMERICAN JURISPRUDENCE

A COMPREHENSIVE TEXT STATEMENT OF AMERICAN CASE LAW, AS DEVELOPED IN THE CASES AND ANNOTATIONS IN THE ANNOTATED REPORTS SYSTEM, BEING A REWRITING OF *Ruling Case Law* TO REFLECT THE MODERN DEVELOPMENTS OF THE LAW

By the Editorial Staff
of the Publishers

Volume 5

ATTACHMENT AND GARNISHMENT, §§ 655 TO END
TO AUTOMOBILES

BANCROFT-WHITNEY COMPANY · SAN FRANCISCO · CALIFORNIA
THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY
ROCHESTER · NEW YORK

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B. Remedies of Attaching Creditor.
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A. The Cause of Action.

1. In General.

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§ 986. *Malice and Probable Cause.*
§ 987. *—Under Wrongful Attachment or Garnishment Statutes.*
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1. In General.

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- § 1026. *Corporation Defendant.*
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- § 1029. *—Defendants.*

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5. Trial.
- § 1038. *Generally.*

6. Judgments.
- § 1039. *Generally.*

7. Costs.
- § 1040. *Generally.*

X. THE GARNISHMENT PROPER

A. INTRODUCTORY

§ 655. **Generally.**—This division deals with the matter of the garnishment proper, as distinguished from the main action,[12] which is discussed in a subsequent division of this article.[13] The effect and priority of garnishment,[14] claim, intervention, and interpleader in garnishment,[15] bonds in garnishment proceedings and their enforcement,[16] and actions for wrongful or malicious garnishment[17] are, however, reserved for treatment in subsequent divisions of this article.

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[12] As to distinction between the main action and the garnishment proper, see Vol. 4, p. 556, §§ 9 et seq.

[13] See infra, §§ 938 et seq.

[14] See infra, §§ 815 et seq.

[15] See infra, §§ 964 et seq.

[16] See infra, §§ 896 et seq.

§ 656. Constitutionality of Garnishment Statutes.—Statutes authorizing the attachment or garnishment of assets of a defendant in the hands of a third party do not of themselves operate to deprive the defendant of his property. There must be an adjudication of the rights of the parties before the property can be subjected to the plaintiff's claim. Therefore, such a statutory provision is not violative of the "due process" provisions of the Federal and State Constitutions.[18]

§ 657. Test of What Constitutes Garnishment Proceedings.—As stated in an early section of this article,[19] the distinguishing characteristic of American garnishment or trustee process is the attachment, garnishment, or sequestration of property of, or indebtedness owing to, the defendant in the hands of a garnishee or trustee, who is summoned to answer the claim of the plaintiff against the defendant to the extent of such property of the defendant in his possession in so far as it does not exceed such claim. Such attachment, garnishment, or sequestration constitutes an execution dependent upon a subsequent judgment.[20] Hence, this division constitutes a study of the garnishment proper, viz., the ancillary proceeding against one holding property of, or indebted to, the defendant, as a mode of execution on original or mesne process in an action. Consequently, this article treats as garnishment all execution proceedings on original or mesne process answering the above test, regardless of the nomenclature of local law and practice.[1]

§ 658. Garnished Property as Impounded.—The majority rule is that a garnishment operates like an attachment to impound the garnished property in the custody of the law and to secure it to satisfy a judgment for the plaintiff, but there is authority to the effect that it is no more, and has no other effect, than a proceeding in personam against a debtor of the defendant.[2] However, in the absence of a statute to the contrary, the garnishment binds only sufficient property or credits of the defendant in the hands of the garnishee to satisfy the plaintiff's claim against the defendant.[3] Under the local law and practice in some jurisdictions, a garnishment binds all the property and effects of the defendant in the hands of the garnishee.[4]

B. Rights, Duties, and Liabilities of Garnishee

1. In General

§ 659. Generally.—A garnishee is regarded as an innocent person owing money to, or having in his possession property of, another, without fault or blame, and he is supposed to stand indifferent as to who shall have the money or property.[5] His only concern is to whom he shall lawfully pay his debt.[6]

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[17] See infra, §§ 984 et seq.

[18] Byrd v. Rector, 112 W. Va. 192, 163 S. E. 845, 81 A.L.R. 1213.

[19] See Vol. 4, p. 553, § 4.

[20] See Vol. 4, p. 552, §§ 3, 4.

[1] Generally, as to scope and method of treatment of this article, see Vol. 4, p. 552, § 2.

[2] Generally, as to effect and priority of garnishment, see infra, §§ 815 et seq.

[3] Davis v. Choctaw, O. & G. R. Co. 73 Ark. 120, 83 S. W. 318, 3 Ann. Cas. 658.

See also infra, § 790.

[4] See infra, § 817.

[5] Walters v. Washington Ins. Co. 1 Iowa, 404, 63 Am. Dec. 451; Oldham v. Ledbetter, 1 How. (Miss.) 43, 26 Am. Dec. 690; Farrington v. F. E. Fleming Commission Co. 94 Neb. 108, 142 N. W. 297, 47 L.R.A.(N.S.) 742; Bassett v. Garthwaite, 22 Tex. 230, 73 Am. Dec. 257; Pennsylvania R. Co. v. Rogers, 52 W. Va. 450, 44 S. E. 300, 62 L.R.A. 178.

The garnishee is regarded by the law somewhat in the light of a trustee, and, as such, is bound to protect, by legal and appropriate steps, the rights of all parties

In the eyes of the law, he is a mere stakeholder, a custodian of property or estate attached in his hands, and he has no right to do any voluntary act to the prejudice of either the plaintiff or the defendant in the action. He must let the law take its course, except that he may protect himself from jeopardy or injury by unauthorized acts and proceedings.[7]

A garnishee is not permitted unnecessarily to prolong the proceedings or hold on to the property at the expense of the one taking out and serving the writ of garnishment.[8]

These rules apply to the garnishment of rights under negotiable instruments.[9]

It is the duty of the courts and their officers, at all times and under all circumstances, to protect the rights of garnishees and those who may have business relations with them.[10]

§ 660. Status as Custodian of the Property.—The garnishee, or one in whose hands property is attached or garnished, is universally regarded as charged with its legal custody pending the outcome of the attachment or garnishment,[11] unless, by local statute and practice, he is permitted to surrender or pay the garnished property or funds into court, to the attaching officer, or to a receiver or trustee appointed to receive them.[12]

A court may appoint a proper person custodian of property or funds abandoned by a garnishee.[13]

§ 661. Duty of Agent or Trustee Who Is Garnished.—It frequently happens that a garnishee is under duty to the defendant in the garnishment or to adverse claimants of the garnished property not only as garnishee, but in some fiduciary capacity, such as that of a trustee or an agent with respect to the garnished property. In such case his duties as agent or trustee are not diminished by the garnishment except that they must be exercised without prejudice to his legal duties as garnishee.[14] A bank receiving a draft for collection, with instructions to remit the proceeds or protest it if not paid on presentment, is liable to the owner for the proceeds in case it neglects to remit them for several days, until they are attached by a creditor of the drawer, and fails promptly to notify the owner of the attachment, or comply with his request to secure counsel to protect the owner's interest, or notify the court of the

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to the goods or credits attached in his hands. Oldham v. Ledbetter, 1 How. (Miss.) 43, 26 Am. Dec. 690.

[6] Bassett v. Garthwaite, 22 Tex. 230, 73 Am. Dec. 257.

[7] Cox v. Cronan, 82 Conn. 175, 72 A. 927, 135 Am. St. Rep. 268; White v. Bird, 20 La. Ann. 188, 96 Am. Dec. 393; Brondum v. Rosenblum, 151 Miss. 91, 117 So. 363, citing R. C. L.; Farrington v. F. E. Fleming Commission Co. 94 Neb. 108, 142 N. W. 297, 47 L.R.A.(N.S.) 742; Pennsylvania R. Co. v. Rogers, 52 W. Va. 450, 44 S. E. 300, 62 L.R.A. 178.

Annotation: L.R.A.1918C, 756.

A garnishee who refuses to avail himself of the method pointed out by statute for his protection acts at his own risk and expense. Henderson v. Hooper Sugar Co. 65 Utah, 241, 236 P. 239, 45 A.L.R. 637.

[8] Henderson v. Hooper Sugar Co. 65 Utah, 241, 236 P. 239, 45 A.L.R. 637.

As to liability for interest as damages for unnecessarily prolonging the proceeding, see infra, § 673.

[9] White v. Bird, 20 La. Ann. 188, 96 Am. Dec. 393.

Annotation: L.R.A.1918C, 731.

See also Vol. 4, p. 728, §§ 267 et seq.

[10] West Cache Sugar Co. v. Hendrickson, 56 Utah, 327, 190 P. 946, 11 A.L.R. 216.

Generally, as to danger of double liability as defense to garnishee, see infra, §§ 751 et seq.

[11] International Bedding Co. v. Terminal Warehouse Co. 146 Md. 479, 126 A. 902, 40 A.L.R. 960; Farrington v. F. E. Fleming Commission Co. 94 Neb. 108, 142 N. W. 297, 47 L.R.A.(N.S.) 742; State use of Arnold v. Linaweaver, 3 Head (Tenn.) 51, 75 Am. Dec. 757; Bristol v. Brent, 36 Utah, 108, 103 P. 1076, 140 Am. St. Rep. 804, 21 Ann. Cas. 1125.

[12] See infra, § 719.

[13] Northfield Knife Co. v. Shapleigh, 24 Neb. 635, 39 N. W. 788, 8 Am. St. Rep. 224.

[14] Kutz v. Nolan, 224 Pa. 262, 73 A. 555, 24 L.R.A.(N.S.) 1124; First Wisconsin Nat. Bank v. People's Nat. Bank, 136 Va. 276, 118 S. E. 82, 36 A.L.R. 736.

Annotation: 36 A.L.R. 742.

owner's claim, so that the proceeds are returned to the drawee in the attachment proceedings and lost to the owner, although its delay was to give the parties a chance to settle their differences without legal proceedings.[15] Likewise, a bank garnished for the proceeds of a draft which it has collected for a nonresident owner, and which are claimed by the attaching creditor as the property of the drawer, is bound to comply with the request of its correspondent, who claims the proceeds as a bona fide holder, to employ counsel at his expense to protect his rights.[16]

2. Right and Duty to Hold Garnished Property and Measure of Liability

a. Right and Duty to Hold Property

§ 662. Generally.—The general rule is that a garnishee is under obligation of law to exercise reasonable care to preserve property attached or garnished in his possession pending the outcome of the garnishment proceedings. Accordingly, he may not, except at his peril, during that time, transfer such property, and if he does so, he is in no wise relieved from liability to the creditor by the fact that he was mistaken as to the effect of the writ.[17] Indeed, while the garnishee has a right to surrender garnished property to its true owner, the general rule is that he surrenders it at his peril to an adverse claimant without a proper order of court.[18] Thus, a bank is bound to respect the process attaching or garnishing a deposit therein, and the courts do not permit it to apply the fund attached to the payment of any debt due from the depositor to anyone.[19] Nevertheless, it has been held that the garnishee is under duty to surrender it to an assignee of the defendant, where he knew of the assignment before the garnishment.[1]

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[15] First Wisconsin Nat. Bank v. People's Nat. Bank, 136 Va. 276, 118 S. E. 82, 36 A.L.R. 736.

An extended discussion of the duty of a collecting bank upon an attachment or garnishment of the funds appears in First Wisconsin Nat. Bank v. People's Nat. Bank, 136 Va. 276, 118 S. E. 82, 36 A.L.R. 736. It will be observed that the court in this case holds that relation of principal and agent existed between the plaintiff and defendant banks. This is in accord with the rule that one who undertakes the collection of commercial paper for another becomes the agent of such other (see Bills and Notes [Also Banks, 3 R. C. L. p. 610]). This being the relation, the court further says that the defendant bank was under "a high duty" to protect and respect the rights of defendant as the holder of the draft in question. It will be observed that this distinguishes the case from those where there was a mere relationship of debtor and creditor between the garnishee and the claimant. Annotation: 36 A.L.R. 742.

[16] First Wisconsin Nat. Bank v. People's Nat. Bank, 136 Va. 276, 118 S. E. 82, 36 A.L.R. 736.

[17] Miller v. United States (Page v. United States) 11 Wall. (U. S.) 268, 20 L. ed. 135; Kennedy v. Brent, 6 Cranch (U. S.) 187, 3 L. ed. 194; Loewe v. Savings Bank (C. C. A. 2d) 236 F. 444, L.R.A.1917B, 938, affirmed in 242 U. S. 357, 61 L. ed. 360, 37 S. Ct. 172; Alexander v. Birmingham Trust & Sav. Co. 206 Ala. 50, 89 So. 66, 16 A.L.R. 1079; Skipper v. Foster, 29 Ala. 330, 65 Am. Dec. 405; Great Western Finance Co. v. Hamilton Nat. Bank, 76 Colo. 48, 230 P. 115, 41 A.L.R. 997; Cox v. Cronan, 82 Conn. 175, 72 A. 927, 135 Am. St. Rep. 268; Smith v. Picket, 7 Ga. 104, 50 Am. Dec. 385; United Collieries v. Martin, 248 Ky. 808, 60 S. W. (2d) 125, 89 A.L.R. 971; White v. Bird, 20 La. Ann. 188, 96 Am. Dec. 393; Koontz v. Baltimore & O. R. Co. 220 Mass. 285, 107 N. E. 973, L.R.A.1915D, 838; Van Camp Hardware & Iron Co. v. Plimpton, 174 Mass. 208, 54 N. E. 538, 75 Am. St. Rep. 296; Cook v. Coleman, 167 Mass. 414, 45 N. E. 913, 57 Am. St. Rep. 465; McCann v. Randall, 147 Mass. 81, 17 N. E. 75, 9 Am. St. Rep. 666; International Bedding Co. v. Terminal Warehouse Co. 146 Md. 479, 126 A. 902, 40 A.L.R. 960; Sykes v. City Sav. Bank, 115 Mich. 321, 73 N. W. 369, 69 Am. St. Rep. 562; Ferry v. Home Sav. Bank, 114 Mich. 321, 72 N. W. 181, 68 Am. St. Rep. 487; Cooley v. Minnesota Transfer R. Co. 53 Minn. 327, 55 N. W. 141, 39 Am. St. Rep. 609; Wileman v. King, 120 Miss. 392, 82 So. 265, 5 A.L.R. 584; Farmers' & M. Nat. Bank v. King, 57 Pa. 202, 98 Am. Dec. 215; Pure Oil Co. v. Walsh-Woldert Motor Co. (Tex. Civ. App.) 36 S. W. (2d) 802, citing R. C. L.; Henderson v. Hooper Sugar Co. 65 Utah, 241, 236 P. 239, 45 A.L.R. 637; Dow v. Taylor, 71 Vt. 337, 45 A. 220, 76 Am. St. Rep. 775; Great Western Theatre Equipment v. First Nat. Bank, 170 Wash. 241, 16 P. (2d) 459 (affirmed on rehearing in 173 Wash. 700, 22 P. (2d) 1120), citing R. C. L.; Maury v. Toledo Logging Co. 163 Wash. 563, 1 P. (2d) 896, citing R. C. L.; Eau Claire Nat. Bank v. Chippewa Valley Bank, 124 Wis. 520, 102 N. W. 1068, 109 Am. St. Rep. 966. See also Oldham v. Ledbetter, 1 How. (Miss.) 43, 26 Am. Dec. 690.

Annotation: 49 A.L.R. 1411; 89 A.L.R. 975; L.R.A.1917F, 396.

The service of a subpœna, in case of a chancery attachment in Virginia, will make the garnishee liable if he pays away the money after notice of the subpœna. Kennedy v. Brent, 6 Cranch (U. S.) 187, 3 L. ed. 194.

[18] Stiles v. Davis, 1 Black (U. S.) 101, 17 L. ed. 33; Loewe v. Savings Bank (C. C. A. 2d) 236 F. 444, L.R.A.1917B, 938, affirmed in 242 U. S. 357, 61 L. ed. 360, 37 S. Ct. 172;

The garnishee may not, pending the garnishment, without the order of the court, surrender the garnished property or pay the garnished debt to the defendant.[2] Indeed, notwithstanding the property or debts sought to be garnished are in fact not garnishable under the statute, a reasonable misapprehension on the point will justify the garnishee in refusing to deliver or pay the same to the defendant, and will not constitute an act of conversion.[3] The garnishee in a suit which is not prosecuted to judgment during the term in which the writ is made returnable has no right to assume that the suit is abandoned against him and settle his debt. If he does, equity will grant no relief against a judgment afterwards obtained against him in the garnishment suit.[4] However, payment to the debtor before the commencement of garnishment proceedings is proper, even though the future garnishee knew, when he made the payment, that the creditor was preparing to institute proceedings.[5]

The fact that the garnishee is bound to hold the property does not mean that a garnishment has the effect of destroying or interrupting contractual rela-

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Alexander v. Birmingham Trust & Sav. Co. 206 Ala. 50, 89 So. 66, 16 A.L.R. 1079; McCann v. Randall, 147 Mass. 81, 17 N. E. 75, 9 Am. St. Rep. 666; Cooley v. Minnesota Transfer R. Co. 53 Minn. 327, 55 N. W. 141, 39 Am. St. Rep. 609.

[19] Loewe v. Savings Bank (C. C. A. 2d) 236 F. 444, L.R.A.1917B, 938, affirmed in 242 U. S. 357, 61 L. ed. 360, 37 S. Ct. 172; Alexander v. Birmingham Trust & Sav. Co. 206 Ala. 50, 89 So. 66, 16 A.L.R. 1079; Wileman v. King, 120 Miss. 392, 82 So. 265, 5 A.L.R. 584.

Accordingly, failure of a creditor to present a check tendered in payment of the debt without any agreement that it shall be accepted as payment, whether good or bad, for ten days on account of illness, does not satisfy the indebtedness if, when the check is presented for payment, the maker's account has been garnished by another creditor. Wileman v. King, 120 Miss. 392, 82 So. 265, 5 A.L.R. 584.

A bank to which a draft against a bill of lading is sent for collection, which forwards the proceeds after being served with a writ of garnishment in a suit against the drawer, cannot escape liability on the ground that it did not know that the proceeds belonged to the drawer, because the draft was drawn to the order of its correspondent bank, where the draft showed on its face that it was by one in the business of handling the goods against which it was drawn, and was not payable until the goods arrived at destination, while the direction as to collection showed that he retained control over the collection. Alexander v. Birmingham Trust & Sav. Co. 206 Ala. 50, 89 So. 66, 16 L.R.A. 1079.

Where one in whose hands a draft on a subtreasury of the United States is garnished permits or procures it to be thereafter indorsed and paid in contempt of the authority of the court under whose process it was garnished in his hands, he becomes answerable to the plaintiff for the amount thereof. McCann v. Randall, 147 Mass. 81, 17 N. E. 75, 9 Am. St. Rep. 666.

[1] Cox v. Cronan, 82 Conn. 175, 72 A. 927, 135 Am. St. Rep. 268.

[2] Stiles v. Davis, 1 Black (U. S.) 101, 17 L. ed. 33; Kennedy v. Brent, 6 Cranch (U. S.) 187, 3 L. ed. 194; Skipper v. Foster, 29 Ala. 330, 65 Am. Dec. 405; Cox v. Cronan, 82 Conn. 175, 72 A. 927, 135 Am. St. Rep. 268; Stroup v. Sullivan, 2 Ga. 275, 46 Am. Dec. 389; Cooley v. Minnesota Transfer Co. 53 Minn. 327, 55 N. W. 141, 39 Am. St. Rep. 609.

See also Landa v. Holck, 129 Mo. 663, 31 S. W. 900, 50 Am. St. Rep. 459; Fletcher v. Fletcher, 7 N. H. 452, 28 Am. Dec. 359.

That an insurer has been garnished for a claim against the insured, and for that reason refuses to pay the policy to the insured, does not amount to a waiver of the time limited in the policy for bringing the action. Gilbert v. Globe & R. F. Ins. Co. 91 Or. 59, 174 P. 1161, 178 P. 358, 3 A.L.R. 205.

It has been held that a garnishee may not pay the garnished debt to the defendant even by reason of an execution directed against him, where it is possible for him to obtain a stay of execution in the action brought by the defendant. Skipper v. Foster, 29 Ala. 330, 65 Am. Dec. 405.

[3] Fletcher v. Fletcher, 7 N. H. 452, 28 Am. Dec. 359.

A garnishee has been held justified in retaining against the defendant garnished promissory notes, where he held the same for collection, a circumstance rendering them not garnishable in his possession. Ibid.

[4] Stroup v. Sullivan, 2 Ga. 275, 46 Am. Dec. 389.

[5] Simpson v. Dall, 3 Wall. (U. S.) 460, 18 L. ed. 265.

tions between the defendant and the garnishee; the rule is that it has no such effect.[6]

A court may order a suitable person to take custody of garnished property upon its abandonment by a garnishee.[7]

§ 663. Duty of Garnishee to Stop Check Given for Indebtedness.—The drawer of a check is under no duty or obligation to stop payment, when garnished, for the benefit of the garnishing plaintiff.[8] However, it has been ruled that where the check is still within the control of the drawer at the time of the service of the writ upon him, it is his duty to exercise reasonable diligence to stop delivery. And where the check has not been delivered at the time of the service of the summons upon the drawer, it is revocable, and the debt is still owing and subject to garnishment. This is true even though the check has been deposited in the postoffice, if, under the regulation of such office, the sender has a right to withdraw it from the mail, unless the payee agreed to accept a check in payment of the debt, or directed that a check be mailed.[9]

§ 664. Effect of Defects and Irregularities in the Garnishment Proceedings.—Defects and irregularities in a garnishment proceeding which clearly void it prevent the garnishment from having any binding effect on the garnishee, and he is as free as he would be otherwise to transfer the property of the defendant or surrender it to him.[10] Furthermore, the rights of a garnishing creditor against the garnishee are to be determined as of the time of the filing of a supplemental affidavit to cure a jurisdictional defect in the petition, unless the rights of an assignee under an intervening assignment by the debtor of the debt in the hands of the garnishee were not acquired in good faith.[11] However, from a review of the cases dealing with the liability of the garnishee to the garnishor where the garnishee pays the debt or releases the property pending defective or irregular garnishment proceedings, it would seem that the rights of the garnishor in such a case depend upon a number of variable factors. Among these are the jurisdictional character of the defect or irregularity, the extent to which the garnishee has acted in good faith, the abandonment or nonabandonment of the garnishment proceedings, and the character of the acts of the garnishee in paying the debt or releasing the property as having been done voluntarily on his own initiative, or under the compulsion of legal process.[12] Generally, however, it may be said that a garnishee is not bound by a garnishment that is jurisdictionally defective.

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[6] North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co. 152 U. S. 596, 38 L. ed. 565, 14 S. Ct. 710; Schuler v. Israel, 120 U. S. 506, 30 L. ed. 707, 7 S. Ct. 648; Clyne v. Easton, 148 Cal. 287, 83 P. 36, 113 Am. St. Rep. 253; Southern Flour & Grain Co. v. Northern P. R. Co. 127 Ga. 626, 56 S. E. 742, 9 L.R.A.(N.S.) 853, 119 Am. St. Rep. 356, 9 Ann. Cas. 437; Baugh v. Kirkpatrick, 54 Pa. 84, 93 Am. Dec. 675; Bingham v. Lamping, 26 Pa. 340, 67 Am. Dec. 418; Wall v. Norfolk & W. R. Co. 52 W. Va. 485, 44 S. E. 294, 64 L.R.A. 501, 94 Am. St. Rep. 948.

[7] Northfield Knife Co. v. Shapleigh, 24 Neb. 635, 39 N. W. 788, 8 Am. St. Rep. 224.

[8] American Agri. Chemical Co. v. Scrimger, 130 Md. 389, L.R.A.1917F, 394, 100 A. 774.

Annotation: L.R.A.1917F, 394; 94 A.L.R. 1393.

[9] Annotation: L.R.A.1917F, 396; 94 A.L.R. 1393.

A debtor may stop payment on his check when he is served with garnishment, and the debt for which it was given is then bound by the process. See Vol. 4, p. 677, § 194.

[10] Generally, as to payment under void order in garnishment proceedings as protection to garnishee, see infra, § 805.

[11] United Collieries v. Martin, 248 Ky. 808, 60 S. W. (2d) 125, 89 A.L.R. 971.

[12] Annotation: 89 A.L.R. 975.

United Collieries v. Martin, 248 Ky. 808, 60 S. W. (2d) 125, 89 A.L.R. 971, holding that a garnishee, who had paid over the garnished money pending defective garnishment proceedings to one to whom the debt had been assigned as security after the service of the writ but before the correction of the defect, was not liable under the writ, seems to turn upon the point that, as between the assignee and the garnisher, the assignee had the prior right to the fund, and that, therefore, the garnisher

§ 665. Right to Discharge Prior Liens.—The general rule is that a garnishee may discharge prior liens on the garnished property, especially where it is necessary to protect himself.[13] Accordingly, the liability of a garnishee who, pending the proceeding, lets go the fund or property in his possession to the defendant or a third person does not attach where he discharges a lien on it superior or prior to the attachment lien.[14] An owner of a building under construction can pay off mechanics' liens when he is garnished with respect to money due under the construction contract, at least where there is a provision in the contract that the owner may retain sufficient funds to discharge such liens.[15]

§ 666. Right to Make Loan to Defendant.—A garnishee from whom nothing is due may make advances or loans to the defendant, after service of the garnishment process, without rendering himself liable to the defendant's creditor.[16]

§ 667. Duty to Hold Exempt Property or Funds.—The general rule is that a garnishee is not bound to withhold exempt property or funds from the defendant.[17]

§ 668. Obligation of Bailee Who Is Garnished.—The garnishment of property in the possession of a common carrier or other bailee excuses the failure to deliver according to the contract of bailment, unless the garnishment is for some reason void or of no force and effect.[18] But a bailee cannot lightly shake off his obligation to defend his possession against a garnishment.[19] Under the Uniform Sales Act,[20] Bills of Lading Act,[1] and Warehouse Receipts Act,[2] a bailee is not bound by an attachment or garnishment of the property under bailment if he has issued a negotiable bill of lading, warehouse receipt, or other document of title for the same, unless such negotiable document is surrendered to him or its negotiation enjoined. Furthermore, a carrier must respond in damages for any loss or diminution in the value of the property caused by unreasonable delay in its transportation by reason of the service of a garnishment in a suit between the consignor and a third person.[3]

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was in no position to complain of the payment.

See Cook v. Coleman, 167 Mass. 414, 45 N. E. 913, 57 Am. St. Rep. 465, in which a bank paying out money to a partnership having a deposit therein, despite the service upon it of a writ charging it in the body thereof as trustee for the members of such partnership, the excuse given for such payment being that the president of the bank had not examined the body of the writ, but had relied on the indorsements on the back of the writ, from which it appeared that there was but one defendant, was held liable under the writ.

[13] United Collieries v. Martin, 248 Ky. 808, 60 S. W. (2d) 125, 89 A.L.R. 971; Drake v. Harrison, 69 Wis. 99, 33 N. W. 81, 2 Am. St. Rep. 717.

[14] United Collieries v. Martin, 248 Ky. 808, 60 S. W. (2d) 125, 89 A.L.R. 971.

[15] Drake v. Harrison, 69 Wis. 99, 33 N. W. 81, 2 Am. St. Rep. 717.

[16] Smith v. Davis, 1 Wis. 447, 60 Am. Dec. 390.

[17] Black Hills Teleg. & Teleph. Co. v. Mitchell, 11 S. D. 615, 79 N. W. 999, 74 Am. St. Rep. 830.

[18] Stiles v. Davis, 1 Black (U. S.) 101, 17 L. ed. 33; Cooley v. Minnesota Transfer R. Co. 53 Minn. 327, 55 N. W. 141, 39 Am. St. Rep. 609; Landa v. Holck, 129 Mo. 663, 31 S. W. 900, 50 Am. St. Rep. 459.

Annotation: 33 L.R.A.(N.S.) 689.

The view has been taken that a common carrier cannot escape being charged by trustee process for a case of merchandise in its possession for carriage on the theory that it does not know, of its own knowledge, that the contents of the box are property subject to such process and has no right to open it to find out, it being sufficient that it has been informed as to the contents and that they are goods of value. Rosenbush v. Bernheimer, 211 Mass. 146, 97 N. E. 984, Ann. Cas. 1913A, 1317.

[19] Annotation: 33 L.R.A.(N.S.) 689.

[20] See Vol. 4, p. 569, § 29.

[1] See Vol. 4, p. 570, § 32.

[2] See Vol. 4, p. 571, § 33.

[3] Baldwin v. Great Northern R. Co. 81 Minn. 247, 83 N. W. 986, 51 L.R.A. 640, 83 Am. St. Rep. 370.

b. Measure of Liability

§ 669. Where No Property or Credits of Defendant Held at Time of Garnishment.[4]—It may be stated broadly that there is no liability from the garnishee to the plaintiff where, at the time of service of the writ or warrant of garnishment on the garnishee, he has no property of the defendant in his possession and is not indebted to him. In such a case, the general rule is that the property of the defendant coming into the possession of the garnishee subsequently to such service, or indebtedness of the garnishee arising subsequent thereto, is not bound by the service of the writ.[5]

§ 670. Where Property or Credits of Defendant Held at Time of Garnishment.—It follows from the general rule that except in cases of fraud and collusion between the defendant and the garnishee, an attaching or garnishing creditor can acquire no greater interest in the attached or garnished property than that of the defendant,[6] that under no other circumstances can the garnishee, by the operation of proceedings against him, be placed in any worse condition than he would be if the defendant's claim against him were enforced by the defendant himself.[7] Consequently, the liability, legal and equitable, of the garnishee to the principal debtor, or, in other words, the property of the debtor in his possession, is a measure of his liability to the attaching creditor.[8] Under some statutes, however, it seems that under certain circumstances the plaintiff may proceed against the garnishee even though the defendant has not made a demand upon the garnishee or performed other conditions precedent to his right to proceed against the garnishee.[9]

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[4] As to amount of judgment against garnishee, see infra, § 790.

[5] See supra, Vol. 4, p. 650, §§ 156, 161.

[6] See infra, §§ 820 et seq.

[7] North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co. 152 U. S. 596, 38 L. ed. 565, 14 S. Ct. 710; Schuler v. Israel, 120 U. S. 506, 30 L. ed. 707, 7 S. Ct. 648; McLaughlin v. Swann, 18 How. (U. S.) 217, 15 L. ed. 357; Wanzer v. Truly, 17 How. (U. S.) 584, 15 L. ed. 216; Beach v. Viles, 2 Pet. (U. S.) 675, 7 L. ed. 559; Allen v. Ætna L. Ins. Co. (C. C. A. 3d) 145 F. 881, 7 L.R.A.(N.S.) 958; Skewes v. Tennessee Coal, I. & R. Co. 124 Ala. 629, 27 So. 435, 82 Am. St. Rep. 214; Home Land & Loan Co. v. Routh, 123 Ark. 360, 185 S. W. 467, Ann. Cas. 1917C, 1142; Roesch v. W. B. Worthen Co. 95 Ark. 482, 130 S. W. 551, 31 L.R.A. (N.S.) 374; Walker v. Doak, 210 Cal. 30, 290 P. 290, citing R. C. L.; Shelton v. Wolthausen, 80 Conn. 599, 69 A. 1030, 125 Am. St. Rep. 131; Lancashire Ins. Co. v. Corbetts, 165 Ill. 592, 46 N. E. 631, 36 L.R.A. 640, 56 Am. St. Rep. 275; Malone v. Moore, 204 Iowa, 625, 215 N. W. 625, 55 A.L.R. 356; Hoyt v. Clemans, 167 Iowa, 330, 149 N. W. 442, L.R.A.1915C, 166; J. J. Smith Lumber Co. v. Scott County Garbage Reducing & Fuel Co. 149 Iowa, 272, 128 N. W. 389, 30 L.R.A.(N.S.) 1184; Meek v. Briggs, 87 Iowa, 610, 54 N. W. 456, 43 Am. St. Rep. 410; Metcalf v. Kincaid, 87 Iowa, 443, 54 N. W. 867, 43 Am. St. Rep. 391; Walters v. Washington Ins. Co. 1 Iowa, 404, 63 Am. Dec. 451; Lewis v. Barnett, 139 Kan. 821, 33 P. (2d) 331, 93 A.L.R. 1082; Madden v. Union P. R. Co. 89 Kan. 282, 131 P. 552, Ann. Cas. 1914D, 78; Springfield F. & M. Ins. Co. v. Huntington Nat. Bank, 229 Ky. 674, 17 S. W. (2d) 726, 71 A.L.R. 70; Metropolitan L. Ins. Co. v. Hightower, 211 Ky. 36, 276 S. W. 1063, 44 A.L.R. 1158; Cummins v. Christie, 179 Mass. 74, 60 N. E. 396, 88 Am. St. Rep. 357; Van Camp Hardware & Iron Co. v. Plimpton, 174 Mass. 208, 54 N. E. 538, 75 Am. St. Rep. 296; Whipple v. Robbins, 97 Mass. 107, 93 Am. Dec. 64; Wunderlich v. Merchants Nat. Bank, 109 Minn. 468, 471, 124 N. W. 223, 27 L.R.A.(N.S.) 811, 134 Am. St. Rep. 788, 18 Ann. Cas. 212; Melton Hardware Co. v. Heidelberg, 91 Miss. 598, 44 So. 857, 15 Ann. Cas. 704; Shuler v. Murphy, 91 Miss. 518, 44 So. 810, 14 L.R.A.(N.S.) 333, 124 Am. St. Rep. 708; Weil v. Tyler, 38 Mo. 545, 90 Am. Dec. 441; Farrington v. F. E. Fleming Commission Co. 94 Neb. 108, 142 N. W. 297, 47 L.R.A. (N.S.) 742; Goodwin v. Claytor, 137 N. C. 224, 49 S. E. 173, 67 L.R.A. 209, 107 Am. St. Rep. 479; Graf v. Wilson, 62 Or. 476, 125 P. 1005, Ann. Cas. 1914C, 462; Baugh v. Kirkpatrick, 54 Pa. 84, 93 Am. Dec. 675; Johnson v. Union P. R. Co. 29 R. I. 80, 69 A. 298, 132 Am. St. Rep. 799; Bank of Centerville v. Gelhaus, 60 S. D. 31, 242 N. W. 642, 83 A.L.R. 1380; Home Nat. Bank v. Barnes-Piazzek Co. (Tex. Civ. App.) 278 S. W. 299, citing R. C. L.; Acheson-Harder Co. v. Western Wholesale Notions Co. 72 Utah, 323, 269 P. 1032, 60 A.L.R. 881; Rollo v. Andes Ins. Co. 23 Gratt. (Va.) 509, 14 Am. Rep. 147; Beaston v. Portland Trust & Sav. Bank, 89 Wash. 627, 55 P. 162, Ann. Cas. 1917B, 488; McAlmond v. Bevington, 23 Wash. 315, 63 P. 251, 53 L.R.A. 597; Marx v. Parker, 9 Wash. 473, 37 P. 675, 43 Am. St. Rep. 849; Wall v. Norfolk & W. R. Co. 52 W. Va. 485, 44 S. E. 294, 64 L.R.A. 501, 94 Am. St. Rep. 948.

[8] North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co. 152 U. S. 596, 38 L. ed. 565, 14 S. Ct. 710; East Tennessee, V. & G. R. Co. v. Kennedy, 83 Ala. 462, 3 So. 852, 3 Am. St. Rep. 755; Southern Flour & Grain Co. v. Northern P. R. Co. 127 Ga. 626, 56 S. E. 742, 9 L.R.A.(N.S.) 853, 119 Am. St. Rep. 356, 9 Ann. Cas. 437; Salyers Auto Co. v. De Vore, 116 Neb. 317, 217 N.

§ 671. Liability as Limited by Plaintiff's Claim against Defendant.—It is clear that a plaintiff's claim against a garnishee is limited by his claim against the defendant; he can recover no more from the garnishee than is necessary to satisfy what the defendant owes him, making full allowance for all satisfaction of such claim previously received.[10]

§ 672. Liability as Limited by Writ.[11]—The general rule is that the terms of the writ limit the liability of the garnishee and that he is not liable for an amount greater than that named in the writ.[12] However, a garnishment of all property of the defendant in the hands of the garnishee under a statute providing for that practice binds all the property of the defendant in the hands of the garnishee.[13] Nevertheless, it has been held that a garnishment of credits and effects does not bind debts owing to the defendant.[14]

§ 672a. Liability as to Property or Credits Coming into His Possession after Garnishment.—The binding effect of the process upon property coming into the hands of a garnishee subsequent to the service of the garnishment upon him has been previously discussed.[15] As there shown, the courts are not uniform in their holdings. Where the attachment or garnishment is not binding on property of, or debts owing to, the defendant coming into the garnishee's possession after service upon him, the general rule is that the garnishee's liability is to be determined as of the date of the service of the attachment or garnishment on the garnishee,[16] or at the time of its issuance when, under local practice, it takes effect at that time,[17] and that such garnishee's liability is limited to the property of the principal defendant in his possession or under his control, and owing by him to the defendant at that time.[18] But in jurisdictions where the garnishment binds property or

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W. 94, 56 A.L.R. 594; Arrington v. Screws, 31 N. C. (9 Ired. L.) 42, 49 Am. Dec. 408; Acheson-Harder Co. v. Western Wholesale Notions Co. 72 Utah, 323, 269 P. 1032, 60 A.L.R. 881.

In Cottingham v. Greely Barnham Grocery Co. 129 Ala. 200, 30 So. 560, 87 Am. St. Rep. 58, where notes, mortgages, accounts, and choses in action sold by the debtor to the defendant were the subject of the garnishment proceeding, it being claimed that the sale was fraudulent as to creditors, it was held that in the determination of the value of the property received by the garnishee under the fraudulent conveyance, the criterion was the value at the time of the conveyance, and not the amount of money collected by the garnishee upon such notes, etc.

[9] As to the right of the plaintiff to make proof of loss where the defendant does not, and to proceed against the insurance company as garnishee, see Vol. 4, p. 747, § 297.

As to the right of the plaintiff to proceed against defendant's fraudulent vendee as garnishee, see infra, § 823.

As to miscellaneous exceptions to the rule that an attaching or garnishing creditor stands in the shoes of the garnishee, see infra, §§ 822, 823.

[10] Davis Bros. v. Choctaw, O. & G. R. Co. 73 Ark. 120, 83 S. W. 318, 3 Ann. Cas. 658; Scott v. Hill, 3 Mo. 88, 22 Am. Dec. 462; Drew v. Towle, 27 N. H. 412, 59 Am. Dec. 380.

Annotation: 3 Ann. Cas. 660.

[11] As to the necessity and sufficiency of statements in the writ relating to the plaintiff's demand, see infra, § 728.

[12] Clyne v. Easton, E. & Co. 148 Cal. 287, 83 P. 36, 113 Am. St. Rep. 253.

[13] See supra, § 670.

[14] Clyne v. Easton, E. & Co. 148 Cal. 287, 83 P. 36, 113 Am. St. Rep. 253.

[15] See Vol. 4, p. 652, § 161.

[16] Salyers Auto Co. v. De Vore, 116 Neb. 317, 217 N. W. 94, 56 A.L.R. 594; Arrington v. Screws, 31 N. C. (9 Ired. L.) 42, 49 Am. Dec. 408.

[17] Wattles v. Wayne County Circuit Judge, 117 Mich. 662, 76 N. W. 115, 72 Am. St. Rep. 590.

[18] Burlington & M. River R. Co. v. Thompson, 31 Kan. 180, 1 P. 622, 47 Am. Rep. 497; Humphrey v. Midkiff, 122 La. 939, 48 So. 331, 20 L.R.A.(N.S.) 912; Williams v. Androscoggin & K. R. Co. 36 Me. 201, 58 Am. Dec. 742; McLean v. Sworts, 69 Minn. 128, 71 N. W. 925, 65 Am. St. Rep. 556; Acheson-Harder Co. v. Western Wholesale Notions Co. 72 Utah, 323, 269 P. 1032, 60 A.L.R. 881; Davis v. Pawlette, 3 Wis. 300, 62 Am. Dec. 690.

credits of the defendant coming into the possession of the garnishee after the garnishment, the liability of the garnishee to the plaintiff may be measured by his liability to the defendant at the time of his disclosure in the garnishment, at the time of trial, or at the time of final judgment.[19]

§ 673. Liability for Interest.[1]—It is clear that interest and income owing from the garnishee to the defendant at the time of the service of a writ of garnishment is thereby bound to the same extent as other property or credits of the defendant in the hands of the garnishee at that time. However, there is no liability of the garnishee to the plaintiff for interest prior to the garnishment when there is no such liability from the garnishee to the defendant.[2] With respect to interest or income accruing after the garnishment, a garnishee is liable to the plaintiff for interest on the garnished property or funds where he would be liable to the debtor for the same as an incident of contract relating to the garnished property,[3] where he actually receives interest belonging to the defendant,[4] where he uses the garnished property for his own profit pending the outcome of the garnishment proceedings,[5] or where his conduct, rather than the orderly progress of the garnishment, is at fault for the detention of the garnished property and the consequent delay of satisfaction of the plaintiff's claim,[6] at least in jurisdictions where a garnishment is binding on property or funds of the defendant coming into the hands of the garnishee subsequent to garnishment and some time prior to disclosure, trial, judgment, or final execution in the garnishment.[7] Accordingly, if the garnishee wrongfully uses such funds as his own and thus is guilty of a breach of trust, he is bound to account for interest.[8] Similarly, garnishees have been held liable to pay interest on the amount in their hands for which they are charged from and after the day on which the demand of payment was made upon them.[9] In the absence of such circumstances as those just related, however, the general rule is that the garnishee is not liable for interest on the garnished property or funds pending the garnishment;[10] and the courts presume, unless the contrary appears, that the garnished property was not used by the garnishee for his own profit, but kept safely to answer the judgment of the court.[11] Nevertheless, where a garnishee retains money, not as a stakeholder pending litigation, but in order to litigate for his own benefit the title of the owner as assignee of the debt, he is entitled to no presumption that he has not used the money for his own benefit so as to render him not liable for interest.[12]

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[19] See Vol. 4, p. 652, § 161.

[1] As to liability of garnishee to defendant for interest, see infra, § 686.

[2] Thompson v. Stewart, 3 Conn. 171, 8 Am. Dec. 168.

[3] Loewe v. Savings Bank (C. C. A. 2d) 236 F. 444, L.R.A.1917B, 938, affirmed in 242 U. S. 357, 61 L. ed. 360, 37 S. Ct. 172.

If a garnished deposit in a savings bank produces earnings during the period of attachment, those earnings are an incident of the attached fund and subject to the lien. It makes no difference by what name the earnings may be called, whether interest or dividends. Loewe v. Savings Bank (C. C. A. 2d) 236 F. 444, L.R.A.1917B, 938, affirmed 242 U. S. 357, 61 L. ed. 360, 37 S. Ct. 172.

[4] Loewe v. Savings Bank (C. C. A. 2d) 236 F. 444, L.R.A.1917B, 938, affirmed in 242 U. S. 357, 61 L. ed. 360, 37 S. Ct. 172.

[5] Mattingly v. Boyd, 20 How. (U. S.) 128, 15 L. ed. 845; Cox v. Cronan, 82 Conn. 175, 72 A. 927, 135 Am. St. Rep. 268; Moore v. Lowrey, 25 Iowa, 336, 95 Am. Dec. 790.

[6] Mattingly v. Boyd, 20 How. (U. S.) 128, 15 L. ed. 845; Loewe v. Savings Bank (C. C. A. 2d) 236 F. 444, L.R.A.1917B, 938, affirmed in 242 U. S. 357, 61 L. ed. 360, 37 S. Ct. 172; Williams v. Androscoggin & K. R. Co. 36 Me. 201, 58 Am. Dec. 742; Sickman v. Lapsley, 13 Serg. & R. (Pa.) 224, 15 Am. Dec. 596.

Annotation: 100 Am. Dec. 511.

A withholding by a garnishee—e. g., a savings bank—of the attached fund pending the determination of the rights of a claimant thereto cannot be regarded as an unlawful withholding so as to subject the garnishee to a penal liability to pay interest thereon. Loewe v. Savings Bank (C. C. A. 2d) 236 F. 444, L.R.A.1917B, 938, affirmed in 242 U. S. 357, 61 L. ed. 360, 37 S. Ct. 172.

[7] Generally as to the binding effect of garnishment on the interest on, and earnings of, garnished property, see Vol. 4, p. 654, § 162.

[8] Mattingly v. Boyd, 20 How. (U. S.) 128, 15 L. ed. 845.

[9] Williams v. Androscoggin & K. R. Co. 36 Me. 201, 58 Am. Dec. 742.

[10] Mattingly v. Boyd, 20 How. (U. S.) 128, 15 L. ed. 845.

§ 674. Liability for Damages and Depreciation.—The general rule is that a garnishee is liable to the garnishing creditor only for loss or damage to the garnished property for which he is at fault, and that the plaintiff must bear the loss of natural deterioration and depreciation in value of the garnished property.[13] Thus, where shares of stock sought to be seized by garnishment process become worthless after service of such process and during the pendency of litigation between the seizing creditor and the garnishee as to the ownership of such stock and as to the liability of such stock to seizure for a debt of the record owner of same, the garnishee, who, having assumed obligations as depository of the certificate, contests the garnishment in good faith, is not liable for the loss.[14]

§ 675. Liability as Limited by Ignorance of Service of Garnishment.—The general rule is that ignorance of a garnishment, where there is no good reason to know of it, releases the garnishee from any liability to the plaintiff for surrender or payment in good faith of the garnished property or funds to the defendant or another.[15] However, since branch banks, though having no control over one another, are agencies of the principal bank, it has been held that it is the duty of the manager of a branch bank, when served with process of garnishment, to make this fact known, within the shortest time reasonably practicable, to the principal office of the bank and to a branch at another place in which the branch manager knows that the debtor has an account.[16] Consequently, a bank is liable to an attaching or garnishing creditor where the attachment or garnishment is served upon one of its branches and where the attachment debtor subsequently withdraws his deposit from another branch.[17]

§ 676. Liability as Limited by Ignorance of Identity of Defendant.—Under proper circumstances, ignorance of the identity of the defendant may relieve a garnishee from liability for failure to hold the garnished property or debt pending the garnishment.[18] However, the liability of the garnishee is not thus limited where he made payment in reliance upon an incorrect name of the defendant on the back of the writ where the correct name of the defendant was contained in the body of the writ.[19]

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[11] Cox v. Cronan, 82 Conn. 175, 72 A. 927, 135 Am. St. Rep. 268; Moore v. Lowrey, 25 Iowa, 336, 95 Am. Dec. 790.

[12] Cox v. Cronan, 82 Conn. 175, 72 A. 927, 135 Am. St. Rep. 268.

[13] Hearne v. Commercial Nat. Bank, 155 La. 488, 99 So. 413, 32 A.L.R. 570. See also Cottingham v. Greely Barnham Grocery Co. 129 Ala. 200, 38 So. 560, 87 Am. St. Rep. 58.

Annotation: 32 A.L.R. 572.

[14] Hearne v. Commercial Nat. Bank, 155 La. 488, 99 So. 413, 32 A.L.R. 570.

[15] Bates v. Chicago, M. & St. P. R. Co. 60 Wis. 296, 19 N. W. 72, 50 Am. Rep. 369.

Annotation: 50 A.L.R. 1354.

Where garnishment process is served upon one agent of a corporation while the property is in the actual possession of another agent, if the latter delivers the property to one authorized to receive it before the officer served can with reasonable diligence notify the other, the corporation is not liable. Bates v. Chicago, M. & St. P. R. Co. 60 Wis. 296, 19 N. W. 72, 50 Am. Rep. 369.

[16] Annotation: 50 A.L.R. 1354.

[17] Annotation: 50 A.L.R. 1354.

[18] "It is required that the garnishment writ give accurate description of the principal defendant by correctly giving his name, and, failing in this respect, the garnishee can claim to be relieved of responsibility to the plaintiff in case the plaintiff does not show that the garnishee otherwise had knowledge of the identity of the defendant." Pure Oil Co. v. Walsh-Woldert Motor Co. (Tex. Civ. App.) 36 S. W. (2d) 802, citing R. C. L.

§ 677. Liability as Limited by Ignorance of Goods and Effects of Defendant in Garnishee's Hands.—Ignorance of property or funds of the defendant in his hands may, under certain circumstances justifying his ignorance, release a garnishee from liability for not preserving the same pending the garnishment.[20] Accordingly, a deposit by the defendant in the name of another excuses the bank, when garnished, for failure to reserve the deposit, unless it had good reason to know that the deposit was meant to be garnished.[1] Similarly, notice of garnishment of credits and effects has been held not a sufficient garnishment of a debt.[2] However, a garnishee's liability will not be limited in this respect where he knew or had good reason to know that property or funds in his hand belonged to the defendant.[3]

§ 678. Liability as Limited by Surrender or Payment under Legal Compulsion.—The general rule is that surrender or payment of garnished property or funds under compulsion of law, as by process, releases the garnishee from liability to the plaintiff.[4]

§ 679. Liability as to Lost Property or Funds.—A garnishee is liable for the loss of the garnished property or funds through his fault,[5] but the loss of property or funds paid to a sheriff under garnishment proceedings, resulting from the subsequent absconding of that officer, must be borne by the plaintiff.[6]

3. Duty of Garnishee to Defendant

§ 680. Generally.[7]—The general rule is that a garnishee, being a mere stakeholder between the plaintiff and the defendant in the attachment,[8] is not bound in duty to the defendant to go further than to look to the jurisdiction, to act fairly, and to make a full disclosure in the garnishment proceedings.[9]

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[19] Cook v. Coleman, 167 Mass. 414, 45 N. E. 913, 57 Am. St. Rep. 465.

[20] Clyne v. Easton, 148 Cal. 287, 83 P. 36, 113 Am. St. Rep. 253; Pittsburgh, C. C. & St. L. R. Co. v. Cox, 36 Ind. App. 291, 73 N. E. 120, 114 Am. St. Rep. 377; First Nat. Bank v. Jaggers, 31 Md. 38, 100 Am. Dec. 53; Bingham v. Lamping, 26 Pa. 340, 67 Am. Dec. 418.

[1] First Nat. Bank v. Jaggers, 31 Md. 38, 100 Am. Dec. 53.

[2] Clyne v. Easton, 148 Cal. 287, 83 P. 36, 113 Am. St. Rep. 253.

[3] Sykes v. City Sav. Bank, 115 Mich. 321, 73 N. W. 369, 69 Am. St. Rep. 562.

In Eau Claire Nat. Bank v. Chippewa Valley Bank, 124 Wis. 520, 102 N. W. 1068, 109 Am. St. Rep. 966, a bank which at the time of the service of a garnishment upon it had notice of a fraudulent assignment of a note and mortgage from the defendant to his wife who had deposited it in the bank for collection, but, nevertheless, paid the proceeds to the wife, was held liable as a garnishee.

[4] Lancashire Ins. Co. v. Corbetts, 165 Ill. 592, 46 N. E. 631, 36 L.R.A. 640, 56 Am. St. Rep. 275; Goddard v. Hapgood, 25 Vt. 351, 60 Am. Dec. 272 (where plaintiff took garnished property on premature and void execution in same suit against defendant); Virginia F. & M. Ins. Co. v. New York Carousal Mfg. Co. 95 Va. 515, 28 S. E. 888, 40 L.R.A. 237.

Contra: Despatch Line of Packets v. Ballamy Mfg. Co. 12 N. H. 205, 37 Am. Dec. 203 (as to junior attachment or execution).

In Goddard v. Hapgood, 25 Vt. 351, 60 Am. Dec. 272, the court said: "We are satisfied the trustee should not be held liable for property taken out of his hands under these circumstances. If the execution was irregular, or void, the party will still have his redress, for the actual damages. But he cannot be thus held liable for property which this same creditor has already taken from him, upon the ground that he may recover its value. This would be to encourage circuity of action, which courts will not do."

[5] See supra, §§ 669 et seq.

[6] Re Dawson, 110 N. Y. 114, 17 N. E. 668, 6 Am. St. Rep. 346.

Annotation: 6 Am. St. Rep. 348.

[7] See also Vol. 4, p. 888, § 548.

[8] See supra, § 660.

[9] Baltimore & O. S. W. R. Co. v. Adams, 159 Ind. 688, 66 N. E. 43, 60 L.R.A. 396.

Where a railroad company which had been garnished by a creditor of its em-

§ 681. **Duty to Claim Exemption.**—The duty of one summoned as garnishee to set up or disclose the principal defendant's exemptions has been declared broadly in a number of cases, although the decision in some of these cases is limited by the fact or assumption that the garnishment proceeding was ex parte and the principal defendant was without actual knowledge thereof.[10] Nevertheless, it has been held that it is the duty of the garnishee to make such disclosure, although the defendant has been formally cited to appear and has not voluntarily appeared for the purpose of maintaining his right.[11] It has been said that although the statute does not in terms require a garnishee to answer that the property garnished is exempt, it is in the interests of justice that such an exemption be stated.[12] Likewise, a garnishee paying into court the amount due the principal defendant in advance of an adjudication, as allowed by a statute, which expressly excepts a certain sum due to a householder for personal labor, does so at his peril, unless the principal defendant is estopped by circumstances from asserting his claim for this exemption, since the garnishee may always protect himself by his disclosure, by stating at least that he does not know whether the principal defendant is or is not a householder.[13] However, there are decisions to the effect that the garnishee is under no obligation to set up the exemption of the debt, such a plea being a personal privilege of the principal debtor, and that the garnishee may plead only that which tends to discharge him from the debt, at least when the debtor has actual knowledge of the proceedings.[14] Undoubtedly, if the garnishee sets up in his answer the exemption rights of the principal debtor, and the decision of the court is adverse thereto and he is compelled to pay the debt into court, he will have performed his full duty to the principal debtor, and will not be required to prosecute the claim of exemption further.[15]

§ 682. **Duty to Make Defense or to Notify Defendant.**—The view has been taken that in an action against a nonresident defendant who is served with notice of the same constructively only, as by publication, it is the duty of a garnishee to notify such principal defendant of such garnishment proceedings, if he is able to do so, and also to interpose in behalf of such principal defendant any defense thereto of which he is cognizant and which he is able to make.[16] Some cases hold that the garnishee, after disclosing the

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ployee in the courts of another state caused the employee to be notified personally of the pendency of the garnishment suit, aside from the judicial notice that he received, and disclosed to the foreign courts the nature of the demand, and sought to claim the exemption of the employee under the laws of Indiana, the company could not be held liable by the employee in a subsequent action by him. Baltimore & O. S. W. R. Co. v. Adams, 159 Ind. 688, 66 N. E. 43, 60 L.R.A. 396.

The garnishee is regarded by the law somewhat in the light of a trustee. Oldham v. Ledbetter, 1 How. (Miss.) 43, 26 Am. Dec. 690.

[10] Southern R. Co. v. Fulford, 125 Ga. 105, 54 S. E. 68, 5 Ann. Cas. 168; Missouri P. R. Co. v. Sharitt, 43 Kan. 375, 23 P. 430, 8 L.R.A. 385, 19 Am. St. Rep. 143; Crisp v. Ft. Wayne & E. R. Co. 98 Mich. 648, 57 N. W. 1050, 22 L.R.A. 732; Wright v. Chicago, B. & Q. R. Co. 19 Neb. 175, 27 N. W. 90, 56 Am. Rep. 747; Missouri P. R. Co. v. Whipsker, 77 Tex. 14, 13 S. W. 639, 8 L.R.A. 321, 19 Am. St. Rep. 734; Clark v. Averill, 31 Vt. 512, 76 Am. Dec. 131.

Annotation: 45 A.L.R. 646.

[11] Missouri P. R. Co. v. Whipsker, 77 Tex. 14, 13 S. W. 639, 8 L.R.A. 321, 19 Am. St. Rep. 734.

Annotation: 19 Am. St. Rep. 737.

[12] Missouri P. R. Co. v. Whipsker, 77 Tex. 14, 13 S. W. 639, 8 L.R.A. 321, 19 Am. St. Rep. 734.

[13] Crisp v. Ft. Wayne & E. R. Co. 98 Mich. 648, 57 N. W. 1050, 22 L.R.A. 732.

[14] Carson' v. Memphis & C. R. Co. 88 Tenn. 646, 13 S. W. 588, 8 L.R.A. 412, 17 Am. St. Rep. 921.

[15] Annotation: 5 Ann. Cas. 170.

[16] Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023, 25 S. Ct. 625, 3 Ann. Cas. 1084; Southern R. Co. v. Fulford, 125 Ga. 103, 54 S. E. 68, 5 Ann. Cas. 168; Stroup v. Sullivan, 2 Ga. 275, 46 Am. Dec. 389; Czesna v. Lietuva Loan & Sav. Asso. 252 Ill. App. 612, citing R. C. L.; St. Louis & S. F. R. Co. v. Crews, 51 Okla. 144, 151 P. 879, Ann. Cas. 1918C,

exemption in his answer, should notify the principal defendant of the garnishment.[17] A distinction has been drawn between the case where the defendant was personally served within the jurisdiction in which the garnishment proceeding was had and a case where he was served constructively only,[18] and the view has been taken that the conclusion of garnishment proceedings will protect the garnishee as against further liability on the garnishor's claim, although he did not notify the defendant of the proceedings, if the defendant had actual notice or was personally served with process.[19] Indeed, it has even been held that constructive service on the defendant is sufficient to relieve the garnishee of such duty.[20] The view has been taken that the garnishee's failure either to set up a claim for exemptions or to notify the defendant would not in any event deprive him of the protection of the judgment in garnishment where the claim would have been futile, whether made by the garnishee or the principal defendant.[1] Accordingly, the consent of a garnishee to a judgment impounding his debt to the princi-

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823; Missouri P. R. Co. v. Whipsker, 77 Tex. 14, 13 S. W. 639, 8 L.R.A. 321, 19 Am. St. Rep. 734; Henderson v. Hooper Sugar Co. 65 Utah, 241, 236 P. 239, 45 A.L.R. 637; Stewart v. Northern Assur. Co. 45 W. Va. 734, 32 S. E. 218, 44 L.R.A. 101. See also First Wisconsin Nat. Bank, v. People's Nat. Bank, 136 Va. 276, 118 S. E. 82, 36 A.L.R. 736.

Annotation: 45 A.L.R. 646.

It is the duty of the garnishee to give notice to his own creditor, if he would protect himself, so that the creditor may have the opportunity to defend himself against the claim of the person suing out the attachment, and the failure on the part of the garnishee to give this proper notice of the levying of the attachment is generally such a neglect of duty on his part as will prevent his availing himself of the judgment in the attachment suit as a bar to the suit of the creditor against him. Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023, 25 S. Ct. 625, 3 Ann. Cas. 1084.

The duty of the garnishee to give notice of the garnishment proceedings to the principal debtor is discharged by pleading the judgment therein in bar to an action on the debt while there then remained nearly a year in which the principal debtor might litigate the question of his liability in the court which rendered the judgment. Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023, 25 S. Ct. 625, 3 Ann. Cas. 1084.

If a void contract is sued on by a foreign attachment, the garnishee must make defense to the action, or notify, if practicable, his absent creditor of the pendency of the attachment proceedings, so that such creditor may make such defense; otherwise, a judgment rendered by default will not protect the garnishee when sued by his creditor. Stewart v. Northern Assur. Co. 45 W. Va. 734, 32 S. E. 218, 44 L.R.A. 101.

[17] Southern R. Co. v. Fulford, 125 Ga. 103, 54 S. E. 68, 5 Ann. Cas. 168; Missouri P. R. Co. v. Whipsker, 77 Tex. 14, 13 S. W. 639, 8 L.R.A. 321, 19 Am. St. Rep. 734.

A company which owed wages and was summoned as garnishee of one of its day laborers, knowing that such wages were exempt from garnishment, had the duty of disclosing the "exemption to the court when it made its answer to the summons of garnishment, and then to insist upon the same as a legal ground for a refusal to pay the money into court," or, "at least, it should have disclosed in its answer the grounds upon which the sum due Fulford [principal defendant] was exempt from the process of garnishment, and should have notified him of the fact that it had been garnished." Southern R. Co. v. Fulford, 125 Ga. 103, 54 S. E. 68, 5 Ann. Cas. 168.

In Missouri P. R. Co. v. Whipsker, 77 Tex. 14, 13 S. W. 639, 8 L.R.A. 321, 19 Am. St. Rep. 734, the court said: "It would be a proper practice for a garnishee, after disclosing the fact which would show the exemption, to have the defendant cited, to the end that he should make his own defense."

[18] Annotation: 45 A.L.R. 646.

[19] Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023, 25 S. Ct. 625, 3 Ann. Cas. 1084; Carson v. Memphis & C. R. Co. 88 Tenn. 646, 13 S. W. 588, 8 L.R.A. 412, 17 Am. St. Rep. 921; Henderson v. Hooper Sugar Co. 65 Utah, 241, 236 P. 239, 45 A.L.R. 635 (as to mere bailee for hire).

Annotation: 45 A.L.R. 646.

In Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023, 25 S. Ct. 625, 3 Ann. Cas. 1084, where the principal defendant, a nonresident, was served constructively in the garnishment proceeding, the court said that generally the failure of the garnishee to give proper notice to his creditor of the attaching suit would be such a neglect of duty on his part which he owed his creditor as would prevent his availing himself of the judgment in the attachment suit as a bar to the subsequent suit by his creditor, but where, as in the case at bar, the latter, under the statute, had an opportunity for a year and a day after the entry of the judgment to litigate the question of his liability in the garnishment proceeding, but took no proceedings to that end, although he knew of the judgment within a few days after its rendition, he could not complain that, by the failure of the garnishee to give him notice, he had been deprived of defense on the merits.

See also infra, § 964.

[20] Annotation: 45 A.L.R. 646.

[1] Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023, 25 S. Ct. 625, 3 Ann. Cas. 1084.

Annotation: 45 A.L.R. 646.

pal debtor does not make the payment under the judgment voluntary, where he was absolutely without defense, so as to prevent him from pleading such payment in bar to an action on the debt.[2]

§ 683. **—In Garnishment of Salary or Wage Cases.** —The weight of opinion is that good faith and fair dealing require that a garnishee, in making his answer of a disclosure, state every fact which may aid the court in determining whether the garnishee should be required to pay the money into court for the use of the plaintiff, and in accordance with this principle, where an employer is garnished in a suit against its nonresident employee, it should set up his exemption, and if it does not, judgment and payment in the garnishment proceedings will constitute no defense to an action by the employee on his claim.[3] Accordingly, failure of a garnishee to state in his answer the facts which show an exemption of the principal defendant, under a statute providing that "no current wages for personal services shall be subject to garnishment," will deprive him of the protection of a judgment against him as against the principal defendant, if the latter has not appeared or been formally cited to appear in the garnishment proceedings, although he made default in the principal suit.[4] Likewise, it has been held that where an action against a nonresident defendant who is served with notice thereof only by publication is upon a claim or debt assigned to the plaintiff in violation of a statute of another state inhibiting such an assignment for the purpose of attachment, garnishment, or other process, outside of such other state, when the creditor, the debtor (being a citizen of such other state), and the person or corporation owing the money intended to be reached by the proceedings in attachment or garnishment are all within the jurisdiction of such other state, so that the res may be seized as well in that state if not exempt by law, the violation of such statute of that state is a defense to the garnishment proceedings and should be interposed by the garnishee.[5] However, the view has been taken that where the employee has actual notice of the garnishment proceedings, but fails to make any defense thereto, the judgment therein will be conclusive on him and a protection to the garnishee, although the garnishee fails to set up the employee's statutory exemption.[6]

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[2] Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023, 25 S. Ct. 625, 3 Ann. Cas. 1084.

[3] Southern R. Co. v. Fulford, 125 Ga. 103, 54 S. E. 68, 5 Ann. Cas. 168; St. Louis & S. F. R. Co. v. Crews, 51 Okla. 144, 151 P. 879, Ann. Cas. 1918C, 823; Missouri P. R. Co. v. Whipsker, 77 Tex. 14, 13 S. W. 639, 8 L.R.A. 321, 19 Am. St. Rep. 734.

Annotation: 45 A.L.R. 646.

In Southern R. Co. v. Fulford, 125 Ga. 103, 54 S. E. 68, 5 Ann. Cas. 168, it was held that one who owes wages which are exempt from garnishment, upon being garnished, must set up the facts of the garnishment in his answer, and, if he fails to do so and permits judgment to be rendered against himself, and, upon the issuance of a fi. fa., pays the money into court, he does so at his peril and will be liable in a suit by the laborer, notwithstanding that the latter was a party to the original action, but did not contest the same, and a judgment was rendered against him therein.

[4] Missouri P. R. Co. v. Whipsker, 77 Tex. 14, 13 S. E. 639, 8 L.R.A. 321, 19 Am. St. Rep. 734.

[5] St. Louis & S. F. R. Co. v. Crews, 51 Okla. 144, 151 P. 879, Ann. Cas. 1918C, 823.

Generally, as to remedies against violation of exemption laws of forum by attachment or garnishment suit in foreign jurisdiction, see Vol. 4, p. 847, § 481, infra, § 721.

Generally, as to full faith and credit due judgment on garnishment of claim in foreign jurisdiction where claim arose in the state of the forum and is there exempt from garnishment, see infra, §§ 810, 811.

[6] Carson v. Memphis & C. R. Co. 88 Tenn. 648, 13 S. W. 588, 8 L.R.A. 412, 17 Am. St. Rep. 921.

In Carson v. Memphis & C. R. Co. 88 Tenn. 646, 13 S. W. 588, 8 L.R.A. 412, 17 Am. St. Rep. 921, where a railroad was garnished in the courts of another state for wages due an employee for services performed, and the employee had actual notice of the proceedings and failed to make any defense, it was held that the railroad company did not have the obligation or duty to set up the exemption law given by the law of Tennessee, the court saying: "The contention of Carson would make the obligation greatly more burdensome by throwing upon the company the additional responsibility and expense of knowing, at its peril, that there was an

§ 684. Duty to Require Execution of Attachment Bonds.—The general rule is that it is the duty of the garnishee to require the execution of bonds essential to the validity of the garnishment proceedings before rendering the plaintiff any satisfaction in such proceedings.[7]

§ 685. Duty where Defendant Succeeds in Suit, and as to Surplus.—It is obvious that a garnishee may not retain property against the defendant where the garnishment has terminated in the defendant's favor. Likewise, he cannot retain against the defendant an excess over the amount necessary to discharge the garnishment, at least after judgment and satisfaction in the garnishment.[8] Furthermore, the general rule is that a pending garnishment does not justify the garnishee in holding against the defendant property or funds of the defendant upon which the garnishment is not binding, and constitutes no danger of liability of the garnishee to the plaintiff. Accordingly, where the writ of garnishment states a certain amount as the demand of the plaintiff, the garnishee has no right to retain a greater amount against the defendant, for under such a circumstance the garnishment is not binding on the surplus. However, the garnishee need yield no property or funds to the defendant, where the effect of the garnishment is to bind all property and funds of the defendant in his possession pending the garnishment.[9]

§ 686. Liability for Interest.—Liability of the garnishee to the defendant for interest is limited in the same manner as is his liability to the defendant generally. There is no liability for interest as damages for the detention of the property in so far as such detention is consequent upon the garnishment.[10] But interest actually earned by the property and received by the garnishee is owing to the defendant in the same manner and to the same extent as are his property and funds generally. Accordingly, a garnishee who has paid a judgment rendered against him may be held liable to his creditor for interest on the remainder of the debt from the date of the judgment in garnishment,[11] though not prior thereto.[12] Generally, the garnishee is liable to the defendant for retaining property or funds of the defendant for his own benefit,[13] as, for example, when it is not bound by the garnishment [14] or not appropriated to the satisfaction of the plaintiff's demand.[15] The garnishee is liable for interest where he has fraudulently participated in the institution of the garnishment proceedings or in acts delaying their termination.[16] Similarly, where a garnishee retains money, not as a stakeholder pending the litigation, but that he may litigate for his own benefit the title of the owner of it, he is entitled to no presumption, rendering him not liable for interest, that he

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exemption law in his favor, and of claiming the benefit of it for him. Such a requirement would be unjust and unreasonable." The court gave as an additional reason that exemption laws had no extraterritorial effect, and, even though the same had been pleaded, would have availed the employee nothing.

[7] Oldham v. Ledbetter, 1 How. (Miss.) 43, 26 Am. Dec. 690.

[8] Sickman v. Lapsley, 13 Serg. & R. (Pa.) 224, 15 Am. Dec. 596; Berry Bros. v. Davis, 77 Tex. 191, 13 S. W. 978, 19 Am. St. Rep. 748.

[9] See supra, § 672.

[10] Moore v. Lowrey, 25 Iowa, 336, 95 Am. Dec. 790; Fitzgerald v. Caldwell, 2 Dall. (Pa.) 215, 1 L. ed. 354; Berry Bros. v. Davis, 77 Tex. 191, 13 S. W. 978, 13 Am. St. Rep. 748; Eau Claire Nat. Bank v. Chippewa Valley Bank, 124 Wis. 520, 102 N. W. 1068, 109 Am. St. Rep. 966.

[11] Berry Bros. v. Davis, 77 Tex. 191, 13 S. W. 978, 19 Am. St. Rep. 748.

[12] Eau Claire Nat. Bank v. Chippewa Valley Bank, 124 Wis. 520, 102 N. W. 1068, 109 Am. St. Rep. 966.

[13] Moore v. Lowrey, 25 Iowa, 336, 95 Am. Dec. 790; Sickman v. Lapsley, 13 Serg. & R. (Pa.) 224, 15 Am. Dec. 596.

[14] Sickman v. Lapsley, 13 Serg. & R. (Pa.) 224, 15 Am. Dec. 596.

[15] Rice v. Jones, 103 N. C. 226, 9 S. E. 571, 14 Am. St. Rep. 801.

[16] Fitzgerald v. Caldwell, 2 Dall. (Pa.) 215, 1 L. ed. 354.

has not used the money for his own benefit.[17] Generally liability to the defendant for interest on garnished property or funds may be avoided by the garnishee by surrendering or paying the same into court.[18] The same general rules govern the liability of the garnishee to the defendant's assignee for interest on the garnished property or funds.[19] However, it may be added to what already has been said, that it has been held that a garnishee is liable for interest to an assignee of the defendant where he has been notified of the assignment previous to the garnishment but, nevertheless, refuses to surrender the property or funds to the assignee.[20]

4. Duty of Garnishee to Third Persons

§ 687. Generally.—The garnishee, in making his disclosure, must be strictly impartial, and must not make an unqualified admission of indebtedness to the principal defendant, without disclosing real facts which leave it in doubt whether the property or debt belongs or is owing to the principal defendant or to a third person.[1] Nevertheless, it is said that a garnishee is not bound at its peril to ask that all claimants be made parties to the proceeding or to defend the rights of claimants to be fully protected by the judgment.[2]

§ 688. Duty to Notify Adverse Claimants.—To protect himself against liability to adverse claimants of the garnished property, of whose claims he has notice, the garnishee must, under certain circumstances, notify them of the garnishment,[3] or at least disclose their claims in his disclosure in the garnishment.[4] But the view is taken that actual knowledge by the claimant of the garnishment will relieve the garnishee of the duty of notifying him and making a defense on his claim in the garnishment.[5]

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[17] Cox v. Cronan, 82 Conn. 175, 72 A. 927, 135 Am. St. Rep. 268 (where owner was assignee of defendant).

[18] Stephens v. Pennsylvania Casualty Co. 135 Mich. 189, 97 N. W. 686, 3 Ann. Cas. 478.

See Standard Pa. Prac. Vol. 10.

[19] Cox v. Cronan, 82 Conn. 175, 72 A. 927, 135 Am. St. Rep. 268; Moore v. Lowrey, 25 Iowa, 336, 95 Am. Dec. 790; Fitzgerald v. Caldwell, 2 Dall. (Pa.) 215, 1 L. ed. 354.

[20] Cox v. Cronan, 82 Conn. 175, 72 A. 927, 135 Am. St. Rep. 268.

[1] Annotation: 45 A.L.R. 646.

[2] Henderson v. Hooper Sugar Co. 65 Utah, 241, 236 P. 239, 45 A.L.R. 637.

[3] See Hambley & Co. v. H. W. White & Co. 192 N. C. 31, 133 S. E. 399, citing R. C. L.; Henderson v. Hooper Sugar Co. 65 Utah, 241, 236 P. 237, 45 A.L.R. 637; Adams v. Filer, 7 Wis. 306, 73 Am. Dec. 410.

Annotation: 45 A.L.R. 646.

Where the vendee of property was garnished in an attachment suit by one claiming that title to it was in the principal defendant in that suit, and the vendee did not apprise the vendor that the title acquired by the purchase from him had been called in question, or give him notice of the garnishee process served upon him, or invite or request him to defend the title, the garnishee cannot plead the garnishee judgment in bar to a subsequent action by the vendor against him for the purchase price of the property, he having been bound not only to notify the vendor of the pendency of the proceeding, but also to tender to him the conduct of the defense or request him to defend. Adams v. Filer, 7 Wis. 306, 73 Am. Dec. 410.

However, where one intervenes in a garnishment proceeding, and claims the funds in the possession of the garnishee, and later withdraws his petition of intervention and fails to prosecute his claim to the funds garnished, the garnishee is under no obligation to such claimant to serve notice upon him of the garnishment, or to interpose any defense in behalf of such claimant, but has a right to presume that such claimant, by his act, has abandoned his claim to the ownership of the funds garnished, and the compliance by the garnishee with the judgment of the garnishment court, requiring him to pay the funds in his hands to the satisfaction of the judgment in favor of the garnishee plaintiff, is binding upon such claimant. Schenbeck v. First Nat. Bank, 69 Okla. 21, 169 P. 619, L.R.A.1918B, 1066.

[4] See infra, § 689.

[5] Henderson v. Hooper Sugar Co. 65 Utah, 241, 236 P. 239, 45 A.L.R. 637.

A garnishee owes no duty to one who has intervened in the garnishment proceeding and claimed the funds in the garnishee's possession, after such intervener has withdrawn his petition of intervention and failed to prosecute his claim for the funds garnisheed, to serve notice upon him of the garnishment proceeding, or interpose any defense in such intervener's behalf; he has a right to presume that such intervener has abandoned his claim to the ownership of the funds garnisheed. Schenbeck v. First Nat. Bank, 69 Okla. 21, 169 P. 619, L.R.A.1918B, 1066.

§ 689. Duty to Disclose Adverse Claims.—A garnishee must disclose adverse claims to the debt or property garnished in order to protect himself against subsequent demands by the adverse claimants,[6] at least where he has not notified such adverse claimants of the garnishment.[7] It is the duty of a garnishee to make disclosure. He is obligated fully and fairly to state all that he knows concerning his indebtedness to the defendant.[8]

§ 690. Duty to Disclose Assignments.—Where one summoned in garnishment proceedings against his creditor knows or acquires knowledge before his answer that the debt had been assigned prior to the institution of the proceedings, he is bound to disclose such fact in his answer and bring it to the attention of the court in order that the assignee's claim may be heard and determined; otherwise, he may be held liable in a subsequent suit by the assignee.[9] However, it seems clear that ordinarily, after the garnishee has in good faith, and without knowledge of the assignment, paid the debt, pursuant to judgment or execution against him as the debtor of the assignor, the assignee cannot enforce a second payment from the garnishee. The fault is that of the assignee in failing to give notice to the garnishee.[10] But it seems, also, that there may be instances where the garnishee is at fault in failing to require production of the written evidence of the indebtedness, and so is liable to the assignee, notwithstanding lack of notice of the assignment.[11] The view has been taken that the garnishee may be protected in making payment pursuant to judgment in the garnishment proceedings, although he has notice of the assignment at the time he makes the payment, if the notice is not given until after such judgment is rendered, and is therefore, for this reason, insufficient.[12] On the other hand, it has been held that where the garnishee at the time of the judgment against him has notice that a third party is claiming an assignment of the debt, it is his duty to plead the assignment in defense of the garnishment proceedings, and that if he does not do so, he cannot resist the assignee's claim against him by showing the judgment in the garnishment proceedings.[13] At least, it seems that where by statute the garnishee, up to the time of satisfaction of the judgment in garnishment, still has the opportunity to be heard against its enforcement, as where, for example, he is entitled to show cause against the issuance of an execution, it is his duty to set up the prior assignment as a cause against the issuing of execution on the judgment in the garnishment.[14] This division of authority as to the liability of the garnishee to the assignee of a chose in action who has notified the garnishee of the assignment subsequently to judgment in the garnishment proceedings, after which the garnishee has satisfied such judgment, is in accordance with the division of authority with respect to priority between the garnishment and a previous assignment where the garnishment reaches final judgment without any notice from the assignee to the garnishee—viz., the debtor—of such assignment.[15]

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[6] Bessemer Sav. Bank v. Anderson, 134 Ala. 343, 32 So. 716, 92 Am. St. Rep. 38; Herndon v. Swearingen, 1 Port. (Ala.) 192, 26 Am. Dec. 359; Whipple v. Robbins, 97 Mass. 107, 93 Am. Dec. 64; First Wisconsin Nat. Bank v. People's Nat. Bank, 136 Va. 276, 118 S. E. 82, 36 A.L.R. 736; Adams v. Filer, 7 Wis. 306, 73 Am. Dec. 410.

Annotation: 45 A.L.R. 646; L.R.A.1918C, 731.

In Henderson v. Hooper Sugar Co. 65 Utah, 241, 236 P. 239, 45 A.L.R. 637, however, it was held that where one had deposited stock with another under an agreement that the latter would hold the property for the use and benefit of certain corporations, and later garnishment proceedings were commenced against the bailee by creditors of one of the corporations, the bailee was not required to file a supplemental answer when one of the claimants assigned his claim to another three years after the garnishment proceedings had been instituted, and after the garnishee had made a full answer to the writ and the court had acquired jurisdiction of the parties and the property.

However, see discussion of Schenbeck v. First Nat. Bank, 69 Okla. 21, 169 P. 619, L.R.A.1918B, 1068, supra, note 5, § 688.

A bank garnished for the proceeds of a draft which it has collected for a nonresident owner as the property of the drawer is bound to make a frank statement to the court of the facts with respect to its correspondent's claim to ownership of the funds as a bona fide holder of the draft for value. First Wisconsin Nat. Bank v. People's Nat. Bank, 136 Va. 276, 118 S. E. 82, 36 A.L.R. 736.

[7] See supra, § 688.

[8] Bassett v. Garthwaite, 22 Tex. 230, 73 Am. Dec. 257.

As to disclosure, see infra, §§ 754 et seq.

[9] Bessemer Sav. Bank v. Anderson, 134 Ala. 343, 32 So. 716, 92 Am. St. Rep. 38; Cox v. Cronan, 82 Conn. 175, 72 A. 927, 135 Am. St. Rep. 268; Walter v. Whitlock, 9 Fla. 86, 76 Am. Dec. 607; Walters v. Washington Ins. Co. 1 Iowa, 404, 63 Am. Dec. 451; Black v. Brisbin, 3 Minn. 360, Gil. 253, 74 Am. Dec. 762; Dodd v. Brott, 1 Minn. 270, Gil. 205, 66 Am. Dec. 541; Oldham v. Ledbetter, 1 How. (Miss.) 43, 26 Am. Dec. 690; Burditt Bros. v. Porter, 63 Vt. 296, 21 A. 955, 25 Am. St. Rep. 763.

Annotation: 45 A.L.R. 655; 52 A.L.R. 116; L.R.A.1918C, 731.

A garnishee notified of the assignment to a third party, before regular garnishment, of his indebtedness to the principal defendant must protect himself by presenting the facts in the garnishment proceedings; otherwise, he will be estopped from setting up the garnishment judgment in defense of an action by the assignee against him. Black v. Brisbin, 3 Minn. 360, Gil. 253, 74 Am. Dec. 762.

Where an insurance company has received notice of the assignment of an insurance policy before the commencement of the garnishment, in time to enable it to show such fact in its answer or before judgment against it, and neglects to show such defense, it cannot resist a subsequent claim by the assignee; but if the insurer was not notified of such assignment prior to judgment, it cannot be held liable in a subsequent suit by the assignee, even though at the time of the latter suit the garnishee judgment had not been paid. Walters v. Washington Ins. Co. 1 Iowa, 404, 63 Am. Dec. 451. Wright, Ch. J., dissented, saying that if the garnishee had notice of the assignment before payment or execution, it was sufficient and the assignee should recover.

[10] Houtz v. Daniels, 36 Idaho, 544, 211 P. 1088, 32 A.L.R. 1016; Richards v. Griggs, 16 Mo. 416, 57 Am. Dec. 240.

Annotation: 32 A.L.R. 1025; 52 A.L.R. 120.

The view has been taken that it is the duty of the assignee to intervene and protect his own interest when he has notice of the garnishment, and that his failure to do so relieves the garnishee from all liability to him.[16] Thus, it has been said that a mere bailee for hire who becomes garnishee in a proceeding to reach the property bailed is protected from claims of a subsequent assignee of the property, who has knowledge from any reliable source that the proceedings are pending and fails to assert his claim, although he is not made a party to the proceeding.[17]

§ 691. Duty to Disclose Assignments of Judgments.—Some of the cases take the view that an assignment of a judgment, though without notice to the judgment debtor, leaves him no longer indebted to the judgment creditor, and they hold, therefore, that there is nothing of the judgment creditor's in his hands subject to garnishment, so that if he pays the garnishor he will not be protected against the assignee.[18] Other cases, however, take the view that the question depends upon notice and hold that an assignment of a judgment without notice to the judgment debtor leaves him free to deal with the garnishor as if the assignor had never assigned the judgment.[19] With respect to when notice of an assignment of a judgment debt must be given to the judgment debtor in order to render the debtor liable if he pays the debt to the garnishing creditor, there are cases which hold that such notice is sufficient for that purpose if it is given before the garnishment,[1] before the judgment debtor answers the garnishment,[2] or before judgment in the garnishment.[3] This division of authority as to when such notice must be given is also found with respect to the matter of the effect of such notice on priority between the garnishment and the assignment of a judgment.[4]

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[11] Annotation: 52 A.L.R. 120.

[12] Annotation: 52 A.L.R. 120.

[13] Annotation: 45 A.L.R. 657.

[14] McDowell, P. & Co. v. Hopfield, 148 Md. 84, 128 A. 742, 52 A.L.R. 105; Oldham v. Ledbetter, 1 How. (Miss.) 43, 26 Am. Dec. 690.

Annotation: 52 A.L.R. 117.

[15] See infra, §§ 874 et seq.

[16] Henderson v. Hooper Sugar Co. 65 Utah, 241, 236 P. 239, 45 A.L.R. 637.

[17] Ibid.

[18] Annotation: 32 A.L.R. 1024.

See also Brown v. Ayres, 33 Cal. 525, 91 Am. Dec. 655.

[19] Buckeye Ref. Co. v. Kelly, 163 Cal. 9, 124 P. 536, Ann. Cas. 1913E, 840; Houtz v. Daniels, 36 Idaho, 544, 211 P. 1088, 32 A.L.R. 1016. See also Dodd v. Brott, 1 Minn. 270, Gil. 205, 66 Am. Dec. 541.

Annotation: 32 A.L.R. 1025.

In Buckeye Ref. Co. v. Kelly, 163 Cal. 8, 124 P. 536, Ann. Cas. 1913E, 840, where the judgment debtor paid a judgment which had been partially assigned, and which was levied on in execution of a judgment against the judgment creditor, the court held that the judgment debtor, in the first place, was not obliged to take notice of the partial assignment, but that, in the second place, even if there had been a valid legal assignment, the judgment debtor was protected, as without notice of the assignment he had paid the judgment.

§ 692. **Duty to Require Execution of Attachment Bonds.**—It is the duty of a garnishee to require the garnishing creditor to give security, as required by statute, for the protection of persons whose property is garnished in his possession.[5] Thus, it is the duty of a garnishee to see that a plaintiff in attachment executes a bond for refund, required by statute to be made after judgment in execution and before payment; and where the attaching creditor does not execute the bond, the garnishee is not bound to pay, and if he does so, it is a voluntary payment and constitutes no defense to an action by an assignee of the note.[6]

§ 693. **Duty to Appeal.**—Under some circumstances, it is the duty of a garnishee to appeal from judgment in order to protect the interests of third persons.[7]

5. Rights, Duties, and Liabilities of Garnishee on Negotiable Paper

§ 694. **Generally.**—A garnishee upon negotiable paper has the same rights and duties as a garnishee generally. The note, or liability upon it, whichever is garnished,[8] is impounded in his possession in the custody of the law, and he is regarded as an innocent stakeholder of the same and owes a duty of impartiality to each party. He is bound by the general rule that a garnishee who refuses to avail himself of available methods for his protection acts at his risk and peril.[9] Consequently, if a garnishee indebted upon negotiable commercial paper omits in due season to claim the benefit of a statute enacted to afford him protection against duplicate liability, he must bear the consequent loss.[10] However, a garnishee upon such paper, because of its negotiable character, acquires certain peculiar rights and is under certain duties in addition to the usual rights and duties of an ordinary garnishee. The garnishee must withhold all payment upon it from a garnishing creditor until it matures and he is satisfied that the defendant was the holder of it at maturity, or until it is surrendered to him.[11]

A judgment debtor who in good faith, in answer to garnishment process issued by a judgment creditor of his creditor, pays the amount of the judgment to the sheriff and takes his receipt therefor, without notice of an assignment of the judgment, will not be compelled to pay the amount of the judgment to the assignee. Houtz v. Daniels, 36 Idaho, 544, 211 P. 1088, 32 A.L.R. 1016. Annotation: 32 A.L.R. 1026.

[1] Clodfelter v. Cox, 1 Sneed (Tenn.) 330, 60 Am. Dec. 157 (not necessary to result).

[2] Schoolfield v. Hirsh, 71 Miss. 55, 14 So. 528, 42 Am. St. Rep. 450.

[3] Annotation: 32 A.L.R. 1027.

[4] See infra, § 866.

[5] Oldham v. Ledbetter, 1 How. (Miss.) 43, 26 Am. Dec. 690.
Annotation: 45 A.L.R. 654.

[6] Oldham v. Ledbetter, 1 How. (Miss.) 43, 26 Am. Dec. 690.

[7] Hardy v. Hunt, 11 Cal. 343, 70 Am. Dec. 787.
Annotation: 45 A.L.R. 659.

[8] See Vol. 4, p. 723, § 262.
Under a statute requiring a garnishee to deliver choses in action to the constable, failure to deliver a check will render the garnishee liable to the attaching creditor for its amount in case the proceeds are lost to him through the act of the garnishee. Great Western Finance Co. v. Hamilton Nat. Bank, 76 Colo. 48, 230 P. 115, 41 A.L.R. 997.

[9] Smoot v. Eslava, 23 Ala. 659, 58 Am. Dec. 310; Yarborough v. Thompson, 3 Smedes & M. (Miss.) 291, 41 Am. Dec. 626.
Annotation: 45 A.L.R. 646; L.R.A.1918C, 759.

[10] Annotation: L.R.A.1918C, 758.

[11] Smith v. Blatchford, 2 Ind. 184, 52 Am. Dec. 504.

Good faith in the maker of negotiable commercial paper is just as essential to safeguard him in case of garnishment as it is to protect the indorsee. The law, it has been declared, does not shield the maker of a negotiable promissory note from a judgment in garnishment where he colluded with the payee to defeat the garnishor's right.[12] Not all the courts, however, are in full harmony upon this matter. It has been held, for example, that the fact that the maker of a negotiable promissory note knew when he made and delivered it that by its means the payee purposed to defraud his creditors—a purpose the maker meant to facilitate—does not make him liable to be charged as garnishee while the paper is outstanding and unmatured.[13]

§ 695. Duty to Disclose Transfer.—Where the maker of a note is garnished by creditors of the payee, and, before final judgment, he receives notice of an assignment of the note, transferred before service of a writ of garnishment upon him, he is bound to bring such fact to the attention of the court, and, for his failure to do so, he may be held liable in a subsequent suit by the holder.[14] Some cases hold that the garnishee has the duty of disclosing knowledge of an assignment or transfer of the note made before the commencement of the garnishment proceedings when notice has been given before answer has been filed.[15] The view has been taken that where the garnishee is notified of an assignment of the note garnished only after execution has been awarded against him, he should not render satisfaction of the judgment, but should protect himself by a bill of interpleader.[16] But a maker of an overdue promissory note who has disclosed an indebtedness thereon to the defendant in garnishment and, without waiting for judgment, has paid the debt to the plaintiff is fully protected thereby against the claim of an indorsee after maturity of the paper if he had no notice of his transfer, and a judgment in the garnishment proceedings against the garnishee affords him a good defense in a later action upon his note by a holder who did not acquire it until after it was past due.[17]

C. GARNISHMENT AS A DEFENSE TO OTHER PROCEEDINGS ON GARNISHED CLAIM

1. AS DEFENSE TO PROCEEDINGS BY DEFENDANT

§ 696. Generally.[18]—The courts are not entirely agreed as to the effect of a pending garnishment proceeding upon a subsequent action against the garnishee by the principal defendant. It is clear, however, that the pending garnishment proceeding does not constitute a defense in bar.[19] In some jurisdictions the pendency of garnishment proceedings may be pleaded in abatement of a subsequent action begun against the garnishee by the principal defendant to recover the claim garnished. The majority rule, however, is that the pendency of garnishment proceedings will not abate the subsequent action by the principal defendant,[20] although it is uniformly recognized that

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See Vol. 4, p. 728, §§ 267 et seq.
Annotation: L.R.A.1918C, 731.

[12] Annotation: L.R.A.1918C, 748.

[13] Willis v. Heath, 75 Tex. 124, 12 S. W. 971, 16 Am. St. Rep. 876.

[14] Yarborough v. Thompson, 3 Smedes & M. (Miss.) 291, 41 Am. Dec. 626.
Annotation: 45 A.L.R. 652; L.R.A.1918C, 759.

[15] Smoot v. Eslava, 23 Ala. 659, 58 Am. Dec. 310.
Annotation: 45 A.L.R. 652; L.R.A.1918C, 759.

[16] Oldham v. Ledbetter, 1 How. (Miss.) 43, 26 Am. Dec. 690.

[17] Annotation: L.R.A.1918C, 763.

[18] As to effect of judgment or satisfaction thereof in garnishment as defense to action by defendant against garnishee, see infra, §§ 804 et seq.

[19] Annotation: 91 A.L.R. 961; 9 Ann. Cas. 478; Ann. Cas. 1916B, 365.

[20] See ABATEMENT, SURVIVAL, AND REVIVAL, Vol. 1, p. 40, § 35.

the garnishee should be protected from double liability.[1] The pendency of the garnishment proceeding will furnish sufficient cause for a continuance of the subsequent action begun by the principal defendant on the garnished claim, or for a stay of proceedings therein, until final determination has been made in the garnishment proceedings.[2] In other cases, the courts have allowed the subsequent action begun by the principal defendant upon the garnished claim to proceed to final determination, but have allowed the judgment debtor summoned as garnishee, upon proper application, to secure an order staying the enforcement of the judgment to abide the result of the garnishment proceedings.[3]

If the garnishment proceedings are void, they do not affect the subsequent action begun by the principal defendant against the garnishee,[4] although a mere lack of merits in a pending garnishment does not prevent it from operating as a defense to a subsequent action on the garnished claim.[5]

§ 697. Where Suit Was Instituted Prior to Garnishment Proceedings.—A defendant in an action who is, subsequent to the institution of the suit against him, garnished by creditors of the plaintiff cannot set up the garnishment in complete bar of the action against him.[6] Moreover, it is clear that when the action for the recovery of the debt is commenced before the garnishment of the defendant therein, he cannot plead the subsequent garnishment proceedings in abatement,[7] for in any case, priority of suit determines the right of abatement by reason of the pendency of another action.[8] The defendant is entitled, however, to protection from the imposition of a double liability by reason of the subsequent garnishment proceedings;[9] but there is a difference of opinion as to the proper course to be pursued,[10] which would seem to be to raise in the garnishment action the objection of the pendency of the prior action to recover the debt, particularly where the two proceedings are in different states.[11] In some cases, however, where both the action and the garnishment are in the same state, the defendant has been permitted to set up the subsequent garnishment proceedings by a plea puis darrein continuance.[12] This has been done, however, only where it is recognized that a debt in suit or a judgment upon it is garnishable;[13] the subsequent garnishment clearly constitutes no defense otherwise. Other courts, however, have taken the position that garnishment or trustee process instituted in one state subsequent to the commencement of the action in another to recover the debt cannot be pleaded puis darrein continuance or otherwise made available in the latter action.[14] In such cases, the maxim "qui prior est tempore, portior est jure" is applicable.[15]

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[1] See infra, § 781.

[2] Crawford v. Slade, 9 Ala. 887, 44 Am. Dec. 463 (explaining Crawford v. Clute, 7 Ala. 157, 41 Am. Dec. 92); McKeon v. McDermott, 22 Cal. 667, 83 Am. Dec. 86; Smith v. Blatchford, 2 Ind. 184, 52 Am. Dec. 504; American Hardwood Lumber Co. v. Joannin-Hansen Co. 99 Minn. 305, 109 N. W. 403, 9 Ann. Cas. 477; Harvey v. Great Northern R. Co. 50 Minn. 405, 52 N. W. 905, 17 L.R.A. 84.

[3] Early v. Rogers, 16 How. (U. S.) 599, 14 L. ed. 1074; Crawford v. Slade, 9 Ala. 887, 44 Am. Dec. 463; McKeon v. McDermott, 22 Cal. 667, 83 Am. Dec. 86; Jax Ice & Cold Storage Co. v. South Florida Farms Co. 91 Fla. 593, 109 So. 212, 48 A.L.R. 957; Smith v. Blatchford, 2 Ind. 184, 52 Am. Dec. 504.

Annotation: 91 A.L.R. 960; 19 Am. St. Rep. 145; 9 Ann. Cas. 479; Ann. Cas. 1916B, 365.

[4] Missouri P. R. Co. v. Sharitt, 43 Kan. 375, 23 P. 430, 8 L.R.A. 385, 19 Am. St. Rep. 143; Douglass v. Phenix Ins. Co. 138 N. Y. 209, 33 N. E. 938, 20 L.R.A. 118, 34 Am. St. Rep. 448; Neufelder v. German American Ins. Co. 6 Wash. 336, 33 P. 870, 22 L.R.A. 287, 36 Am. St. Rep. 166.

[5] American Hardwood Lumber Co. v. Joannin-Hansen Co. 99 Minn. 305, 109 N. W. 403, 9 Ann. Cas. 477.

[6] Annotation: 91 A.L.R. 962.

As to pendency of other proceedings on garnished claim as defense to garnishment, see infra, § 783.

[7] Wabash R. Co. v. Tourville, 179 U. S. 322, 45 L. ed. 210, 21 S. Ct. 113, affirming 148 Mo. 614, 50 S. W. 300, 71 Am. St. Rep. 650; Wallace v. McConnell, 13 Pet. (U. S.) 136, 10 L. ed. 95; Missouri, K. & T. R. Co. v. Bradshaw, 37 Okla. 317, 132 P. 327, L.R.A. 1917F, 1013.

Annotation: 91 A.L.R. 959; L.R.A.1917F, 1019.

To sustain the validity of a plea of garnishment, the garnishment must have preceded the commencement of the suit in which the plea is made. Wabash R. Co. v. Tourville, 179 U. S. 322, 45 L. ed. 210, 21 S. Ct. 113.

[8] See Abatement, Survival, and Revival, Vol. 1, p. 31, § 21.

[9] See infra, § 781.

[10] See discussion in Virginia F. & M. Ins. Co. v. New York Carousal Mfg. Co. 95 Va. 515, 28 S. E. 888, 40 L.R.A. 237.

[11] Whipple v. Robbins, 97 Mass. 107, 93 Am. Dec. 64; Missouri, K. & T. R. Co. v. Bradshaw, 37 Okla. 317, 132 P. 327, L.R.A. 1917F, 1013.

See infra, § 783.

§ 698. Garnishment Proceeding in Another State.—It may fairly be conceded that the pendency of garnishment proceedings in one state does not constitute a ground for a plea in bar to proceedings in another state by the original creditor upon the debt.[16] The mere service of a garnishment writ does not give the court exclusive jurisdiction as against garnishment proceedings begun in another state.[17] It must be conceded, however, that the garnishee should be protected from having to pay the same debt twice. And the courts are generally agreed as to the necessity and equity under such circumstances of affording protection to the garnishee[18] by allowing him to set up such proceedings by way of defense to the action against him,[19] although they differ as to the mode and method by which such protection must be afforded.[20] The rule is fully applicable to an action wherein the defendant is garnishee with respect to the cause of action in a garnishment proceeding in another state and the plaintiff is an assignee of the defendant in the garnishment proceedings, where the assignment was subsequent to the garnishment proceedings.[1]

In a number of cases the courts have abated the action on the debt when attachment or garnishment proceedings were pending in another state to reach the same debt,[2] apparently leaving the plaintiff to his remedy of later instituting a new action if the debt has not been subjected to the claim of the garnishor. Other cases, however, either disapprove of or entirely repudiate the rule that such a pending garnishment proceeding abates the action on the debt.[3] Some courts merely continue or suspend the action until the determination of the pending proceedings in the other state.[4] Others afford protection to the garnishee by suspending the execution of the judgment recovered in the action on the debt until the determination of attachment or garnishment proceedings in the other state.[5]

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[12] Harvey v. Great Northern R. Co. 50 Minn. 405, 52 N. W. 905, 17 L.R.A. 84; Smith v. Carroll, 17 R. I. 125, 21 A. 343, 12 L.R.A. 301.

[13] See Vol. 4, p. 687, §§ 210 et seq.

[14] Whipple v. Robbins, 97 Mass. 107, 93 Am. Dec. 64.

Where an action by a creditor against his debtor is brought in a court of one state, wherein jurisdiction of the defendant is acquired, and subsequently, an action is commenced in a court of a sister state, in which the plaintiff in the first action is there made defendant, and the defendant in said action is there served with garnishment process, the subject-matter being the same, the latter action can be pleaded neither in bar nor in abatement of the former. Missouri R. Co. v. Bradshaw, 37 Okla. 317, 132 P. 327, L.R.A.1917F, 1013.

In Wallace v. McConnell, 13 Pet. (U. S.) 136, 10 L. ed. 95, where garnishment proceedings were instituted in a state court, after the commencement of suit in the District Court of the United States, by the principal defendant in garnishment to recover the debt, it was held that the right of the plaintiff to prosecute his suit in that court could not be arrested or taken away by the subsequent proceedings in the state court.

A foreign judgment may, however, be garnished in a minority of jurisdictions. See Vol. 4, p. 689, § 214.

[15] Missouri, K. & T. R. Co. v. Bradshaw, 37 Okla. 317, 32 P. 327, L.R.A.1917F, 1013.

[16] Becker v. Illinois C. R. Co. 250 Ill. 40, 95 N. E. 42, 35 L.R.A.(N.S.) 1154; Lancashire Ins. Co. v. Corbetts, 165 Ill. 592, 46 N. E. 631, 36 L.R.A. 640, 56 Am. St. Rep. 275.

Annotation: 91 A.L.R. 959.

Neufelder v. German American Ins. Co. 6 Wash. 336, 33 P. 870, 22 L.R.A. 287, 36 Am. St. Rep. 166, which is on its face contrary to the rule stated, involved the question primarily where the court of the other state had jurisdiction in the garnishment proceeding.

[17] Lancashire Ins. Co. v. Corbetts, 165 Ill. 592, 46 N. E. 631, 36 L.R.A. 640, 56 Am. St. Rep. 275.

[18] Chicago, R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 43 L. ed. 1144, 19 S. Ct. 797; Virginia F. & M. Ins. Co. v. New York Carousal Mfg. Co. 95 Va. 515, 28 S. E. 888, 40 L.R.A. 237.

[19] Harvey v. Great Northern R. Co. 50 Minn. 405, 52 N. W. 905, 17 L.R.A. 84.

[20] Annotation: 91 A.L.R. 964; L.R.A. 1917F, 1016.

[1] Harvey v. Great Northern R. Co. 50 Minn. 405, 52 N. W. 905, 17 L.R.A. 84.

[2] Mattingly v. Boyd, 20 How. (U. S.) 128, 15 L. ed. 845; German Bank v. American F. Ins. Co. 83 Iowa, 491, 50 N. W. 53, 32 Am. St. Rep. 316; Scott v. Coleman, 5 Litt. (Ky.) 348, 15 Am. Dec. 71; Harvey v. Great Northern R. Co. 50 Minn. 405, 52 N. W. 905, 17 L.R.A. 84.

The question is affected by the fact that the garnishment proceedings were instituted before or after the commencement of the action on the debt in the other state. There is no necessity for abating or continuing the action on the debt or suspending execution therein when there is no danger of imposing a double liability on the defendant.[6] Nor will an action be abated or continued or execution therein be suspended because the defendant has been garnished with respect to the claim in suit in an action in a foreign jurisdiction against the plaintiff if it appears that such foreign garnishment proceedings were instituted through the bad faith of the garnishee.[7]

It may be noted that many of the cases involving the effect of pending garnishment procedings in another state on a subsequent suit by the defendant on the garnished debt turn upon the view taken by the court with respect to the jurisdiction of the foreign court in the garnishment proceedings.[8]

§ 699. —Where Danger of Double Liability Has Ceased.—There is no necessity for abating or continuing an action or for suspending execution therein because of the pendency in another jurisdiction of proceedings to garnish the claim upon which the action is based, if there is in fact no danger of double liability, or if such danger has ceased.[9]

§ 700. —Garnishment of Salary or Wages.—The question of the effect of the pendency of garnishment proceedings in one state, designed to reach

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Annotation: 91 A.L.R. 964; L.R.A.1917F, 1016.

[3] Annotation: 91 A.L.R. 964.

[4] Chicago, R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 43 L. ed. 1144, 19 S. Ct. 797; Baltimore & O. S. W. R. Co. v. Adams, 159 Ind. 688, 66 N. E. 43, 60 L.R.A. 396.

Annotation: 91 A.L.R. 965.

In Baltimore & O. S. W. R. Co. v. Adams, 159 Ind. 688, 66 N. E. 43, 60 L.R.A. 396, the court, in passing upon the effect of a judgment obtained in garnishment proceedings in Kentucky upon a prior judgment obtained in a suit to recover the debt, which suit was not instituted until after the commencement of the garnishment proceedings, observed that the effect of the pendency of the garnishment proceedings in Kentucky was merely to confer upon the defendant in the Indiana suit the privilege of seeking a stay of the proceedings.

[5] Annotation: 91 A.L.R. 961.

[6] See infra, § 699.

[7] Annotation: 91 A.L.R. 969.

[8] In Douglass v. Phenix Ins. Co. 138 N. Y. 209, 33 N. E. 938, 20 L.R.A. 118, 34 Am. St. Rep. 448, the holding that the answer of the defendant, pleading in abatement the pendency of garnishment proceedings in a court of another state commenced prior to the institution of the instant action, was insufficient in law to stay the further prosecution of the action was based on the ground that the court of the other state had no jurisdiction to garnish the debt, where both the garnishee and the principal defendant in garnishment were nonresidents, the principal defendant was not personally served in that state, and the situs of the debt was in the state of the forum.

In Neufelder v. German American Ins. Co. 6 Wash. 336, 33 P. 870, 22 L.R.A. 287, 36 Am. St. Rep. 166, where the defense that a levy of garnishment process in another state prior to the time of the assignment was a bar to the action was sustained, the decision, however, turned on whether the court of the other state had jurisdiction in the garnishment proceedings.

In German Bank v. American F. Ins. Co. 83 Iowa, 491, 50 N. W. 53, 32 Am. St. Rep. 316, the court, upon an objection to the plea of the pendency of garnishment proceedings in another state in abatement to the suit in Iowa based upon the ground that the court of the other state had no jurisdiction over the garnishee, decided that such court had jurisdiction over the defendant, the garnishee.

[9] Annotation: 91 A.L.R. 970.

wages due from an employer, on the right of the employee to maintain an action commenced subsequently in another state to recover the wages is complicated by the existence of statutes exempting wages from garnishment process, although the rule now is that a pending garnishment or attachment of wages in another state is a good defense to a subsequent action for their recovery, providing the foreign court had jurisdiction, irrespective of whether or not the wages are exempt from attachment or execution in the state where they were earned, where the wage earner resides, or where he brings his suit for their recovery. How such a pending garnishment or attachment may be availed of in defense of such an action, whether in abatement or bar, or as a ground for a continuance or a suspension of execution, varies.[10] According to some of the earlier cases, however, when wages are exempt from garnishment in the state in which action is brought for their recovery, the pendency of garnishment proceedings in another jurisdiction to reach such wages will not furnish a ground for abating or continuing the action begun in the forum, even though, as a result of such a rule, the employer may be subjected to a double liability.[11] But this doctrine apparently has been repudiated by the United States Supreme Court, which holds that garnishment of a debt may be had by obtaining jurisdiction of the debtor,[12] and that such garnishment proceedings, at least after judgment, are entitled to the protection of the full faith and credit clause of the Federal Constitution.[13] There is a difference of opinion, however, as to whether the full faith and credit clause protects a prior garnishment against a subsequent suit in another state on the garnished claim where judgment is rendered in that suit before judgment in the garnishment. This matter is discussed elsewhere in this article.[14]

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[10] Chicago, R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 43 L. ed. 1144, 19 S. Ct. 797; Baltimore & O. R. Co. v. Allen, 58 W. Va. 388, 52 S. E. 465, 3 L.R.A.(N.S.) 608, 112 Am. St. Rep. 975. See also Sanders v. Armour Fertilizer Works, 292 U. S. 190, 78 L. ed. 1206, 54 S. Ct. 677, 91 A.L.R. 950, rehearing denied in 292 U. S. 612, 78 L. ed. 1472, 54 S. Ct. 855.

Annotation: 27 A.L.R. 1396.

In Chicago, R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 43 L. ed. 1144, 19 S. Ct. 797, approved in King v. Cross, 175 U. S. 396, 44 L. ed. 211, 20 S. Ct. 131; Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023, 25 S. Ct. 625, 3 Ann. Cas. 1084; and in Sanders v. Armour Fertilizer Works, 292 U. S. 190, 78 L. ed. 1206, 54 S. Ct. 677, 91 A.L.R. 950 (rehearing denied in 292 U. S. 612, 78 L. ed. 1472, 54 S. Ct. 855), it was held that garnishment proceedings pending in Iowa against a claim for wages due by the railway to a resident of Kansas, and there exempt from execution, constituted a good defense when the wage earner subsequently sued the railway in Kansas. The case approved the doctrine that debts accompany the debtor and may be attached wherever he can be sued by his creditor.

[11] Missouri P. R. Co. v. Sharitt, 43 Kan. 375, 23 P. 430, 8 L.R.A. 385, 19 Am. St. Rep. 143; Illinois C. R. Co. v. Smith, 70 Miss. 344, 12 So. 461, 19 L.R.A. 577, 35 Am. St. Rep. 651, overruled in Southern P. R. Co. v. A. J. Lyon & Co. 99 Miss. 186, 54 So. 728, 34 L.R.A.(N.S.) 234, Ann. Cas. 1913D, 800, suggestion of error overruled in (Miss.) 54 So. 784, 34 L.R.A.(N.S.) 237.

The exemption of wages by the law of the state in which is the residence of both debtor and creditor and the place where the wages are payable cannot be defeated by garnishment pending in another state, although the debtor is a railroad corporation which has a residence also in such other state. Illinois C. R. Co. v. Smith, 70 Miss. 344, 12 So. 461, 19 L.R.A. 577, 35 Am. St. Rep. 651, overruled in Southern P. R. Co. v. A. J. Lyon & Co. 99 Miss. 186, 54 So. 728, 34 L.R.A.(N.S.) 234, Ann. Cas. 1913D, 800, suggestion of error overruled in (Miss.) 54 So. 784, 34 L.R.A.(N.S.) 237.

[12] See Vol. 4, p. 589, §§ 66, 67.

[13] Chicago, R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 43 L. ed. 1144, 19 S. Ct. 797. See also Sanders v. Armour Fertilizer Works, 292 U. S. 190, 78 L. ed. 1206, 54 S. Ct. 677, 91 A.L.R. 950, rehearing denied in 292 U. S. 612, 78 L. ed. 1472, 54 S. Ct. 855.

In Chicago, R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 43 L. ed. 1144, 19 S. Ct. 797, prior to the institution of a suit in a Kansas court for wages, a creditor of the wage earner had obtained a judgment in garnishment proceedings instituted to subject the wage claim to the payment of his debt, but an appeal had been taken therefrom and was pending at the time of the institution of the Kansas action; the Kansas court refused to continue the action until the determination of the proceedings in the Iowa court, it appearing that the wages were exempt from garnishment under the Kansas law. The United States Supreme Court, after reviewing the question of the situs of the debt for the purpose of garnishment and sustaining the validity of the garnishment proceedings, concluded that the Kansas court did not give full faith and credit to the garnishment proceedings, and disapproved the decision in Missouri P. R. Co. v. Sharitt, 43 Kan. 375, 23 P. 430, 8 L.R.A. 385, 19 Am. St. Rep. 143.

It should be observed, in connection with the discussion above, that in some states statutes have been enacted which permit residents of the forum to secure injunctive relief against the institution, by another resident of the forum, of a suit in a foreign jurisdiction to evade the exemption laws of the state where such relief is sought; under other statutes a debtor is given a cause of action against a creditor who resorts to the courts of another state in order to defeat the exemption laws of the state of his residence.[15]

§ 701. —Garnishment of Insurance and Other Claims Exempt from Garnishment where Other Proceedings Are Brought.—The rule stated in the foregoing section, that an attachment or garnishment of wages in another state of the Union is entitled to full faith and credit, at least after judgment, as a defense to an action for their recovery although they are exempt from attachment or garnishment in the state where they were earned, where the wage earner resides, or where the suit is brought for their recovery, applies also to an attachment or garnishment of a debt due on an insurance policy or any other debt generally, irrespective of the exemption laws of the state where the debt arises, where suit is brought for its recovery, or where the creditor, viz., the defendant in the attachment, resides.[16]

2. As Defense to Proceedings by Third Persons

§ 702. Generally.—The general rule is that a garnishment is no defense to an action against the garnishee by adverse claimants for the recovery of the garnished property[17] unless such adverse claimants are interpleaded in the garnishment proceedings, under which circumstance the garnishment has the same effect upon an action by them against the garnishee as it has upon such an action by the defendant.[18] Nevertheless, a pending garnishment justifies the garnishee in refusing to deliver the garnished property to an adverse claimant, and such a refusal constitutes no act of conversion.[19]

D. Practice and Procedure

1. Introductory

a. In General

§ 703. Generally.—Practice and procedure in the garnishment is to be distinguished from practice and procedure in the main action between the plaintiff and the defendant.[20] Sometimes, however, there is, in form, but a single action against the defendant and the garnishee.

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[14] See infra, § 784.

[15] See infra, § 721.

[16] Sanders v. Armour Fertilizer Works, 292 U. S. 190, 78 L. ed. 1206, 54 S. Ct. 677, 91 A.L.R. 950, rehearing denied in 292 U. S. 612, 78 L. ed. 1472, 54 S. Ct. 855.

However, in Sanders v. Armour Fertilizer Works, 292 U. S. 190, 78 L. ed. 1206, 54 S. Ct. 677, 91 A.L.R. 950, rehearing denied in 292 U. S. 612, 78 L. ed. 1472, 54 S. Ct. 855, an insurance company which was garnished in Illinois by a creditor of one of its policyholders whose claim under the policy was exempt from execution under the Texas law caused the policyholder and the garnisher to interplead in a Federal court in Texas as to the fund deposited by the company in that court, and sought to enjoin the garnishor from further prosecuting the pending garnishment proceedings in Illinois. It was held that although the garnishment proceedings in Illinois had not yet been consummated by a judgment, still, thereunder, the garnishor acquired a lien on the fund as against the principal debtor, which the statute of Texas could not divest, and the Federal court in Texas could not, in the interpleader proceedings before it, enjoin the further prosecution of the garnishment proceedings in Illinois to final conclusion, and thereby deny thereto the credit and effect accorded them in Illinois.

[17] Smith v. Blatchford, 2 Ind. 184, 52 Am. Dec. 504.

[18] German Bank v. American F. Ins. Co. 83 Iowa, 491, 50 N. W. 53, 32 Am. St. Rep. 316.

Generally, as to interpleader in garnishment, see infra, § 964.

[19] See supra, §§ 662 et seq.

§ 704. Parties.—The parties to a garnishment proceeding are the plaintiff, the garnishee, and, usually, though not always, the principal debtor.[1] Whether or not the garnishee is a party to the main action between the plaintiff and the defendant depends upon local statutes and practice, and is discussed in a subsequent section.[2] However, to subject a debt due from the garnishee to the defendant to the claim of the plaintiff against the defendant, it is essential that the garnishee be made a party to a proceeding to determine the fact of such indebtedness, and the same rule applies to the seizure of property of the defendant in the possession of the garnishee to satisfy the plaintiff's claim against the defendant.[3]

§ 705. —Joinder.[4]—The general rule is that two or more joint debtors may, and must, be joined as garnishees.[5] Consequently, where it is sought to garnish a debt owing from a partnership to the defendant, it is ordinarily not sufficient to summon as garnishee only one member of the partnership.[6] The same rule has been applied to the garnishment of joint and several liabilities.[7] But one of two or more joint and several debtors may be charged as such trustee without joining the others in the action, if it appears that he may not remain liable to pay the debt the second time, either to the payee or to any of the other joint and several debtors, or be otherwise prejudiced if he is thus charged.[8] Under statute in some jurisdictions any number of persons may be joined as garnishees whether or not they are joint or several debtors of the defendant.[9]

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[20] Generally, as to main action, see infra, §§ 938 et seq.

[1] New York L. Ins. Co. v. Dunlevy, 241 U. S. 518, 60 L. ed. 1140, 36 S. Ct. 613; Tiger v. Rogers Cotton Cleaner & Gin Co. 96 Ark. 1, 130 S. W. 585, 30 L.R.A.(N.S.) 694, Ann. Cas. 1912B, 488; Forrester v. Forrester, 155 Ga. 722, 118 S. E. 373, 29 A.L.R. 1363; Warthen v. Melton, 132 Ga. 113, 63 S. E. 832, 131 Am. St. Rep. 184; Dugas v. Mathews, 9 Ga. 510, 54 Am. Dec. 361; Pitzl v. Winter, 96 Minn. 499, 105 N. W. 673, 5 L.R.A.(N.S.) 1009; Missouri P. R. Co. v. Whipsker, 77 Tex. 14, 13 S. W. 639, 8 L.R.A. 321, 19 Am. St. Rep. 734; Bragg v. Gaynor, 85 Wis. 468, 55 N. W. 919, 21 L.R.A. 161.

Where notice of the pendency of a garnishment proceeding was given by registered mail to the main creditor of a foreign debtor and to the latter's assignee in bankruptcy, and the assignee, representing all the creditors, appeared specially in the action and pleaded to the jurisdiction of the court and appealed from an adverse judgment, it cannot be said that there has been a deficiency of notice to parties in interest so as to render unavailing a plea of double liability interposed by the garnishee, based on a payment made by it in the foreign jurisdiction. Parker, Peebles & Knox v. National F. Ins. Co. 111 Conn. 383, 150 A. 313, 69 A.L.R. 599.

As a general rule, a judgment debtor is not a party to a garnishment proceeding to condemn a claim due him from a third person, and is not bound by a judgment discharging the garnishee. New York L. Ins. Co. v. Dunlevy, 241 U. S. 518, 60 L. ed. 1140, 36 S. Ct. 613.

The debtor is not a party to garnishment proceedings, nor is he required to be served with notice of either the issuing or the service of the writ of garnishment. Missouri P. R. Co. v. Whipsker, 77 Tex. 14, 13 S. W. 639, 8 L.R.A. 321, 19 Am. St. Rep. 734.

The adverse claimant to a debt which is the subject of garnishment may be made a party defendant to the proceedings. Bragg v. Gaynor, 85 Wis. 468, 55 N. W. 919, 21 L.R.A. 161.

As to duty to disclose adverse claims of which the garnishee has notice, see supra, § 689.

As to citation, joinder, and interpleader of adverse claimants as parties, see infra, § 964.

[2] See infra, § 940.

[3] Tiger v. Rogers Cotton Cleaner & Gin Co. 96 Ark. 1, 130 S. W. 585, 30 L.R.A.(N.S.) 694, Ann. Cas. 1912B, 488; Forrester v. Forrester, 155 Ga. 722, 118 S. E. 373, 29 A.L.R. 1363.

However, that a garnishee was not made a party to the principal action, and no relief was demanded against him therein, does not prevent the court from rendering judgment against him where the writ of garnishment was served on him, if by statute it is not necessary to commence an action against the garnishee in order to authorize the court to render judgment against him. Tiger v. Rogers Cotton Cleaner & Gin Co. 96 Ark. 1, 130 S. W. 585, 30 L.R.A.(N.S.) 694, Ann. Cas. 1912B, 488.

[4] As to garnishment of debt due jointly to defendant and another, see Vol. 4, p. 671, § 188.

[5] Lyon v. Ballentine, 63 Mich. 97, 29 N. W. 837, 6 Am. St. Rep. 284; Ladd v. Baker, 26 N. H. 76, 57 Am. Dec. 355.

[6] Lyon v. Ballentine, 63 Mich. 97, 29 N. W. 837, 6 Am. St. Rep. 284.

However, service may generally be made upon one member of a firm. See infra, § 730.

[7] Ladd v. Baker, 26 N. H. 76, 57 Am. Dec. 355.

§ 706. Pleadings, Motions, and Rules.—As a general rule the pleadings in garnishment consist of the plaintiff's petition or affidavit for the garnishment,[10] his interrogatories or examination of the garnishee,[11] the garnishee's answer or disclosure to the garnishment,[12] the plaintiff's traverse of the garnishee's answer,[13] and, in some jurisdictions, the garnishee's reply to the plaintiff's traverse of his answer.[14] These pleadings may frame an issue for trial,[15] or they may establish a basis for judgment without trial.[16] Generally they are supplemented in local practice by various rules and motions directed to facilitating the progress of the proceedings to a final conclusion, such as a rule upon the garnishee to answer,[17] a motion for a judgment on the answers of the garnishee,[18] and a rule upon the garnishee to plead.[19] It is also generally recognized that the principal debtor, as a party to the proceeding, may take exception to the disclosure of the garnishee and show cause why his property, debts, or contracts should not suffer interference.[20] In some jurisdictions formal pleadings are dispensed with by statute in garnishment proceedings, the proceeding being regarded as a mode of determining an issue already formed, namely, whether the garnishee owes the debtor anything or has in his possession any property belonging to him.[21]

§ 707. Successive Garnishment.—Successive garnishments may not be employed to defeat exemption laws. Accordingly, they are not valid against the aggregate sum of each debt garnished where each debt is within the statutory exemption although the aggregate sum exceeds it.[1] Successive garnishments, particularly of exempt property, may, under certain circumstances, give rise to a cause of action for abuse of process[2] or for injunctive relief.[3] But a garnishment lien is not, as a matter of law, waived by the institution of a second garnishment proceeding by the same party against the same garnishee in a suit on the judgment recovered in the first suit in which the first garnishment was had.[4]

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[8] Ibid.

[9] A number of complainants whose rights are entirely several and distinct may, by joining as plaintiffs in a single proceeding, subject, by garnishment, the same fund of the debtor to their claims, particularly when the uniting in the single suit produces no confusion or complexity in the defense and prevents a multiplicity of suits. Comstock v. Rayford, 1 Smedes & M. (Miss.) 423, 40 Am. Dec. 102.

A Wisconsin statute is noted which provides that any number of garnishees may be embraced in the same affidavit and summons (Stat. 1898, § 275). Eau Claire Nat. Bank v. Chippewa Valley Bank, 124 Wis. 520, 102 N. W. 1068, 109 Am. St. Rep. 966.

[10] Generally, as to petition or affidavit for garnishment, see infra, §§ 722 et seq.

[11] Generally, as to interrogatories or examination, see infra, § 753.

[12] Generally, as to garnishee's disclosure, see infra, §§ 754 et seq.

[13] Generally, as to traverse of garnishee's answer, see infra, § 762.

[14] See infra, § 762.

[15] Holker v. Hennessey, 141 Mo. 527, 42 S. W. 1090, 39 L.R.A. 165, 64 Am. St. Rep. 524; Adams v. Filer, 7 Wis. 306, 73 Am. Dec. 410.

As to trial, see infra, §§ 765 et seq.

[16] Generally, as to judgment against garnishee on disclosure, see infra, § 798; on failure to answer, see infra, §§ 796, 797.

[17] See Standard Pa. Prac. Vol. 10.

[18] See Standard Pa. Prac. Vol. 10.

[19] This practice is followed in some jurisdictions to bring the garnishment on for trial. See Standard Pa. Prac. Vol. 10.

[20] See infra, § 764.

[21] Lutz v. Williams, 79 W. Va. 609, 91 S. E. 460, L.R.A.1918A, 76.

[1] Howard Coal Co. v. Savage, 116 Me. 115, 100 A. 369, L.R.A.1917D, 898 (wage case); Rustad v. Bishop, 80 Minn. 497, 83 N. W. 449, 50 L.R.A. 168, 81 Am. St. Rep. 262 (wage case).

Annotation: L.R.A.1917D, 899.

[2] See infra, § 717.

[3] See infra, § 717.

[4] Lawrence v. Security Co. 56 Conn. 423, 15 A. 406, 1 L.R.A. 342.

§ 708. Garnishment as Suit.—A garnishment is the institution of a suit by a creditor against the debtor of his debtor and is governed by the general rules applicable to other suits adapted to the relative situation of the parties.[5]

b. Commencement of Proceedings

§ 709. Generally.—Garnishment proceedings are generally initiated by the filing of a petition or affidavit[6] and a garnishment bond. It is generally provided by statute that an order of garnishment shall not issue until an undertaking on the part of the plaintiff has been executed by one or more sureties, in a sum not exceeding double the amount of the plaintiff's claim, to the effect that the plaintiff shall pay to the defendant all damages which he may sustain by reason of such garnishment if the order is wrongfully obtained, though such undertakings are not always required where the parties defendant are nonresidents.[7] Such bonds, if required, are essential to the validity of the proceedings.[8] The garnishee is bound to see that the bond, when required, is given by the creditor, and unless it is given, payment by him of the judgment is at his own risk.[9]

c. Order of Proceedings as between Main Action and Garnishment

§ 710. With Respect to Commencement of Suit and Garnishment.—It has been observed in an early section of this article that garnishment proceedings are always ancillary to a main suit between the garnishing creditor and his debtor.[10] Consequently, a garnishment, as distinguished from a garnishment execution,[11] must necessarily constitute the original process, or issue on mesne process, in the main suit.[12] In other words, the main action may be commenced by a writ of garnishment or by a writ of attachment summoning a garnishee, and this practice is generally followed in the case of foreign attachment or garnishment, where the attachment or garnishment issues on the ground of nonresidence of the defendant and for the purpose of compelling his appearance in the action; or the garnishment may issue in an action already commenced by a writ of summons. Accordingly, all that can be said generally with respect to the order of commencement between the garnishment and the main action is that a garnishment can never precede, although it may constitute the commencement of, the main action, but generally it may, even in the case of garnishment on the ground of nonresidence of the defendant, issue in an action already commenced. A statutory requirement that execution must be issued and returned nulla bona before process of garnishment can be sued out[13] in effect constitutes the garnishment a garnishment execution, and will be treated in this work as such.[14]

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[5] Roman v. Montgomery Iron Works, 156 Ala. 604, 47 So. 136, 19 L.R.A.(N.S.) 604, 130 Am. St. Rep. 106.

A garnishment proceeding is ancillary to a main proceeding against the defendant. See Vol. 4, p. 555, § 6.

Generally, as to effect of garnishment as subrogation, see infra, § 821.

[6] See infra, §§ 722 et seq.

[7] Benedict v. Bray, 2 Cal. 251, 56 Am. Dec. 332; United States v. Murdock, 18 La. Ann. 305, 89 Am. Dec. 651; Oklahoma State Bank v. Reed, 143 Okla. 131, 288 P. 281, 85 A.L.R. 635; Byrd v. Rector, 112 W. Va. 192, 163 S. E. 845, 81 A.L.R. 1213.

[8] Erwin v. Commercial & R. Bank, 3 La. Ann. 186, 48 Am. Dec. 447; Citizens' Nat. Bank v. Pollard (Tex. Civ. App.) 31 S. W. (2d) 508, citing R. C. L.

[9] Oldham v. Ledbetter, 1 How. (Miss.) 43, 26 Am. Dec. 690.

[10] See Vol. 4, p. 555, § 6.

[11] See Vol. 4, p. 553, § 4.
See Executions [Also 10 R. C. L. p. 1211].

[12] See Vol. 4, p. 552, § 4.

[13] Wyatt v. Rambo, 29 Ala. 510, 68 Am. Dec. 89; Gunn v. Howell, 27 Ala. 663, 62 Am. Dec. 785.

[14] See Executions [Also 10 R. C. L. p. 1211].

§ 711. With Respect to Judgment in Main Action and in Garnishment.—The general rule is that a valid judgment against the principal defendant, in force and effect, is essential to authorize a judgment against the garnishee,[15] and that where there is no valid judgment against the principal defendant, there is no jurisdiction to render any judgment against a garnishee.[16] Where, by expiration of time or other cause, a judgment against the defendant in the main action has ceased to be of force and effect, the garnishment proceedings lose their vitality, and a judgment therein against the garnishee is as completely without force and effect as the judgment against the defendant.[17] Consequently, the termination of an action in favor of the defendant, or the expiration of a judgment for the plaintiff, discharges a garnishment.[18]

d. Miscellaneous Proceedings in Aid of or against Garnishment

§ 712. Generally.—Equity in general, as well as local statutes and practice, permits miscellaneous remedies in aid of, and against, garnishment.[19]

§ 713. Equitable Relief to Preserve Garnishment Lien.—Equity may interfere, where grounds for jurisdiction in equity exist, to protect a lien created by garnishment[20] or to preserve the garnished property or funds.[1]

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[15] James E. Colliflower & Co. v. McCallum-Sauber Co. 61 App. D. C. 390, 63 F. (2d) 366, citing R. C. L.; Tiger v. Rogers Cotton Cleaner & Gin Co. 96 Ark. 1, 130 S. W. 585, 30 L.R.A.(N.S.) 694, Ann. Cas. 1912B, 488; Smith v. Davis, 131 Me. 9, 158 A. 359, 81 A.L.R. 78; Grace v. Pierce, 127 Miss. 831, 90 So. 590, 21 A.L.R. 1035; Mares v. Schuth, 38 N. M. 101, 28 P. (2d) 527, 92 A.L.R. 567; Atwood v. Tucker (Atwood v. Roan) 26 N. D. 622, 145 N. W. 587, 51 L.R.A. (N.S.) 597; Von Seggern Bros. & Ludden v. Antelope County State Bank, 57 S. D. 415, 232 N. W. 913, 71 A.L.R. 577; Hillman v. Gray, 163 Wash. 406, 1 P. (2d) 318, 75 A.L.R. 1356; Byrd v. Rector, 112 W. Va. 192, 163 S. E. 845, 81 A.L.R. 1213; Oelbermann v. Ide, 93 Wis. 669, 68 N. W. 393, 57 Am. St. Rep. 947; Frisk v. Reigelman, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. Rep. 198.

No valid judgment can be rendered against the garnishee defendant upon a default judgment against the principal debtor, based upon attempted service by publication under a void affidavit, where, under the statute, the garnishee proceedings are ancillary to the suit against the principal defendant, and judgment against him is a prerequisite to judgment against the garnishee defendant. Atwood v. Tucker (Atwod v. Roan), 26 N. D. 622, 145 N. W. 587, 51 L.R.A.(N.S.) 597.

As to conditional judgment against garnishee pending entry of final judgment against defendant, see infra, § 792.

[16] Von Seggern Bros. & Ludden v. Antelope County State Bank, 57 S. D. 415, 232 N. W. 913, 71 A.L.R. 577.

Where, because of the expiration of time, a judgment has ceased to be of force and effect, a garnishment proceeding by the judgment creditor fails, though it was instituted and a contingent judgment against the garnishee entered while the judgment was still subsisting. Hillman v. Gray, 163 Wash. 406, 1 P. (2d) 318, 75 A.L.R. 1356.

[17] Grace v. Pierce, 127 Miss. 831, 90 So. 590, 21 A.L.R. 1035; Hillman v. Gray, 163 Wash. 406, 1 P. (2d) 318, 75 A.L.R. 1356.

In Grace v. Pierce, 127 Miss. 831, 90 So. 590, 21 A.L.R. 1035, it was held that a valid judgment is essential to the validity of a garnishment proceeding, and when a judgment upon which a writ of garnishment is founded is extinguished by the bar of the statute of limitation, the garnishment proceedings likewise fail.

[18] Hillman v. Gray, 163 Wash. 406, 1 P. (2d) 318, 75 A.L.R. 1356.

[19] **When a garnishee has appeared and answered,** disclosing that he has in his possession a sealed parcel or a locked safe-deposit box, the contents of which are unknown to him, the person making the affidavit on behalf of the garnishee may be summoned as a witness, and in connection with the examination, the court has power, at least under statutory provision, to direct a witness to break the seal of the parcel, or to open the safe-deposit box, and disclose the contents to the court, in order that it may determine the garnishee's liability. Tillinghast v. Johnson, 34 R. I. 136, 82 A. 788, 41 L.R.A.(N.S.) 764, Ann. Cas. 1914A, 960.

[20] Montana Nat. Bank v. Merchants Nat. Bank, 19 Mont. 586, 49 P. 149, 61 Am. St Rep. 532.

[1] Bank of Monroe v. Ouachita Valley Bank, 124 La. 798, 50 So. 718, 134 Am. St. Rep. 518; Northfield Knife Co. v. Shapleigh, 24 Neb. 635, 39 N. W. 788, 8 Am. St. Rep. 224; Looney v. Stryker, 31 N. M. 557, 249 P. 112, 50 A.L.R. 1404.

A receiver may be appointed in aid of garnishment proceedings. Northfield Knife Co. v. Shapleigh, 24 Neb. 635, 39 N. W. 788, 8 Am. St. Rep. 224.

State officials cannot be restrained from paying out moneys alleged to be due a defendant until the plaintiff can obtain judgment against the defendant where the effect of such injunction would be to enlarge the consent of the state to suit. Looney v. Stryker, 31 N. M. 557, 249 P. 112, 50 A.L.R. 1404.

§ 714. Proceedings to Protect Equity of Adverse Claimants. Equities of adverse claimants to attached or garnished property may under proper circumstances be protected by a proceeding in equity.[2] Thus, if, previous to a garnishment, a portion of the garnished debt or property has been assigned, a court of equity will, where proper, grant equitable relief against the garnishment of the entire amount.[3] Improper garnishment proceedings against a receiver can be enjoined.[4]

§ 715. Proceedings to Protect Equities of Garnishees.—Under proper circumstances for the exercise of equitable jurisdiction, the equities of a garnishee against the defendant in the garnishment will be protected against the garnishing creditor in a proceeding in equity.[5] For example, while a judgment against the garnishee in the garnishment proceedings is, in general, binding on the garnishee and not open to collateral attack,[6] equities may vest in the garnishee subsequently to such judgment which he is entitled to exercise against the defendant in the garnishment, with respect to the property of, or debt owing to, the defendant, garnished in his possession and subject to the judgment in the garnishment, and such equities may be enforced against the plaintiff in the garnishment, as well as against the defendant, for the general rule is that the garnishing creditor can acquire no greater interest in the garnished property than his debtor, and does not take as by a bona fide assignment for value.[7] Consequently, under proper circumstances, viz., where there is no adequate remedy at law, a court of equity will grant relief against the enforcement of the judgment against the garnishee to the extent of protecting such equities of the garnishee.[8] Thus, a garnishee has been granted injunctive relief against the enforcement of the judgment against him where the debt garnished in his possession was the purchase price owing for chattels purchased from the defendant in the garnishment, and where, subsequent to the judgment in the garnishment, the title to the chattels failed, entitling the garnishee to equitable relief against the payment of the purchase price, at least without indemnity for his damages.[9] Likewise, it has been held that a garnishee, after a judgment at law subjecting his indebtedness to the principal debtor to the payment of the creditor, can restrain, in equity, the creditor from enforcing such payment, until the unliquidated damages due the garnishee from such debtor for the breach of a contract existing before the garnishment proceedings can be ascertained and set off against such indebtedness, where such debtor is insolvent and a nonresident.[10]

§ 716. Equitable Remedies against Garnishment of Negotiable Instruments.—The right of the garnishee of a debt due upon negotiable promissory notes, known to be held under a claim of ownership by another than the defendant in the garnishment, to go into chancery and file a bill of interpleader against the garnishor and the claimant has been recognized and upheld.[11] But it has been held that after the maker of a promissory note has suffered judgment to go against him as a garnishee indebted thereon to the payee, when he well knew that the defendant had transferred the paper to a third person, it is too late for him to get relief by a bill in equity to interplead the judgment creditor with the holder of the note.[12] There are decisions that the maker of a negotiable promissory note who has been charged upon it as garnishee of the payee when he has been sued upon it by one who claims ownership of the paper as an indorsee before maturity is entitled to have the garnishment creditor brought into the action to litigate the question whether he or the plaintiff is entitled to the proceeds of the note, and to enjoin the collection until that question shall be determined; and legislation has been enacted making provision, in case of attachment of debts due by commercial negotiable paper, for bringing into the trustee proceeding persons who claim to own and hold the paper by transfers from the defendants.[13]

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[2] National Exch. Bank v. McLoon, 73 Me. 498, 40 Am. Rep. 388.

[3] Ibid.

[4] Annotation: 71 Am. St. Rep. 372.

[5] North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co. 152 U. S. 596, 38 L. ed. 565, 14 S. Ct. 710; Wanzer v. Truly, 17 How. (U. S.) 584, 15 L. ed. 216; Cottrell v. Varnum, 5 Ala. 229, 39 Am. Dec. 323.

[6] See infra, § 1067.

[7] See infra, § 820.

[8] Wanzer v. Truly, 17 How. (U. S.) 384, 15 L. ed. 216; Cottrell v. Varnum, 5 Ala. 229, 39 Am. Dec. 323.

[9] Wanzer v. Truly, 17 How. (U. S.) 584, 15 L. ed. 216.

[10] North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co. 152 U. S. 596, 38 L. ed. 565, 14 S. Ct. 710.

[11] Annotation: L.R.A.1918C, 758.

§ 717. Injunctive Relief against Abusive Successive Garnishments.—In case of abuse of process by successive attachments or garnishments, particularly of exempt property, the remedy of the debtor is generally not in equity, but by an action at law for damages.[14] However, it has been held elsewhere that injunctions may be granted against repeated garnishment suits which have been successfully defended.[15]

§ 718. Accounting and Distribution of Assets in Equity Proceedings in Aid of, or for Relief from, Garnishment.—A court of equity, exercising jurisdiction in aid of, or for relief from, garnishment proceedings, may enforce an accounting or distribution of assets, according to principles of equity.[16] For example, a court of equity exercising jurisdiction to preserve a lien created by garnishment may enforce an equitable distribution of assets where the garnishee is insolvent,[17] as well as determine the rights of the garnishing creditor as against other creditors of the same defendant who have levied on property in the hands of the garnishee.[18] It is said, however, that a garnishment proceeding cannot be converted into an equitable proceeding to reach a fund in contest, at least without making the debtor a party to the proceedings.[19]

§ 719. Surrender or Payment of Garnished Property of Debtor to Officer or into Court.—A practice in some jurisdictions is to allow or require the garnishee to surrender or pay the garnished property or debt to the attaching officer, or into court, such surrender protecting the garnishee against all further liability to the plaintiff, defendant, or adverse claimant with respect to the property or debt thus surrendered or paid.[20] A judgment debtor who in good faith, in answer to garnishment process issued by a judgment creditor of his creditor, pays the amount of the judgment to the sheriff and takes his receipt therefor, without notice of an assignment of the judgment, will not be compelled to pay the amount of the judgment to the assignee, and the court on motion should quash the execution and direct the judgment satisfied.[1]

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[12] Yarborough v. Thompson, 3 Smedes & M. (Miss.) 291, 41 Am. Dec. 626.

[13] Annotation: L.R.A.1918C, 758.

[14] See infra, § 990.

[15] Seiver v. Union P. R. Co. 68 Neb. 91, 93 N. W. 943, 61 L.R.A. 319, 110 Am. St. Rep. 393.
Annotation: 10 L.R.A.(N.S.) 983.

[16] Wanzer v. Truly, 17 How. (U. S.) 584, 15 L. ed. 216; Montana Nat. Bank v. Merchants' Nat. Bank, 19 Mont. 586, 49 P. 149, 61 Am. St. Rep. 532; Northfield Knife Co. v. Shapleigh, 24 Neb. 635, 39 N. W. 788, 8 Am. St. Rep. 224.

[17] Montana Nat. Bank v. Merchants' Nat. Bank, 19 Mont. 586, 49 P. 149, 61 Am. St. Rep. 532.

[18] Northfield Knife Co. v. Shapleigh, 24 Neb. 635, 39 N. W. 788, 8 Am. St. Rep. 224.

[19] Curtis v. Ford, 78 Tex. 262, 14 S. W. 614, 10 L.R.A. 529.

[20] Central Loan & T. Co. v. Campbell Commission Co. 173 U. S. 84, 43 L. ed. 623, 19 S. Ct. 346; Great Western Finance Co. v. Hamilton Nat. Bank, 76 Colo. 48, 230 P. 115, 41 A.L.R. 997 (statute requiring garnishee to deliver choses in action to attaching official); Houtz v. Daniels, 36 Idaho, 544, 211 P. 1088, 32 A.L.R. 1016; Henderson v. Hooper Sugar Co. 65 Utah, 241, 236 P. 239, 45 A.L.R. 637; Hillman v.

§ 720. Investiture of Garnished Property in Receiver or Trustee.—A phase of attachment and garnishment practice in some jurisdictions is the appointment of receivers or trustees who are invested with the possession, custody, and administration of the attached or garnished property pending the garnishment proceedings, with its distribution, upon the outcome of the attachment or garnishment, subject to the order and control of the court, and, finally, with the duty of reporting and accounting to the court upon the discharge of their functions. Generally it is the right and duty of garnishees to surrender the property and effects of the defendant, attached or garnished in their possession, to such trustees or receivers. This practice may be followed in all cases or only in cases where the circumstances demand it and when ordered by the court in its discretion, depending upon local statutes and practice. The practice is followed particularly where the purpose of the attachment is an equitable distribution of assets among creditors rather than a preferment of the attaching creditor, or where a distribution among creditors is warranted by the facts of a particular case.[2] For example, where the garnishee abandons the property or declines to retain the same in his hands, a receiver may be appointed.[3] There may be cases where, with the consent of the parties, the garnishee himself may be appointed receiver of the property in question.[4]

§ 721. Relief against Garnishment Suits in Foreign Jurisdictions to Defeat Exemption, Insolvency, and Other Laws of Forum.—Injunctive relief may be invoked in one state to restrain residents of that state from bringing attachment or garnishment proceedings in another state to evade the laws of the state of their residence, i. e., the insolvency or exemption laws. The granting of such relief is not a violation of the full faith and credit clause of the Federal Constitution.[5] Generally, however, such relief is available only where

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Gray, 163 Wash. 406, 1 P. (2d) 318, 75 A.L.R. 1356.

A garnishee who has paid into the registry of the court the amount of a judgment recovered against him by the principal debtor cannot, because of his failure to appeal from a judgment denying his motion to quash and set aside a judgment against him in the garnishment proceeding contingent upon the establishment of his liability to the principal debtor, be held liable by the garnishing creditor, who has, as against other claimants of the fund, been held not entitled to any part of the amount so paid in. Hillman v. Gray, 163 Wash. 406, 1 P. (2d) 318, 75 A.L.R. 1356.

[1] Houtz v. Daniels, 36 Idaho, 544, 211 P. 1088, 32 A.L.R. 1016.

[2] Central Loan & T. Co. v. Campbell Commission Co. 173 U. S. 84, 43 L. ed. 623, 19 S. Ct. 346; Forrester v. Forrester, 155 Ga. 722, 118 S. E. 373, 29 A.L.R. 1363; Strawberry Growers' Selling Co. v. Lewellyn, 158 La. 303, 103 So. 823, 39 A.L.R. 1502 (appointment of a curator ad hoc); Baldwin v. Hosmer, 101 Mich. 119, 59 N. W. 432, 25 L.R.A. 739; Northfield Knife Co. v. Shapleigh, 24 Neb. 635, 39 N. W. 788, 8 Am. St. Rep. 224.

In Forrester v. Forrester, 155 Ga. 722, 118 S. E. 373, 29 A.L.R. 1363, the court said: "In our opinion there must, at some stage of the proceedings, be a seizure in this state of the property of the nonresident, and the court may appoint a receiver to hold the res for the court, and the garnishee must be made a party in the proceedings."

[3] Northfield Knife Co. v. Shapleigh, 24 Neb. 635, 39 N. W. 788, 8 Am. St. Rep. 224.

[4] Central Loan & T. Co. v. Campbell Commission Co. 173 U. S. 84, 43 L. ed. 623, 19 S. Ct. 346.

[5] Cole v. Cunningham, 133 U. S. 107, 33 L. ed. 538, 10 S. Ct. 269; O'Connor v. Walter, 37 Neb. 267, 55 N. W. 867, 23 L.R.A. 650, 40 Am. St. Rep. 486; Anderson v. Canaday, 37 Okla. 171, 131 P. 697, L.R.A.1915A, 1186, Ann. Cas. 1915B, 714.

Annotation: 21 L.R.A. 75.

Full faith and credit are not denied to

both creditor and debtor are residents of the state in which the action is brought.[6]

The same rules prevail with reference to proceedings to reach any exempt property.[7] One method of preventing domestic creditors from evading the exemption laws of a state is to give their debtors a cause of action for the amount recovered by the creditor or his assignee by an attachment or garnishment suit brought in a foreign jurisdiction to defeat the exemption laws of the forum, to make the bringing of such suit or assignment for that purpose unlawful, and to penalize the same.[8]

2. Petition and Affidavit

§ 722. Generally.—Local statutes and practice generally require a petition or affidavit to procure and sustain the issuance of a writ, warrant, or order of garnishment. It is generally required that such a petition or affidavit be filed with the clerk of court either before the issuance of the garnishment,[9] or at some other time before final judgment.[10] Where required by statute, it is generally held that the filing of such affidavit is essential to give jurisdiction to the court.[11] The proceedings are a nullity without such affidavit,[12] or even with an affidavit which is insufficient.[13]

§ 723. Form, Contents, Sufficiency, and Amendment.—Local statutes and practice requiring a petition or affidavit for garnishment determine the form, contents, and sufficiency of such petition or affidavit.[14] The same is true of

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the judgment of another state upon garnishment proceedings, requiring the garnishee to pay the wages of the debtor to his creditor, by allowing the defendant, where no personal service was obtained on him, to recover damages from his creditor for seizing his exempt wages. Anderson v. Canaday, 37 Okla. 171, 131 P. 697, L.R.A. 1915A, 1186, Ann. Cas. 1915B, 714.

[6] Cole v. Cunninghama, 133 U. S. 107, 33 L. ed. 538, 10 S. Ct. 269; Keyser v. Rice, 47 Md. 203, 28 Am. Rep. 448; Seiver v. Union P. R. Co. 68 Neb. 91, 93 N. W. 943, 61 L.R.A. 319, 110 Am. St. Rep. 393; Moton v. Hull, 77 Tex. 80, 13 S. W. 849, 8 L.R.A. 722.

Annotation: 21 L.R.A. 75.

Where an employer is made a party to a suit to enjoin a multiplicity of garnishment proceedings to reach exempt wages, and the suit has been properly brought against him in any county, and service of summons therein has been made on him, a summons issued to the sheriff of another county, where the judgment creditor resides, which is properly served on him, gives the court jurisdiction of all the parties to the action and full power to grant the proper relief therein. Seiver v. Union P. R. Co. 68 Neb. 91, 93 N. W. 943, 61 L.R.A. 319.

[7] Keyser v. Rice, 47 Md. 203, 28 Am. Rep. 448; Moton v. Hull, 77 Tex. 80, 13 S. W. 849, 8 L.R.A. 722.

Annotation: 21 L.R.A. 75.

[8] Singer Mfg. Co. v. Fleming, 39 Neb. 679, 58 N. W. 226, 23 L.R.A. 210, 42 Am. St. Rep. 613; O'Connor v. Walter, 37 Neb. 267, 55 N. W. 867, 23 L.R.A. 650, 40 Am. St. Rep. 486; Anderson v. Canaday, 37 Okla. 171, 131 P. 697, L.R.A.1915A, 1186, Ann. Cas. 1915B, 714. See Baltimore & O. S. W. R. Co. 159 Ind. 688, 66 N. E. 43, 60 L.R.A. 396.

It has been held that where there were due a resident of Nebraska, from a railroad company operating a line of railroad through Iowa and Nebraska, wages, which, in Nebraska, were exempt from execution and attachment process, but which, nevertheless, by means of an assignment of the claim against the party entitled to such exemption to a resident of Iowa, were procured, by the garnishment of said railroad company in Iowa, to be applied to the payment of said claim, the assignor of such claim is liable to such debtor for the amount so appropriated without his consent. O'Connor v. Walter, 37 Neb. 267, 55 N. W. 867, 23 L.R.A. 650.

[9] Ellery v. Cumming, 40 Ariz. 512, 14 P. (2d) 709, 83 A.L.R. 1081; Teutonia Loan & Bldg. Co. v. Turrell, 19 Ind. App. 469, 49 N. E. 852, 65 Am. St. Rep. 419; Erwin v. Commercial & R. Bank, 3 La. Ann. 186, 48 Am. Dec. 447; People's Wayne County Bank v. Stott, 246 Mich. 540, 224 N. W. 352, 64 A.L.R. 427; Black v. Brisbin, 3 Minn. 360, Gil. 253, 74 Am. Dec. 762; Moton v. Hull, 77 Tex. 80, 13 S. W. 849, 8 L.R.A. 722; Wells v. American Exp. Co. 55 Wis. 23, 11 N. W. 537, 12 N. W. 441, 42 Am. Rep. 695.

[10] Moton v. Hull, 77 Tex. 80, 13 S. W. 849, 8 L.R.A. 722.

[11] Teutonia Loan & Bldg. Co. v. Turrell, 19 Ind. App. 469, 49 N. E. 852, 65 Am. St. Rep. 419; People's Wayne County Bank v. Stott, 246 Mich. 540, 224 N. W. 352, 64 A.L.R. 427; Black v. Brisbin, 3 Minn. 360, Gil. 253, 74 Am. Dec. 762.

[12] Erwin v. Commercial & R. Bank, 3 La. Ann. 186, 48 Am. Dec. 447.

[13] Teutonia Loan & Bldg. Co. v. Turrell, 19 Ind. App. 419, 49 N. E. 852, 65 Am. St. Rep. 419.

[14] Ellery v. Cumming, 40 Ariz. 512, 14 P. (2d) 709, 83 A.L.R. 1081; Teutonia Loan & Bldg. Co. v. Turrell, 19 Ind. App. 419, 49 N. E. 852, 65 Am. St. Rep. 419; Moton v. Hull, 77 Tex. 80, 13 S. W. 849, 8 L.R.A. 722.

amendments of the petition or affidavit. Generally, however, the statement of the material facts in the affidavit must be certain and definite in legal point of view, so as to inform those entitled to defend the action what particular facts they must repel.[15] The courts are not agreed upon what defects and irregularities in attachment or garnishment proceedings are jurisdictional and what are not. Some courts require a substantial adherence to the provisions of the attachment or garnishment statute as essential to the foundation of jurisdiction in the attachment or garnishment, and others take the view that such jurisdiction is founded once the res is attached or garnished without the aid of fraudulent or unlawful trick, within the territorial jurisdiction of the court. Accordingly, it has been said, on the one hand, that a failure of the petition to state that the plaintiff's claim is just is fatal to the jurisdiction of the court.[16] But it has also been held that a variance between the affidavit and the evidence as to a minor matter which could not have misled the garnishee may be disregarded.[17] In this connection it may be stated that the discussion in earlier sections of this article [18] of amendments to attachment affidavits, as well as the statutory provisions and rules and principles governing amendments of pleadings and judicial records generally, apply generally to the amendment of petitions and affidavits to procure or sustain a garnishment.[19] Thus, it is generally agreed that defects and irregularities which do not void the garnishment may be supplied or corrected by amendment,[20] and do not deprive the court of jurisdiction, at least against collateral attack.[1] Accordingly, it has been held that the court may, in a garnishment proceeding, order or allow amendments to the petition which may be necessary to perfect service or bring in necessary parties.[2] But, in a contest involving the plaintiff in garnishment, the garnishee, and the intervener, the plaintiff cannot, by an amendment, even if he is entitled to such remedy, in any case change the proceeding from a legal to an equitable action, without making the original defendant a party.[3] On the other hand, defects and irregularities voiding the garnishment generally cannot be supplied or corrected by amendment,[4] and it has been held that where an affidavit for garnishment has been found insufficient, no subsequent proceedings, based on such affidavit, are valid until a new and sufficient affidavit is filed.[5]

The common statutory provision is that an affidavit for a garnishment may be made by the plaintiff, his attorney or agent.[6]

§ 724. —Setting Forth Claim against Defendant.—A general requirement of a petition or affidavit for a garnishment is that it state the amount of the plaintiff's claim against the defendant, and that it is owing and just,[7] and the view has been taken that failure of a petition upon which garnishment was issued to state that the plaintiff's claim is just is a jurisdictional defect.[8]

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[15] Roberts v. Burns, 48 W. Va. 92, 35 S. E. 922, 86 Am. St. Rep. 17.

[16] United Collieries v. Martin, 248 Ky. 808, 60 S. W. (2d) 125, 89 A.L.R. 971.

[17] Nordstrom v. Corona City Water Co. 155 Cal. 206, 100 P. 242, 132 Am. St. Rep. 81; Turner v. Williams, 114 Kan. 769, 221 P. 267, citing R. C. L.

[18] See Vol. 4, p. 850, §§ 487 et seq.

[19] Wattles v. Wayne County Circuit Judge, 117 Mich. 662, 76 N. W. 115, 72 Am. St. Rep. 590; Curtis v. Ford, 78 Tex. 262, 14 S. W. 614, 10 L.R.A. 529.

Annotation: 72 Am. St. Rep. 593.

See Pleading [Also 21 R. C. L. p. 572, §§ 127 et seq.].

[20] Forrester v. Forrester, 155 Ga. 722, 118 S. E. 373, 29 A.L.R. 1363.

[1] Turner v. Williams, 114 Kan. 769, 221 P. 267; Den. ex dem. Skinner v. Moore, 19 N. C. (2 Dev. & B. L.) 138, 30 Am. Dec. 155; Illinois C. R. Co. v. Brooks, 90 Tenn. 161, 16 S. W. 77, 25 Am. St. Rep. 673.

[2] Forrester v. Forrester, 155 Ga. 722, 118 S. E. 373, 29 A.L.R. 1363.

[3] Curtis v. Ford, 78 Tex. 262, 14 S. W. 614, 10 L.R.A. 529.

[4] Teutonia Loan & Bldg. Co. v. Turrell, 19 Ind. App. 469, 49 N. E. 852, 65 Am. St. Rep. 419; Curtis v. Ford, 78 Tex. 262, 14 S. W. 614, 10 L.R.A. 529.

[5] Teutonia Loan & Bldg. Co. v. Turrell, 19 Ind. App. 469, 49 N. E. 852, 65 Am. St. Rep. 419.

[6] Dugas v. Mathews, 9 Ga. 510, 54 Am. Dec. 361; Teutonia Loan & Bldg. Co. v. Turrell, 19 Ind. App. 469, 49 N. E. 852, 65 Am. St. Rep. 419; Frisk v. Reigelman, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. Rep. 198.

See also Vol. 4, p. 853, § 491, as to affiants on attachment affidavit.

§ 725. **—Averment of Property of, or Debts Owing to, Defendant.**—A general requirement of a petition or affidavit for a garnishment is that it contain an averment that the plaintiff verily believes that the garnishee is indebted to, or has property in his possession or under his control belonging to, the defendant, and that such indebtedness or property is, to the best of the knowledge and belief of the affiant, not by law exempt from the garnishment.[9] As a general rule, an affidavit containing a statement, substantially in the language of the statute, that the garnishee has property of the judgment debtor is sufficient to show that the garnishee has such property. Such statement is not a mere conclusion of law.[10] However, allegations in the affidavit ordinarily need not follow the precise language of the statute.[11]

§ 726. **—Setting Forth Grounds for Garnishment.**—The general rule is that a petition or affidavit for a garnishment must set forth grounds upon which it can issue by force of local statutes and practice.[12] It has been held that although a creditor may invoke the benefit of the bulk sales law by a direct action against one who has purchased goods without the requirements of that statute having been complied with, yet if he elects to proceed by garnishment, in an action on his claim against the seller, allegations regarding the sale have no office to perform in the petition.[13]

3. PROCESS AND NOTICE

a. IN GENERAL

§ 727. **Service on Garnishee.**[14]—Upon the filing of the petition or affidavit in garnishment, it is generally required, by statute, that there be issued to the garnishee, and served upon him, a summons or notice to the effect that he has been summoned as garnishee of the debtor defendant, and that he is required, on or before a certain day, to answer whether he, the said garnishee, is indebted to, or has in his possession or under his control any property belonging to, the defendant. The usual rules in regard to caption and attestation are applied to such summons or notice.[15] In some states a judgment debtor may be garnished by delivering to him a copy of the writ, with a notice in writing stating that all his right, title, and interest in such judgment, and all moneys, goods, credits, and effects due or owing by him to the creditor, are levied upon.[16] A nonresident garnishee, if properly served, must appear and answer. If he fails to appear, judgment by default will be entered against him. If he appears and shows that he had not at the time of the service of the process any property of the principal defendant within the state and was not bound to him upon any debt or contract to be paid or discharged within the state, he will not be charged as garnishee.[17] The defendant in the principal action is not a proper person upon whom service of the writ of summons to the garnishee may be made as an agent of the garnishee, for the garnishment necessarily presupposes the indebtedness of the garnishee to the defendant, and the general rule is that where an agent is interested hostilely to the principal, communications or notice to the agent of the facts is not notice to his principal.[18] The general rule is that the service of the writ of garnishment on the garnishee impounds the property or funds of the defendant in his hands in the custody of the law, and constitutes a lien upon the same, pending the garnishment.[19]

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[7] United Collieries v. Martin, 248 Ky. 808, 60 S. W. (2d) 125, 89 A.L.R. 971; Moton v. Hull, 77 Tex. 80, 13 S. W. 849, 8 L.R.A. 722.

[8] United Collieries v. Martin, 248 Ky. 808, 60 S. W. (2d) 125, 89 A.L.R. 971.

[9] Moton v. Hull, 77 Tex. 80, 13 S. W. 849, 8 L.R.A. 722.

[10] Coffee v. Haynes, 124 Cal. 561, 57 P. 482, 71 Am. St. Rep. 99.

[11] Société Foncière v. Milliken, 135 U. S. 304, 34 L. ed. 208, 10 S. Ct. 823; Dugas v. Mathews, 9 Ga. 510, 54 Am. Dec. 361.

See also Vol. 4, p. 587, § 496.

[12] Moton v. Hull, 77 Tex. 80, 13 S. W. 849, 8 L.R.A. 722.

Generally as to grounds for attachment and garnishment, see Vol. 4, p. 815, §§ 423 et seq.

[13] Linn County Bank v. Davis, 103 Kan. 672, 175 P. 972, 9 A.L.R. 468.

Generally, as to enforcement of claims under bulk sales legislation by attachment or garnishment, see Vol. 4, p. 618, § 100.

[14] See PROCESS [Also 21 R. C. L. p. 1262, §§ 3 et seq.].

[15] Brashear v. West, 7 Pet. (U. S.) 608, 8 L. ed. 801; Kennedy v. Brent, 6 Cranch (U. S.) 187, 3 L. ed. 194; Ellery v. Cumming, 40 Ariz. 512, 14 P. (2d) 709, 83 A.L.R. 1081; Tiger v. Rogers Cotton Cleaner & Gin Co. 96 Ark. 1, 130 S. W. 585, 30 L.R.A.(N.S.) 694, Ann. Cas. 1912B, 488; International Bedding Co. v. Terminal Warehouse Co. 146 Md. 479, 126 A. 902, 40 A.L.R. 960; Starkey v. Cleveland, C. C. & St. L. R. Co. 114 Minn. 27, 130 N. W. 540, L.R.A.1915F, 880; Hirsch Bros. & Co. v. R. E. Kennington Co. 155 Miss. 242, 124 So. 344, 88 A.L.R. 1; Southern P. R. Co. v. A. J. Lyon & Co. 99 Miss. 186, 54 So. 728, 34 L.R.A.(N.S.) 234, Ann. Cas. 1913D, 800, suggestion of error overruled in (Miss.) 54 So. 784, 34 L.R.A. (N.S.) 237; Ireland v. Adair, 12 N. D. 29,

§ 728. **Form, Contents, and Sufficiency of Writ or Summons.**—As a general rule, a writ, summons, or notice of garnishment must comply with the requirements of the statute to give the proceedings validity and to invest the court with jurisdiction.[20] Statutes have sometimes been enacted which allow any number of garnishees to be embraced in the same summons.[1] In the absence of a statute expressly prescribing the method of serving a writ of garnishment, it has been held that the service thereof was not void where the original writ was in proper form and bore the seal of the court, but the copy thereof left with the garnishee was not dated and was not signed by the clerk who issued it.[2] Likewise, it has been held that a slight error in reciting the name of the garnishee may be disregarded,[3] but, on the other hand, it has been

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94 N. W. 766, 102 Am. St. Rep. 561; Wiener v. American Ins. Co. 224 Pa. 292, 73 A. 443, 23 L.R.A.(N.S.) 593; Pure Oil Co. v. Walsh-Woldert Motor Co. (Tex. Civ. App.) 36 S. W. (2d) 802, citing R. C. L.; Bristol v. Brent, 36 Utah, 108, 103 P. 1076, 140 Am. St. Rep. 804, 21 Ann. Cas. 1125.

The usual practice where there is a garnishee is merely to serve a copy of the writ of attachment on the garnishee with notice annexed by the officer that, by virtue of the original writ, he attaches all and singular the goods and chattels of the defendant in his hands or possession, and summons him as garnishee, and the return of the officer is in the same general terms, leaving the existence, nature, extent, and liability of the property to be developed in the subsequent proceedings. Brashear v. West, 7 Pet. (U. S.) 608, 8 L. ed. 801.

Under the Utah statutes credits may be reached in two ways: First, by leaving with the debtor a copy of the attachment writ, with notice of attachment, which method only prevents the debtor from disposing of the property, and second, by having the writ of garnishment issued and served upon the debtor, which method requires the garnishee to answer and places the debt in the custody of the law. Bristol v. Brent, 36 Utah, 108, 103 P. 1076, 140 Am. St. Rep. 804, 21 Ann. Cas. 1125.

A judgment debt may be garnished by a notification of the garnishment given by the sheriff to the judgment debtor. Hanna v. Bry, 5 La. Ann. 651, 52 Am. Dec. 606.

[16] Dore v. Dougherty, 72 Cal. 232, 13 P. 621, 1 Am. St. Rep. 48.

[17] Lawrence v. Smith, 45 N. H. 533, 86 Am. Dec. 183.

[18] Hirsch Bros. & Co. v. R. E. Kennington Co. 155 Miss. 242, 124 So. 344, 88 A.L.R. 1.

[19] As to garnished property as impounded, see supra, § 658.

As to status of garnishee as custodian of property, see supra, § 660.

[20] People's Wayne County Bank v. Stott, 246 Mich. 540, 224 N. W. 352, 64 A.L.R. 427; Ireland v. Adair, 12 N. D. 29, 94 N. W. 766, 102 Am. St. Rep. 561; Pure Oil Co. v. Walsh-Woldert Motor Co. (Tex. Civ. App.) 36 S. W. (2d) 802, citing R. C. L.

Annotation: 102 Am. St. Rep. 564.

[1] Eau Claire Nat. Bank v. Chippewa Valley Bank, 124 Wis. 520, 102 N. W. 1068, 109 Am. St. Rep. 966.

[2] Lyon v. Baldwin, 194 Mich. 118, 160 N. W. 428, L.R.A.1917C, 148.

[3] Donohoe-Kelly Bkg. Co. v. Southern P. Co. 138 Cal. 183, 71 P. 93, 94 Am. St. Rep. 28; Pure Oil Co. v. Walsh-Woldert Motor Co. (Tex. Civ. App.) 36 S. W. (2d) 802, citing R. C. L.

However, a failure to state the identity of the defendant with reasonable certainty said that a notice of garnishment of credits and effects is not a sufficient garnishment of a debt.[4]

§ 729. **Service on Officer of Garnishee Corporation.**—According to the prevailing rule and practice, the service of a writ of garnishment on a corporation by service upon one of its officers is proper.[5] The common practice in the service of such process on a foreign corporation follows the practice in the service upon such a corporation as a defendant in suits generally, that is, service is made upon an officer of the corporation designated by statute.[6] However, local statutes sometimes provide a different procedure to be followed in summoning such a corporation as garnishee from that to be followed in serving process upon it as the principal defendant in an action; nevertheless, such process must be jurisdictionally adequate to obtain jurisdiction over the garnishee.[7]

§ 730. **Service on Member of Garnishee Firm.**—Service of notice of garnishment on one partner is notice to the members of the firm,[8] but it has been said that notice to a resident partner of a nonresident firm, where the debt is not due from a resident of the state, does not create any liability against the nonresident members of the firm.[9]

§ 731. **Return.**—The general rules as to returns to writs [10] and the amendment of such returns [11] apply to the return of a writ of summons to a garnishee. Accordingly, it has been said that the return in the garnishment proceedings should be indorsed upon the writ or annexed thereto and should show that all has been done which the statute requires in the service of the writ, and that the proceedings are vitiated unless they show due service upon the garnishee.[12]

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limits the liability of the garnishee where, in ignorance of the identity of the defendant, he fails to preserve the garnished property. See supra, § 676.

[4] Clyne v. Easton, E. & Co. 148 Cal. 287, 83 P. 36, 113 Am. St. Rep. 253.

Generally, as to limitation of garnishee's liability from failure sufficiently to identify garnished property, see supra, § 677.

[5] National Bank v. Furtick, 2 Marv. (Del.) 35, 42 A. 479, 44 L.R.A. 115, 69 Am. St. Rep. 99; Burnett v. Central of Georgia R. Co. 117 Ga. 521, 43 S. E. 854, 97 Am. St. Rep. 175; Bank of Monroe v. Ouachita Valley Bank, 124 La. 798, 50 So. 718, 134 Am. St. Rep. 518.

[6] Lancashire Ins. Co. v. Corbetts, 165 Ill. 592, 46 N. E. 631, 36 L.R.A. 640, 56 Am. St. Rep. 275; Hannibal & St. J. R. Co. v. Crane, 102 Ill. 249, 40 Am. Rep. 581; Metropolitan L. Ins. Co. v. Hightower, 211 Ky. 36, 276 S. W. 1063, 44 A.L.R. 1158; Boyle v. Musser-Sauntry Land, Logging & Mfg. Co. 88 Minn. 456, 93 N. W. 520, 97 Am. St. Rep. 538; Steer v. Dow, 75 N. H. 95, 71 A. 217, 20 L.R.A.(N.S.) 263; Douglass v. Phenix Ins. Co. 138 N. Y. 209, 33 N. E. 938, 20 L.R.A. 118, 34 Am. St. Rep. 448; Bingenheimer Mercantile Co. v. Weber, 49 N. D. 312, 191 N. W. 620, 27 A.L.R. 1392; Johnson v. Union P. R. Co. 29 R. I. 80, 69 A. 298, 132 Am. St. Rep. 799; Neufelder v. German American Ins. Co. 6 Wash. 336, 33 P. 870, 22 L.R.A. 287, 36 Am. St. Rep. 166; Baltimore & O. R. Co. v. Allen, 58 W. Va. 388, 52 S. E. 465, 3 L.R.A.(N.S.) 608, 112 Am. St. Rep. 975; Pennsylvania R. Co. v. Rogers, 52 W. Va. 450, 44 S. E. 300, 62 L.R.A. 178; Morawetz v. Sun Ins. Office, 96 Wis. 175, 71 N. W. 109, 65 Am. St. Rep. 43.

Annotation: 23 L.R.A. 500.

[7] National Bank v. Furtick, 2 Marv. (Del.) 35, 42 A. 479, 44 L.R.A. 115, 69 Am. St. Rep. 99.

[8] Marx v. Hart, 166 Mo. 503, 66 S. W. 260, 89 Am. St. Rep. 715; State use of Arnold v. Linaweaver, 3 Head (Tenn.) 51, 75 Am. Dec. 757.

As to levy of attachment on interest in partnership by service on member of firm, see Vol. 4, p. 898, § 565.

[9] National Broadway Bank v. Sampson, 179 N. Y. 213, 71 N. E. 766, 66 L.R.A. 606, 103 Am. St. Rep. 851.

[10] Albright-Pryor Co. v. Pacific Selling Co. 126 Ga. 498, 55 S. E. 251, 115 Am. St. Rep. 108; Boyd v. Chesapeake & O. Canal Co. 17 Md. 195, 79 Am. Dec. 646; People's Wayne County Bank v. Stott, 246 Mich. 540, 224 N. W. 352, 64 A.L.R. 427 (holding compliance with statute jurisdictional); Marx v. Hart, 166 Mo. 503, 66 S. W. 260, 89 Am. St. Rep. 715; Bristol v. Brent, 36 Utah, 108, 103 P. 1076, 140 Am. St. Rep. 804, 21 Ann. Cas. 1125.

As to return of writ of attachment, see Vol. 4, p. 911, §§ 590 et seq.

See PROCESS [Also 21 R. C. L. p. 1315, §§ 62 et seq.].

[11] Fairfield v. Paine, 23 Me. 498, 41 Am. Dec. 357; Bristol v. Brent, 36 Utah, 108, 103 P. 1076, 140 Am. St. Rep. 804, 21 Ann. Cas. 1125.

[12] Bristol v. Brent, 36 Utah, 108, 103 P. 1076, 140 Am. St. Rep. 804, 21 Ann. Cas. 1125.

Furthermore, it is said that there is no presumption that the officer serving a writ of garnishment has done his duty, and consequently, that the return must affirmatively show that the writ was served as required by statute.[13] Nevertheless, it is held that failure of the return in garnishment proceedings to show that the writ was served upon the garnishee by delivering a copy to him is a defect which may be cured by amendment upon application to the trial court, and while the granting of such application rests somewhat in its sound discretion, the amendment should ordinarily be allowed if no intervening rights would be affected.[14] However, the view has been taken that omission to show, in the return of service of an order of attachment upon a foreign corporation as garnishee, that the agent upon whom the service was made resides in the county in which he was served, renders the service invalid, and in such case the court obtains no jurisdiction of the res for want of service on the garnishee.[15]

b. Notice to Defendant

§ 732. Generally.—Statutes frequently require notice to the defendant of garnishment proceedings,[16] but where there is no such statutory provision, notice of the garnishment to the defendant has been held not necessary.[17]

4. Appearance and Waiver of Defects and Irregularities in Garnishment

§ 733. Generally.—A garnishee may enter a general appearance to answer the garnishment, or he may enter a special appearance for the purpose of pursuing a proper proceeding to attack it and seek its dissolution.[18]

§ 734. Waiver of Defects.—According to the general rule, a garnishee may waive defects in service or in the form of the writ in garnishment proceedings only as it affects him personally, and may not waive defects affecting the principal defendant, either as to his personal rights or as to the res.[19]

However, the defendant may himself waive his right to object to defects and irregularities in the garnishment.[20] In any event, a general appearance by a garnishee does not confer jurisdiction upon the court to render a judgment against him, where no jurisdiction is thereby, or otherwise, acquired of the defendant and no valid judgment can be rendered against him.[1]

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[13] Ibid.

[14] Ibid.

[15] Pennsylvania R. Co. v. Rogers, 52 W. Va. 450, 44 S. E. 300, 62 L.R.A. 178.

[16] J. J. Smith Lumber Co. v. Scott County Garbage Reducing & Fuel Co. 149 Iowa, 272, 128 N. W. 389, 30 L.R.A.(N.S.) 1184; Union P. R. Co. v. Smersh, 22 Neb. 751, 36 N. W. 139, 3 Am. St. Rep. 290 (although statute does not require notice); Mares v. Schuth, 38 N. M. 101, 28 P. (2d) 527, 92 A.L.R. 567; Illinois C. R. Co. v. Brooks, 90 Tenn. 161, 16 S. W. 77, 25 Am. St. Rep. 673.

Annotation: 92 A.L.R. 570.

Statutory requirements as to notice to defendant must be strictly and literally observed. Mares v. Schuth, 38 N. M. 101, 28 P. (2d) 527, 92 A.L.R. 567.

However, in McAllister v. Brooks, 22 Me. 80, 38 Am. Dec. 282, the court said that when the statute speaks of notifying the parties, it may well be doubted if it was in contemplation that the defendant should be notified.

[17] Endicott-Johnson Corp. v. Smith, 266 U. S. 291, 69 L. ed. 293, 45 S. Ct. 63; Endicott-Johnson Corp. v. Encyclopedia Press, 266 U. S. 285, 69 L. ed. 288, 45 S. Ct. 61; McAllister v. Brooks, 22 Me. 80, 38 Am. Dec. 282. But see Union P. R. Co. v. Smersh, 22 Neb. 751, 36 N. W. 139, 3 Am. St. Rep. 290.

[18] Stone v. Magrader, 10 Gill & J. (Md.) 383, 32 Am. Dec. 177.

[19] Atchison, T. & S. F. R. Co. v. Wells, 265 U. S. 101, 68 L. ed. 928, 44 S. Ct. 469; Cromwell v. Royal Canadian Ins. Co. 49 Md. 366, 33 Am. Rep. 258; People's Wayne County Bank v. Stott, 246 Mich. 540, 224 N. W. 352, 64 A.L.R. 427; Bristol v. Brent, 36 Utah, 108, 103 P. 1076, 140 Am. St. Rep. 804, 21 Ann. Cas. 1125; Dorr v. Rohr, 82 Va. 359, 3 Am. St. Rep. 106; Pennsylvania R. Co. v. Rogers, 52 W. Va. 450, 44 S. E. 300, 62 L.R.A. 178.

Annotation: 64 A.L.R. 430.

Admissions, in the disclosure of the garnishee, of due service of the writ are insufficient to give the court jurisdiction to proceed with the garnishment suit. People's Wayne County Bank v. Stott, 246 Mich. 540, 224 N. W. 352, 64 A.L.R. 427.

[20] Gunn v. Howell, 35 Ala. 144, 73 Am. Dec. 484; Schneitman v. Noble, 75 Iowa, 120, 39 N. W. 224, 9 Am. St. Rep. 467; Hanna v. Lauring, 10 Mart. (La.) 568, 13 Am. Dec. 339.

Annotation: 100 Am. Dec. 511.

§ 735. —**Defective Service.**—The general rule is that a garnishee may waive his objections to defects and irregularities in the service of process on himself as garnishee,[2] but that he cannot waive jurisdictionally defective service on the defendant.[3] Some courts, however, take the view that such defects and irregularities cannot be waived by the garnishee, at least where they are jurisdictional.[4] Thus, where the jurisdiction of the res has been obtained by service of garnishment process on a member of a partnership having property belonging to the principal defendant in his possession, it is entirely competent for other partners to waive, by general appearance, service of process and thereby give the court personal jurisdiction over the partners not served.[5]

§ 736. —**Defects and Irregularities in Petition or Affidavit for Garnishment.**—The view has been taken that a garnishee may waive his objections to defects in the petition or affidavit for the garnishment.[6] On the other hand, it has been held by some courts that such a defect is jurisdictional and cannot be waived.[7]

§ 737. —**By Appearance.**—The general rule is that a garnishee waives objections to defects and irregularities in the garnishment proceedings by a general appearance to answer the garnishment.[8] Likewise, a defendant waives his right to object to defects and irregularities in the garnishment where he enters a general appearance.[9] Some courts hold that by entering a general appearance, a garnishee waives the objection that he is a nonresident of the county wherein the principal suit is pending, and that his nonresidence does not thereafter affect the validity of the proceedings, while others permit the garnishee to allege want of jurisdiction even after a general appearance.[10]

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[1] Mares v. Schuth, 38 N. M. 101, 28 P. (2d) 527, 92 A.L.R. 567; Bristol v. Brent, 36 Utah, 108, 103 P. 1076, 140 Am. St. Rep. 804, 21 Ann. Cas. 1125.

Annotation: 21 Ann. Cas. 1129.

As to necessity of valid judgment against defendant to sustain judgment against garnishee, see supra, § 711.

[2] United Collieries v. Martin, 248 Ky. 808, 60 S. W. (2d) 125, 89 A.L.R. 971 (holding, however, that garnishee could not waive defects in the garnishment petition or affidavit); Bristol v. Brent, 36 Utah, 108, 103 P. 1076, 140 Am. St. Rep. 804, 21 Ann. Cas. 1125.

Since a garnishee can by his general appearance waive any defect in the service so far as it affects him personally, it is immaterial, after appearance, whether the garnishee's officer who was served was an agent on whom service could be legally made. Bristol v. Brent, 36 Utah, 108, 103 P. 1076, 140 Am. St. Rep. 804, 21 Ann. Cas. 1125.

And see authorities cited in § 734, supra.

[3] Mares v. Schuth, 38 N. M. 101, 28 P. (2d) 527, 92 A.L.R. 567.

[4] Bristol v. Brent, 36 Utah, 108, 103 P. 1076, 140 Am. St. Rep. 804, 21 Ann. Cas. 1125; Pennsylvania R. Co. v. Rogers, 52 W. Va. 450, 44 S. E. 300, 62 L.R.A. 178.

Annotation: 21 Ann. Cas. 1130.

A garnishee cannot give jurisdiction of a debt due from him by his voluntary appearance, when he was not previously served with the order of attachment, or when the attempted service was invalid. Pennsylvania R. Co. v. Rogers, 52 W. Va. 450, 44 S. E. 300, 62 L.R.A. 178.

[5] Marx v. Hart, 166 Mo. 503, 66 S. W. 260, 89 Am. St. Rep. 715.

[6] Turner v. Williams, 114 Kan. 769, 221 P. 267, citing R. C. L.

[7] United Collieries v. Martin, 248 Ky. 808, 60 S. W. (2d) 125, 89 A.L.R. 971 (holding, however, that defects in process or service can be waived).

Annotation: 21 Ann. Cas. 1131.

[8] Coffee v. Haynes, 124 Cal. 561, 57 P. 482, 71 Am. St. Rep. 99; Turner v. Williams, 114 Kan. 769, 221 P. 267, citing R. C. L.; Cromwell v. Royal Canadian Ins. Co. 49 Md. 366, 33 Am. Rep. 258; Bristol v. Brent, 36 Utah, 108, 103 P. 1076, 140 Am. St. Rep. 804, 21 Ann. Cas. 1125.

It would seem that by entering a general appearance a garnishee waives the objection that the process was served upon him on a privileged occasion. Peters v. League, 13 Md. 58, 71 Am. Dec. 622.

[9] Gunn v. Howell, 35 Ala. 144, 73 Am. Dec. 484; Schnetman v. Noble, 75 Iowa, 120, 39 N. W. 224, 9 Am. St. Rep. 467; Hanna v. Lauring, 10 Mart. (La.) 568, 13 Am. Dec. 339.

The appearance of the defendant in the main action cannot give the court jurisdiction over a garnishee who has not been served personally with process and who has entered no appearance in the action. Morawitz v. Sun Ins. Office, 96 Wis. 175, 71 N. W. 109, 65 Am. St. Rep. 43.

[10] Cromwell v. Royal Canadian Ins. Co. 49 Md. 366, 33 Am. Rep. 258.

A special appearance by the garnishee to pursue a proper proceeding to attack a garnishment, such as to move for its dissolution, confers no jurisdiction over the garnishee and does not operate as a waiver of any defects or irregularities in the garnishment.[11] Thus, a garnishee defendant who appears specially and moves to set aside the writ and its service because, by the return of service, jurisdiction does not appear, may raise the point, after judgment, upon a writ of error.[12] Likewise, a special appearance by the defendant waives no defects or irregularities in the garnishment.[13]

5. Dissolution, Vacation, Discharge, and Abandonment of Garnishment

§ 738. Generally.—A garnishment, as an attachment,[14] may be vacated or discharged by the direction of the plaintiff, or by the court, for cause shown before final judgment.

§ 739. Judgment and Termination of Suit.—The general rule is that the termination of the main action by judgment and satisfaction or by judgment for the defendant terminates the garnishment.[15] Thus, a garnishee who has paid into the registry of the court the amount of a judgment recovered against him by the principal debtor cannot, because of his failure to appeal from a judgment denying his motion to quash and set aside a judgment against him in the garnishment proceeding contingent upon the establishment of his liability to the principal debtor, be held liable by the garnishing creditor, who has, as against other claimants of the fund, been held not entitled to any part of the amount so paid in.[16] The rule is well settled that if the judgment on which garnishment proceedings are based is in any way effaced or obliterated, the garnishment is thereby dissolved. Inasmuch as the garnishment proceeding is auxiliary to, and dependent upon, the judgment in the principal action, the vacation or satisfaction of the judgment defeats the garnishment proceeding as an incident thereof. Thus, when the judgment in the principal action has been satisfied, a judgment in a garnishment proceeding, which is ancillary thereto, thereby becomes extinguished. On an appeal by a garnishee from a judgment against him, the appellate court will reverse the judgment and discharge the garnishee if its records show that it has previously reversed a judgment against the defendant, in the principal action, upon which the garnishment is based.[17] It has been held that if the judgment against the principal debtor is reversed, a judgment against the garnishee will be set aside, even though, prior to a ruling on the motion therefor, another judgment in favor of the plaintiff has been rendered on a retrial of the principal case.[18] However, taking personal judgment against the principal debtor and the garnishee does not waive the lien of the attachment, where the statute contemplates personal judgment against the garnishee, and the personal judgment against the principal debtor is void for lack of jurisdiction over his person, for the court may, nevertheless, issue judgment against his property.[19] A judgment against the garnishee will not be set aside on the ground that since its rendition an item embraced therein has, without fraud, been recovered in a suit in another state.[20] The dismissal of the main action operates generally to dissolve a garnishment.[1] Accordingly, the dismissal of a proceeding in which a bank deposit had been garnished renders the deposit subject to check, although the bank has been notified of an intention to appeal, if no appeal has actually been taken or supersedeas bond given.[2]

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[11] Stone v. Magruder, 10 Gill & J. (Md.) 383, 32 Am. Dec. 177.

Such an appearance confers no jurisdiction on the court. See Vol. 4, p. 580, § 50.

[12] Lyon v. Baldwin, 194 Mich. 118, 160 N. W. 428, L.R.A.1917C, 148.

[13] Davis v. Cleveland, C. C. & St. L. R. Co. 217 U. S. 157, 54 L. ed. 708, 30 S. Ct. 463, 27 L.R.A.(N.S.) 823, 18 Ann. Cas. 907. See Vol. 4, p. 924, § 618.

[14] See Vol. 4, p. 925, §§ 622 et seq.

[15] Decatur v. Simpson, 119 Iowa, 488, 93 N. W. 496, 97 Am. St. Rep. 328; Grace v. Pierce, 127 Miss. 831, 90 So. 590, 21 A.L.R. 1035; Moody & Williams v. Dye, 125 Miss. 770, 88 So. 332, citing R. C. L.; Chicago Herald Co. v. Bryan, 195 Mo. 590, 92 S. W. 906, 6 Ann. Cas. 751; McNaughton v. Lewis, 126 Okla. 21, 258 P. 266, citing R. C. L.; Hillman v. Gray, 163 Wash. 406, 1 P. (2d) 318, 75 A.L.R. 1356.

Annotation: 96 Am. St. Rep. 132; 6 Ann. Cas. 752.

[16] Hillman v. Gray, 163 Wash. 406, 1 P. (2d) 318, 75 A.L.R. 1356.

[17] Chicago Herald Co. v. Bryan, 195 Mo. 590, 92 S. W. 906, 6 Ann. Cas. 751; McNaughton v. Lewis, 126 Okla. 21, 258 P 266, citing R. C. L.

[18] Decatur v. Simpson, 119 Iowa, 488, 93 N. W. 496, 97 Am. St. Rep. 328; Moody & Williams v. Dye, 125 Miss. 770, 88 So. 332, citing R. C. L.

Annotation: 96 Am. St. Rep. 132.

§ 740. **Effect of Appeal.**—The general rule is that a garnishee is under duty to hold the garnished property or not to pay the garnished debt pending an appeal, at least where a supersedeas bond is filed.[3] However, there is a decided conflict among the authorities in those jurisdictions wherein the question as to the length of time, if any, during which property which has been garnished or attached must be held after dismissal of the writ for the purpose of allowing the plaintiff to perfect an appeal has been considered, some of the courts holding that the officer or garnishee, in the absence of direction by the court or controlling statutory provision, is not bound to retain the property, or, in other words, that the lien is not preserved unless an appeal from the order of dissolution is taken instanter or the court directs that the property be held until an appeal can be perfected.[4] But under statutes which are silent as to the possession and control of money which has been garnished after dismissal of the garnishment, it has been held that the dismissal of a proceeding in which a bank account had been garnished renders the deposit subject to the order of the depositor although the garnishee bank has been notified by the plaintiff of an intention to appeal, no appeal having actually been taken or supersedeas bond issued before the presentation of the order to the bank.[5] Other courts hold that the property must be held for a reasonable time, which is such a time as is sufficient to enable the plaintiff to take a prompt appeal; and one court, at least, holds that the appeal may be taken at any time during which an appeal in an ordinary case could be taken, which means that the property must be held until the expiration of the period prescribed by general statutory provisions relating to appeals, unless a delivery is ordered sooner by the court.[6] Where however, the plaintiff is negligent in prosecuting his appeal or writ of error, he will not be restored to his rights under the attachment.[7]

§ 741. **Abandonment, Withdrawal, and Release.**—A garnishment may be abandoned, withdrawn, or released.[8] The plaintiff may be regarded as having abandoned garnishment proceedings by failing to prosecute the same with requisite diligence. In such cases the garnishee is entitled to a discharge from liability.[9] However, it has been said that entry of default of one summoned as trustee without the entry of judgment against the principal defendant is not such a final judgment against him that failure of the plaintiff to make demand on him within thirty days thereafter will operate, under the provisions of a statute, to dissolve the attachment.[10]

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[19] Goodwin v. Claytor, 137 N. C. 224, 49 S. E. 173, 67 L.R.A. 209, 107 Am. St. Rep. 479.

Generally, as to jurisdiction to enter judgment in personam and in rem against defendant in attachment of whom no personal jurisdiction is obtained, see Vol. 4, p. 579, § 47; infra, § 954.

[20] Hogle v. Mott, 62 Vt. 255, 20 A. 276, 22 Am. St. Rep. 106.

[1] American Nat. Bank v. Douglas, 126 Ark. 7, 189 S. W. 161, L.R.A.1917B, 588.

[2] American Nat. Bank v. Douglas, 126 Ark. 7, 189 S. W. 161, L.R.A.1917B, 588.

[3] Maxwell v. Bank of New Richmond, 101 Wis. 286, 77 N. W. 149, 70 Am. St. Rep. 926.

[4] Annotation: L.R.A.1917B, 591.

[5] American Nat. Bank v. Douglas, 126 Ark. 7, 189 S. W. 161, L.R.A.1917B, 588.

[6] Annotation: L.R.A.1917B, 591.

[7] Annotation: 39 Am. Dec. 609.

[8] Young v. Clarendon Twp. 132 U. S. 340, 33 L. ed. 356, 10 S. Ct. 107; Missouri, K. & T. R. Co. v. Housley, 43 Okla. 794, 144 P. 610, Ann. Cas. 1916B, 363; Neufelder v. North British & M. Ins. Co. 10 Wash. 393, 39 P. 110, 45 Am. St. Rep. 793.

[9] Young v. Clarendon Twp. 132 U. S.

A garnishment lien is not, as a matter of law, waived by the institution of a second garnishment proceeding by the same party against the same garnishee in a suit on the judgment recovered against the principal defendant in the suit in which the first garnishment was had.[11]

§ 742. Death of Defendant.[12]—In the majority of jurisdictions, where there is no specific statute providing for the survival or the dissolution of garnishment by death, it is held that the death of the principal defendant at any stage of the proceedings after the levy does not affect the garnishment.[13] At least, the death of the defendant after judgment against him does not affect the garnishment.[14] However, in some jurisdictions, where there is no specific statute providing for the survival or the dissolution of garnishment, the rule obtains that where the principal defendant dies after the levy, but prior to the final judgment, the garnishment is dissolved.[15] Elsewhere it is the rule that the death of the principal defendant in a garnishment proceeding does not dissolve the garnishment unless the estate is insolvent.[16]

Some statutes expressly provide for the survival of garnishment.[17]

§ 743. Dissolution of Defendant Corporation.—A garnishment is, according to the general rule, dissolved by the dissolution [18] or civil death [19] of the defendant corporation, although there is a conflict of opinion on this point.[20]

§ 744. Insolvency and Bankruptcy.[1]—The general rule is that an insolven-

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340, 33 L. ed. 356, 10 S. Ct. 107; Coit v. Sistare, 85 Conn. 573, 84 A. 119, Ann. Cas. 1913C, 248; Smith v. Davis, 131 Me. 9, 158 A. 359, 81 A.L.R. 78; Missouri, K. & T. R. Co. v. Housley, 43 Okla. 794, 144 P. 610, Ann. Cas. 1916B, 363; Neufelder v. North British & M. Ins. Co. 10 Wash. 393, 39 P. 110, 45 Am. St. Rep. 793.

Thus, the failure of the creditor of a nonresident debtor to proceed in garnishment proceedings in accordance with the applicable statute to obtain service by publication upon the debtor amounts to an abandonment of the cause of action, and it therefore neither bars nor abates an action by the debtor in the state of his residence against the garnishee. Missouri, K. & T. R. Co. v. Housley, 43 Okla. 794, 144 P. 610, Ann. Cas. 1916B, 363.

A creditor of a railroad company who endeavors, by suit in equity, to reach and subject to the payment of his debt the alleged equitable debt of a town to the company by reason of the nondelivery of bonds to the company and their return to the town may be defeated by the laches of the company in the pursuit of its rights against the town. Young v. Clarendon Twp. 132 U. S. 340, 33 L. ed. 356, 10 S. Ct. 107.

[10] Smith v. Davis, 131 Me. 9, 158 A. 359, 81 A.L.R. 78.

[11] Lawrence v. Security Co. 56 Conn. 423, 15 A. 406, 1 L.R.A. 342.

Generally as to successive garnishments, see supra, § 707.

[12] See also ABATEMENT, SURVIVAL, AND REVIVAL, Vol. 1, pp. 59 et seq.

See also Vol. 4, p. 928, §§ 625, 626, as to the effect of the death of the defendant on attachment proceedings.

[13] Coleman v. McAnulty, 16 Mo. 173, 57 Am. Dec. 229; Hawley v. Isaacson, 117 Wash. 197, 200 P. 1109, 21 A.L.R. 268.

Annotation: 21 A.L.R. 272.

The death of the principal defendant before judgment does not defeat a garnishment proceeding where the garnishee has admitted indebtedness. Hawley v. Isaacson, 117 Wash. 197, 200 P. 1109, 21 A.L.R. 268.

[14] Lawrence v. Security Co. 56 Conn. 423, 15 A. 406, 1 L.R.A. 342.

[15] McIlroy v. McIlroy, 208 Mass. 458, 94 N. E. 696, Ann. Cas. 1912A, 934; Foreman Bros. Bkg. Co. v. Handy, 229 Mich. 635, 201 N. W. 951, citing R. C. L.

Annotation: 21 A.L.R. 272.

[16] Annotation: 21 A.L.R. 272.

[17] Annotation: 21 A.L.R. 273.

The local statute should be consulted.

[18] Annotation: 32 L.R.A.(N.S.) 450.

[19] Farmers' & Mechanics' Bank v. Little, 8 Watts & S. (Pa.) 207, 42 Am. Dec. 293.

In Farmers' & Mechanics' Bank v. Little, 8 Watts & S. (Pa.) 207, 42 Am. Dec. 293, a foreign attachment was held to be dissolved by the forfeiture of the charter of the defendant corporation. In later Pennsylvania cases, however, it was held that the dissolution of a corporation, unlike its civil death by forfeiture of its charter, did not have that effect. See Standard Pa. Prac. Vol. 10.

[20] Annotation: 32 L.R.A.(N.S.) 450.

See also Vol. 4, p. 929, § 627.

[1] See also Vol. 4, p. 930, § 628, as to effect

cy proceeding under the state laws will not dissolve a prior garnishment.[2] Nor is a garnishment lien dissolved by a proceeding in bankruptcy unless begun by or against the defendant within four months after the creation of such lien.[3] While a judgment in an action upon a claim to which a discharge in bankruptcy is a bar cannot be enforced against a discharged bankrupt, a special judgment may be entered against him for the purpose of perfecting a right of action against one secondarily liable,[4] charging a garnishee,[5] or of establishing the right to levy on attachable property of the bankrupt the title to which may not have passed to the trustee in bankruptcy.[6]

§ 745. Dissolution or Vacation on Motion.—Garnishment proceedings may be attacked generally on a motion to dissolve or vacate the garnishment or to discharge the garnishee, the particular practice to be pursued depending upon local jurisprudence.[7]

§ 746. —Who May Make Motion.—The general rule is that either the garnishee [8] or the defendant [9] may move for the vacation, dissolution, or discharge of a garnishment. However, the view has been taken that only the garnishee, and not the defendant, may move for the dissolution of a garnishment on the ground that he is not liable to process as garnishee.[10]

§ 747. Grounds of Motion.—Garnishment proceedings, like other civil actions, may be dismissed or dissolved for an infinite variety of causes.[11] Not

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of insolvency and bankruptcy on attachment proceedings.

[2] As to priority between garnishment and an assignment for the benefit of creditors, see infra, § 880.

As to priority between garnishment and a receivership, see infra, §§ 882 et seq.

[3] Franklin Bank v. Bachelder, 23 Me. 60, 39 Am. Dec. 601; Marx v. Hart, 166 Mo. 503, 66 S. W. 260, 89 Am. St. Rep. 715.

Generally as to priority between garnishment and rights arising in bankruptcy proceedings, see infra, § 884.

[4] Smith v. Davis, 131 Me. 9, 158 A. 359, 81 A.L.R. 78.

Annotation: 81 A.L.R. 81.

As to effect of bankruptcy of defendant on liability of surety to dissolve or release attachment, see infra, § 918.

[5] Smith v. Davis, 131 Me. 9, 158 A. 359, 81 A.L.R. 78.

[6] Smith v. Davis, 131 Me. 9, 158 A. 359, 81 A.L.R. 78.

The fact that the principal defendant has received a discharge in bankruptcy does not preclude the enforcement of a lien acquired by trustee process where no trustee in bankruptcy has claimed the bankrupt's property in the hands of the defendant trustee. Smith v. Davis, 131 Me. 9, 158 A. 359, 81 A.L.R. 78.

As to form of such special judgment, see infra, § 963.

[7] Davis v. Cleveland, C. C. & St. L. R. Co. 217 U. S. 157, 54 L. ed. 708, 30 S. Ct. 463, 27 L.R.A.(N.S.) 823, 18 Ann. Cas. 907; Louisville & N. R. Co. v. Webb Furniture Co. 214 Ala. 654, 108 So. 765, 46 A.L.R. 928; Porter & B. Hardware Co. v. Perdue, 105 Ala. 293, 16 So. 713, 53 Am. St. Rep. 124; Cowart v. W. E. Caldwell Co. 134 Ga. 544, 68 S. E. 500, 30 L.R.A.(N.S.) 720; Merwin v. Chicago, 45 Ill. 133, 92 Am. Dec. 204; Stone v. Magruder, 10 Gill & J. (Md.) 383, 32 Am. Dec. 177; Recor v. Commercial & Sav. Bank (Recor v. Recor) 142 Mich. 479, 106 N. W. 82, 5 L.R.A.(N.S.) 472, 7 Ann. Cas. 754; Krafve v. Roy, 98 Minn. 141, 107 N. W. 966, 116 Am. St. Rep. 346; Rustad v. Bishop, 80 Minn. 497, 83 N. W. 449, 50 L.R.A. 168, 81 Am. St. Rep. 282; Dollman v. Moore, 70 Miss. 267, 12 So. 23, 19 L.R.A. 222; Union P. R. Co. v. Smersh, 22 Neb. 751, 36 N. W. 139, 3 Am. St. Rep. 290; Brenizer v. Supreme Council, R. A. 141 N. C. 409, 53 S. E. 835, 6 L.R.A.(N.S.) 235; Orlopp v. Schueller, 72 Ohio St. 41, 73 N. E. 1012, 106 Am. St. Rep. 583, 2 Ann. Cas. 919.

[8] Louisville & N. R. Co. v. Webb Furniture Co. 214 Ala. 654, 108 So. 765, 46 A.L.R. 928; Merwin v. Chicago, 45 Ill. 133, 92 Am. Dec. 204 (particularly where garnishment is void for want of jurisdiction); Stone v. Magruder, 10 Gill & J. (Md.) 383, 32 Am. Dec. 177.

[9] Davis v. Cleveland, C. C. & St. L. R. Co. 217 U. S. 157, 54 L. ed. 708, 30 S. Ct. 463, 27 L.R.A.(N.S.) 823, 18 Ann. Cas. 907; Krafve v. Roy, 98 Minn. 141, 107 N. W. 966, 116 Am. St. Rep. 346; Brenizer v. Supreme Council, R. A. 141 N. C. 409, 53 S. E. 835, 6 L.R.A. (N.S.) 235.

A mutual benefit society the funds of which are attached in the hands of its collector may, upon return to the notice, raise the question as to the liability of the funds to attachment; and it is not required to permit the collector to raise that question when it is sought to take the funds out of his possession under the judgment, where it asserts title to the funds and the duty to hold them under an express trust. Brenizer v. Supreme Council, R. A. 141 N. C. 409, 53 S. E. 835, 6 L.R.A.(N.S.) 235.

[10] Dollman v. Moore, 70 Miss. 267, 12 So. 23, 19 L.R.A. 222.

[11] As to grounds for the dissolution of attachment, see Vol. 4, p. 932, §§ 632 et seq.

only may garnishment proceedings be dissolved, but the garnishee may also procure a perpetual injunction against the plaintiff's judgment against him upon the occurrence, subsequent to his examination, of anything which would furnish a legal defense to an action against him by the defendant.[12] The view has been taken that dissolution of an attachment for failure, after traverse, to sustain the grounds of attachment set up in the affidavit is not sufficient grounds for dissolving a garnishment by the same plaintiff directed to the custodian of the attached property after the court has ordered its return to the defendant.[13]

Abuse of process constitutes a good ground for the dissolution of a garnishment, and a court has inherent power summarily to determine the fact of such abuse.[14]

The general rule is that lack of merits of the claim of the plaintiff against the defendant or of the defendant against the garnishee constitutes no ground for the dissolution of the garnishment on motion.[15]

§ 748. —Lack of Jurisdiction.—Lack of jurisdiction is ground for a motion to dissolve or discharge a garnishment.[16] However, a demurrer to a plea to the jurisdiction in a garnishment proceeding denying assets within the jurisdiction does not admit absence of property if prior allegations in the plea show a claim against a resident insurance company for a loss under a policy held by the debtor.[17] A common carrier garnished for property in its possession for transportation, but which is not within the jurisdiction of the court, may show that the writ is void for lack of jurisdiction and thereby secure its discharge.[18]

§ 749. —Defects and Irregularities in Proceedings.—Defects and irregularities in the institution or course of garnishment proceedings constitute grounds for a motion to vacate, quash, or dissolve the garnishment,[19] although such a motion may be defeated by an amendment correcting or supplying the defects or irregularities unless they are of such character that they void the garnishment and cannot be corrected or supplied by amendment.[20] Thus, the garnishee may move to quash the proceedings on the ground of a defect in the service of summons or notice or in the form of the pleadings or allegations of the plaintiff.[1] The view has been taken that failure to give notice of a garnishment proceeding to the principal does not entitle the garnishee to a discharge or dismissal of the proceeding, under a statute providing that no judgment shall be entered against the garnishee until notice has been given to the principal defendant.[2]

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[12] See supra, § 715.

[13] Mundil v. Hutson, 33 N. M. 388, 268 P. 566, 59 A.L.R. 522.

The dissolution of an attachment is generally deemed to take property out of the custody of the law, so that it can be attached or garnished in the possession of the officer holding it under the dissolved attachment. See Vol. 4, p. 798, §§ 390 et seq.

[14] Rustad v. Bishop, 80 Minn. 497, 83 N. W. 449, 50 L.R.A. 168, 81 Am. St. Rep. 282; Vienne v. M'Carty, 1 Dall. (Pa.) 154, 1 L. ed. 79.

[15] Recor v. Commercial & Sav. Bank (Recor v. Recor) 142 Mich. 479, 106 N. W. 82, 5 L.R.A.(N.S.) 472, 7 Ann. Cas. 754.

[16] Louisville & N. R. Co. v. Webb Furniture Co. 214 Ala. 654, 108 So. 765, 46 A.L.R. 928; Cowart v. W. E. Caldwell Co. 134 Ga. 544, 68 S. E. 500, 30 L.R.A.(N.S.) 720 (garnishment directed to, and served upon, trustee in bankruptcy); Merwin v. Chicago, 45 Ill. 133, 92 Am. Dec. 204.

[17] Parker, Peebles & Knox v. El Saieh, 107 Conn. 545, 141 A. 884, 59 A.L.R. 1424.

[18] Louisville & N. R. Co. v. Webb Furniture Co. 214 Ala. 654, 108 So. 765, 46 A.L.R. 928.

[19] Louisville & N. R. Co. v. Webb Furniture Co. 214 Ala. 654, 108 So. 765, 46 A.L.R. 928; Stone v. Magruder, 10 Gill & J. (Md.) 383, 32 Am. Dec. 177.

Annotation: 35 L.R.A. 765.

[20] See Vol. 4, p. 607, §§ 85 et seq.; p. 843, § 475; supra, § 723.

[1] Stone v. Magruder, 10 Gill & J. (Md.) 383, 32 Am. Dec. 177.

§ 750. **—Nonliability of Property to Garnishment.**—The exemption from garnishment of the property or debt sought to be garnished constitutes good ground for the dissolution of the garnishment with respect to such property.[3]

§ 751. **—Nonliability of Garnishee to Process.**—A garnishment will be discharged on motion where it is directed against one not liable to the process, such as a municipal corporation.[4]

6. DISCOVERY AND DISCLOSURE

a. IN GENERAL

§ 752. **Generally.**—A universal phase of garnishment practice is some form of discovery of the assets of the defendant in the hands of the garnishee.[5] The common form of this practice involves interrogatories to the garnishee and his answers thereto.[6] In some jurisdictions the procedure is commenced by a writ of scire facias to the garnishee, but such a writ is generally not necessary where the garnishee has been summoned and has entered a general appearance in the main action or where specific property or land has been garnished, in either of which cases the plaintiff may proceed at once, without the issuance of a writ of scire facias, to exhibit interrogatories to the garnishee. The writ of scire facias is necessary only where the garnishee has entered no appearance and where the effects of the defendant garnished in his hands are not specific, as where he is summoned in the garnishment to answer as to all property and credits of the defendant in his possession.[7]

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[2] J. J. Smith Lumber Co. v. Scott County Garbage Reducing & Fuel Co. 149 Iowa, 272, 128 N. W. 389, 30 L.R.A.(N.S.) 1184.

Generally as to form and sufficiency of notice to defendant where required, see supra, § 732; infra, §§ 942 et seq.

[3] Davis v. Cleveland, C. C. & St. L. R. Co. 217 U. S. 157, 54 L. ed. 708, 30 S. Ct. 463, 27 L.R.A.(N.S.) 823, 18 Ann. Cas. 907; Cowart v. W. E. Caldwell Co. 134 Ga. 544, 68 S. E. 500, 30 L.R.A.(N.S.) 720; Pugh v. Jones, 134 Iowa, 746, 112 N. W. 225, 11 L.R.A.(N.S.) 706, 120 Am. St. Rep. 451, 13 Ann. Cas. 499 (garnishment or assigned interest in a decedent's estate); Krafve v. Roy, 98 Minn. 141, 107 N. W. 966, 116 Am. St. Rep. 346 (property not in state).

[4] Porter & B. Hardware Co. v. Perdue, 105 Ala. 293, 16 So. 713, 53 Am. St. Rep. 124 (garnishment of municipal corporation); Merwin v. Chicago, 45 Ill. 133, 92 Am. Dec. 204; Pugh v. Jones, 134 Iowa, 746, 112 N. W. 225, 11 L.R.A.(N.S.) 706, 120 Am. St. Rep. 451, 13 Ann. Cas. 499; Orlopp v. Schueller, 72 Ohio St. 41, 73 N. E. 1012, 106 Am. St. Rep. 583, 2 Ann. Cas. 919.

[5] Parker, Peebles & Knox v. El. Saieh, 107 Conn. 545, 141 A. 884, 59 A.L.R. 1424; Jax Ice & Cold Storage Co. v. South Florida Farms Co. 91 Fla. 593, 109 So. 212, 48 A.L.R. 957; Sanders v. Herndon, 122 Ky. 760, 93 S. W. 14, 5 L.R.A.(N.S.) 1072, 121 Am. St. Rep. 493; Humphrey v. Midkiff, 122 La. 939, 48 So. 331, 20 L.R.A.(N.S.) 912; White v. Bird, 20 La. Ann. 188, 96 Am. Dec. 393; Pitts v. Mower, 18 Me. 361, 36 Am. Dec. 727; Boyd v. Chesapeake & O. Canal Co. 17 Md. 195, 79 Am. Dec. 646; Cockey v. Leister, 12 Md. 124, 71 Am. Dec. 588; Drake v. Lake Shore & M. S. R. Co. 69 Mich. 168, 37 N. W. 70, 13 Am. St. Rep. 382; Pitzl v. Winter, 96 Minn. 499, 105 N. W. 673, 5 L.R.A.(N.S.) 1009: Dodd v. Brott, 1 Minn. 270, Gil. 205, 66 Am. Dec. 541; Webb v. Miller, 24 Miss. 638, 57 Am. Dec. 189; Anderson v. Wanzer, 5 How. (Miss.) 587, 37 Am. Dec. 170; Tillinghast v. Johnson, 34 R. I. 136, 82 A. 788, 41 L.R.A. (N.S.) 764, Ann. Cas. 1914A, 960; Black Hills Teleg. & Teleph. Co. v. Mitchell, 11 S. D. 615, 79 N. W. 999, 74 Am. St. Rep. 830; Keating v. J. Stone & Sons Livestock Co. 83 Tex. 467, 18 S. W. 797, 29 Am. St. Rep. 670; Bassett v. Garthwaite, 22 Tex. 230, 75 Am. Dec. 257; Baltimore & O. R. Co. v. Gallahue, 12 Gratt. (Va.) 655, 65 Am. Dec. 254; Hallock v. National Bank (Hallock v. National Body & Mfg. Co.) 110 Wash. 737, 188 P. 479, 10 A.L.R. 737; Pennsylvania R. Co. v. Rogers, 52 W. Va. 450, 44 S. E. 300, 62 L.R.A. 178; Rock v. Collins, 99 Wis. 630, 75 N. W. 426, 67 Am. St. Rep. 885.

In New York the Civil Practice Act provides for the bringing of actions to collect attached claims and to obtain possession of personal property and of actions in the nature of creditors' suits to discover assets of the debtor. It also provides that a third person may be compelled to give a certificate as to any debts he owes the defendant, or any property of the defendant which he has in his possession. 7 Carmody, N. Y. Prac. p. 545.

[6] See infra, § 753.

[7] Parker, Peebles & Knox v. El Saieh, 107 Conn. 545, 141 A. 884, 59 A.L.R. 1424.

The Pennsylvania practice is to commence the disclosure proceedings by such a writ, even in cases where its use is not

b. Interrogatories

§ 753. Generally.—Provision is generally made, by statute, whereby the plaintiff in garnishment proceedings is required to file written interrogatories which he desires to have answered by the garnishee, or it is required that copies of the same be delivered to the garnishee.[8] The practice in some jurisdictions is to incorporate the interrogatories in the writ or warrant.[9]

c. Answer or Disclosure of Garnishee

§ 754. Generally.—Statutory provisions with respect to the answer or disclosure by the garnishee vary greatly. In some jurisdictions the garnishee may be examined orally; in others, he is required to make his disclosure in writing, by means of an answer. Such answer is governed by the general rules of pleading,[10] and may be amended as in the case of other pleadings.[11] It is recognized that the answer of the garnishee may be supplemented by evidence touching his possession of property of, or his indebtedness to, the defendant,[12] and that he may introduce evidence other than his own for the purpose of corroborating and explaining facts additional to those disclosed by him.[13]

§ 755. Verification.—The general rule is that statutory requirements as to the verification of pleadings apply to the verification of the answer or disclosure of the garnishee in garnishment proceedings.[14]

§ 756. Duty of Garnishee to Answer Interrogatories.—It is the duty of a garnishee to answer truly the proper interrogatories of the garnishor, or at least to reply that he need not make the disclosure sought, stating reasons why he is not obligated so to do.[15] Thus, he may be excused from disclosure

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strictly necessary. See Standard Pa. Prac. Vol. 10.

Upon scire facias to enforce a judgment in a garnishment proceeding, the question is open as to the existence of a debt subject to execution, and also the rights of other claimants to the fund, including those of an assignee in bankruptcy. Parker, Peebles & Knox v. El Saieh, 107 Conn. 545, 141 A. 884, 59 A.L.R. 1424.

[8] Sanders v. Herndon, 122 Ky. 760, 93 S. W. 14, 5 L.R.A.(N.S.) 1072, 121 Am. St. Rep. 493.

[9] **In Texas** the statute sets out the general interrogatories that are to be incorporated in the writ, and it seems that additional specific interrogatories may be added. See 20 Texas Jur. pp. 785, 786.

[10] Anderson v. Wanzer, 5 How. (Miss.) 587, 37 Am. Dec. 170; Bassett v. Garthwaite, 22 Tex. 230, 73 Am. Dec. 257; Baltimore & O. R. Co. v. Gallahue, 12 Gratt. (Va.) 655, 65 Am. Dec. 254; Hallock v. National Bank (Hallock v. National Body & Mfg. Co.) 110 Wash. 385, 188 P. 479, 10 A.L.R. 737; Rock v. Collins, 99 Wis. 630, 75 N. W. 426, 67 Am. St. Rep. 885.

[11] Webb v. Miller, 24 Miss. 638, 57 Am. Dec. 189; Rock v. Collins, 99 Wis. 630, 75 N. W. 426, 67 Am. St. Rep. 885.

A garnishee who in his original answer denies all liability may, at the close of the testimony at the trial, be permitted to amend his answer so as to admit possession of certain property under a chattel mortgage, and that he holds a conveyance of other property as security for a debt. Rock v. Collins, 99 Wis. 630, 75 N. W. 426, 67 Am. St. Rep. 885.

[12] Drake v. Lake Shore & M. S. R. Co. 69 Mich. 168, 37 N. W. 70, 13 Am. St. Rep. 382.

[13] Pitzl v. Winter, 96 Minn. 499, 105 N. W. 673, 5 L.R.A.(N.S.) 1009.

[14] Hallock v. National Bank (Hallock v. National Body & Mfg. Co.) 110 Wash. 385, 188 P. 479, 10 A.L.R. 737; Rock v. Collins, 99 Wis. 630, 75 N. W. 426, 67 Am. St. Rep. 885.

If an amended answer of a garnishee is not verified, its want of verification is waived by failing to object thereto. Rock v. Collins, 99 Wis. 630, 75 N. W. 426, 67 Am. St. Rep. 885.

Verification in the form usual for complaints and answers is sufficient to satisfy a statutory provision that an answer in garnishment proceedings must be under oath, in writing, and signed by the garnishee. Hallock v. National Bank (Hallock v. National Body & Mfg. Co.) 110 Wash. 385, 188 P. 479, 10 A.L.R. 737.

[15] Jax Ice & Cold Storage Co. v. South Florida Farms Co. 91 Fla. 593, 109 So. 212, 48 A.L.R. 957; White v. Bird, 20 La. Ann. 188, 96 Am. Dec. 393; Humphrey v. Midkiff, 122 La. 939, 48 So. 331, 20 L.R.A.(N.S.) 912; Dodd v. Brott, 1 Minn. 270, Gil. 205, 66 Am. Dec. 541; Keating v. J. Stone & Sons Live Stock Co. 83 Tex. 467, 18 S. W. 797, 29 Am. St. Rep. 670; Pennsylvania R. Co. v. Rogers, 52 W. Va. 450, 44 S. E. 300, 62 L.R.A. 178.

A garnishee cannot be penalized for false

by declaring on oath that he cannot answer without disclosing matters which are privileged.[16] If he denies the existence of liability when in fact it does exist, and subjects himself to the danger of liability to the garnishing creditor on that issue, the garnishee cannot complain of the embarrassment produced by his own course of action. The situation affords no ground for relief in equity.[17] Since the garnishee is thus bound to answer as to property of, or debts owing to, the defendant named in the process, in his possession, such answer cannot be regarded as merely voluntary.[18]

§ 757. Disclosure of Assets of Defendant.—The garnishee must, in answer to the interrogatories of the plaintiff, disclose the assets of the defendant in his possession, describing them sufficiently to identify them.[19] For example, when corporate shares are garnished, the corporation, in its answer, should state the number of shares held by the garnishee.[20] Likewise, a garnishee is under obligation to disclose, so far as he is able, the contents of a safe-deposit box garnished in his possession.[1]

§ 758. Disclosure of Defenses to Garnishment.—A disclosure or answer of the garnishee in garnishment may contain any defense which the garnishee desires to plead, and may set up a defense which will serve as an excuse for not making full disclosure. For example, he may answer merely by showing that the fund in question is not subject to the control of the court.[2] Indeed, it is necessary for a garnishee thus to plead his defenses in his answer or disclosure in order to avail himself of the same and to execute his duty in protecting the interests of the defendant.[3] Thus, in order that a garnishee indebted upon a promissory note may avail himself of the defense that it is subject to be transferred before maturity to a bona fide holder for value, without notice, it must affirmatively be disclosed by his answer that the note was negotiable.[4] The defenses of a garnishee are discussed generally in the following sections.[5]

d. COMPELLING, AND WAIVER OF RIGHT TO HAVE, DISCLOSURE

§ 759. Compelling Garnishee to Answer.—In some states it is provided that if a garnishee fails to appear and answer, the plaintiff may proceed against him in an action in his own name. The only effect of the garnishee's default in such cases is to lay the foundation for an action wherein his rights must be

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answers made to interrogatories regarding the amount of salary paid, and the amount of his indebtedness to a judgment debtor, by the rendering of a judgment for a larger amount than that due at the date of service thereof, since unearned salary cannot be reached by anticipation through process of garnishment. Humphrey v. Midkiff, 122 La. 939, 48 So. 331, 20 L.R.A.(N.S.) 912.

[16] White v. Bird, 20 La. Ann. 188, 96 Am. Dec. 393.

[17] Jax Ice & Cold Storage Co. v. South Florida Farms Co. 91 Fla. 593, 109 So. 212, 48 A.L.R. 957.

[18] Dodd v. Brott, 1 Minn. 270, Gil. 205, 66 Am. Dec. 541.

[19] Keating v. J. Stone & Sons Live Stock Co. 83 Tex. 467, 18 S. W. 797, 29 Am. St. Rep. 670.

Generally, as to duty to disclose adverse claims to garnished property, see supra, § 689.

[20] Keating v. J. Stone & Sons Live Stock Co. 83 Tex. 467, 18 S. W. 797, 29 Am. St. Rep. 670.

[1] Annotation: 11 A.L.R. 225, s. 19 A.L.R. 863, and 39 A.L.R. 1215.

Generally, as to attachment or garnishment of the contents of safe-deposit boxes and measures to reach the same, see Vol. 4, p. 659, § 172.

[2] Cockey v. Leister, 12 Md. 124, 71 Am. Dec. 588.

[3] Annotation: L.R.A.1918C, 759.

As to duty of garnishee to defend garnishment and protect interests of defendant, see supra, §§ 682 et seq.

[4] Annotation: L.R.A.1918C, 759.

Generally, as to attachment of negotiable instruments, see Vol. 4, p. 721, §§ 259 et seq.

[5] See infra, §§ 770 et seq.

determined. The garnishee is not precluded from setting up any defense which he may have.[6]

§ 760. Waiver of Right to Have Disclosure.—The creditor may waive his right to have interrogatories filed by him answered by the garnishee.[7]

e. DISCLOSURE AS EVIDENCE, AND CONCLUSIVENESS

§ 761. Generally.—The answer of the garnishee is admissible in evidence, at least between those who are parties to the suit,[8] but it has been held not to be evidence against interveners in a contest between the latter and the garnishors.[9] Not only is the answer evidence between the parties, but admissions in such answer are binding on the garnishee.[10] The answer and admission of one partner upon process or garnishment, where both have been regularly served with process, will bind the other.[11] But the answer is not conclusive against the garnishor, and in most jurisdictions he may controvert its allegations,[12] though in some states the answer of the garnishee is taken as true[13] until it has been disproved or controverted.[14] A disclosure in the form of a pleading, filed by an insurance company in a garnishment proceeding to reach the proceeds of a policy held by an insured, cannot be considered on a plea to the jurisdiction of the court, where the statute absolves a garnishee from the necessity of an appearance if it admits or denies assets, and provides for examination by the court in other cases as to the existence of assets.[15]

7. TRAVERSING DISCLOSURE; EXCEPTIONS BY DEFENDANT; AND GARNISHEE'S REPLY

§ 762. Generally.—It is recognized that the plaintiff or garnishor may contest the answer of the garnishee, specifying in what particulars he believes it to be untrue.[16] If the answer of the garnishee in the disclosure or the traverse thereof is regarded as the original pleading in the garnishment rather than the petition or affidavit, the traverse of the plaintiff should also state the grounds upon which a recovery is claimed, and the garnishee's reply to such denial should complete the issue.[17] A rule upon the garnishee to plead, and his plea in answer thereto, take the place of this procedure in some jurisdictions.[18] In many jurisdictions the denial of the plaintiff takes the form of an affidavit.[19] The right of a debtor to refuse to recognize an assignment of a part of the debt is personal to him [20] and cannot be claimed by one attaching or garnishing such debt in traversing the disclosure in the garnishment.[1] It has been held that if the plaintiff asserts that an assignment of the attached or garnished property set up as a defense to his garnishment is fraudulent as to him, the court may determine the issue.[2]

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[6] Tillinghast v. Johnson, 34 R. I. 136, 82 A. 788, 41 L.R.A.(N.S.) 764, Ann. Cas. 1914A, 960; Black Hills Teleg. & Teleph. Co. v. Mitchell, 11 S. D. 615, 79 N. W. 999, 74 Am. St. Rep. 830.

If a garnishee refuses or neglects to render an account of the property in his possession belonging to the defendant, he should be charged, not by reason of his possession of such property, but because of such refusal or neglect. Tillinghast v. Johnson, 34 R. I. 136, 82 A. 788, 41 L.R.A. (N.S.) 764, Ann. Cas. 1914A, 960.

See also infra, § 813, as to compelling disclosure after judgment against the garnishee, in aid of execution of such judgment.

[7] Boyd v. Chesapeake & O. Canal Co. 17 Md. 195, 79 Am. Dec. 646.

[8] Pitts v. Mower, 18 Me. 361, 36 Am. Dec. 727; Bassett v. Garthwaite, 22 Tex. 230, 73 Am. Dec. 257.

The answer is to be looked to by the court in determining the extent of the garnishee's liability, the natural import of the entire answer being taken. It is admissible in evidence as between the plaintiff and the garnishee where the original action and the garnishment proceedings are tried at the same time. The answer is evidence against the garnishee, and, where controverted by the plaintiff, is evidence against him until overcome by competent evidence. Bassett v. Garthwaite, 22 Tex. 230, 73 Am. Dec. 257.

[9] Central Loan & T. Co. v. Campbell Commission Co. 173 U. S. 84, 43 L. ed. 623, 19 S. Ct. 346; Bassett v. Garthwaite, 22 Tex. 230, 73 Am. Dec. 257.

[10] Mann v. Buford, 3 Ala. 312, 37 Am. Dec. 691.

[11] Anderson v. Wanzer, 5 How. (Miss.) 587, 37 Am. Dec. 170.

[12] Serviss v. Washtenaw Circuit Judge, 116 Mich. 101, 74 N. W. 310, 72 Am. St. Rep. 507; Adlum v. Yard, 1 Rawle (Pa.) 163, 18 Am. Dec. 608.

Generally, as to traversing disclosure, see infra, § 762.

[13] Annotation: 100 Am. Dec. 511.

[14] Pierce v. Carleton, 12 Ill. 358, 54 Am. Dec. 405; Walters v. Washington Ins. Co. 1 Iowa, 404, 63 Am. Dec. 451.

[15] Parker, Peebles & Knox v. El Saieh, 107 Conn. 545, 141 A. 884, 59 A.L.R. 1424.

[16] Pierce v. Carleton, 12 Ill. 358, 54 Am. Dec. 405; Walters v. Washington Ins. Co. 1 Iowa, 404, 63 Am. Dec. 451; Serviss v. Washtenaw Circuit Judge, 116 Mich. 101, 74 N. W. 310, 72 Am. St. Rep. 507; Adlum v. Yard, 1 Rawle (Pa.) 163, 18 Am. Dec. 608; Phenix Ins. Co. v. Willis, 70 Tex. 12, 6 S. W. 825, 8 Am. St. Rep. 566; McDaniels v. J. J. Connelly Shoe Co. 30 Wash. 549, 71 P. 37, 60 L.R.A. 947, 94 Am. St. Rep. 889.

§ 763. Effect of Failure to Take Issue to Disclosure.—If issue is not taken on the statements of the garnishee, such statements must be taken as admitted,[3] and the answer of the garnishee is then the sole test of his indebtedness or liability.[4] However, the appointment of a garnishee as receiver, with the consent of all parties then in the case, before the expiration of the time for taking issue on his answer, precludes the necessity of traversing the statements in his answer, which allege his individual right to the possession of the property.[5]

§ 764. Exceptions by Defendant.—It is generally recognized that the principal debtor, whose interest is affected by garnishment proceeding, may take exception to the disclosure of the garnishee and show any good cause why his debts and contracts should not suffer interference.[6]

8. Trial and Evidence

§ 765. Generally.—It has already been noted how the pleadings in garnishment frame an issue for trial.[7] In general, a trial in garnishment is governed by the rules and principles governing trials generally in the particular jurisdiction.[8] Thus, the general provisions with regard to waiver of trial by jury,[9] setting the cause for trial, continuances, and the like apply to such a trial.[10] So also, the verdict of the jury is regarded as binding,[11] or as open to objection as in other civil actions.[12]

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[17] Holker v. Hennessey, 141 Mo. 527, 42 S. W. 1090, 39 L.R.A. 165, 64 Am. St. Rep. 524.

[18] See Standard Pa. Prac. Vol. 10.

[19] Cottingham v. Greely Barnham Grocery Co. 129 Ala. 200, 30 So. 560, 87 Am. St. Rep. 58; McDaniels v. J. J. Connelly Shoe Co. 30 Wash. 549, 71 P. 37, 60 L.R.A. 947, 94 Am. St. Rep. 889.

Affidavits controverting a denial by the garnishee of possession of goods of the debtor, under a statute permitting such affidavits, stating reasons for the belief that the answer is incorrect, and the particulars wherein it is so, are sufficient to raise an issue, where they state that the plaintiff believes with good reason that the answer is incorrect, because the garnishee took into his possession the debtor's stock of goods and attempted to acquire title thereto without complying with the terms of the statute requiring the purchaser of a stock of goods to ascertain the creditors of the seller and have the purchase price applied to their claims. McDaniels v. J. J. Connelly Shoe Co 30 Wash. 549, 71 P. 37, 60 L.R.A. 947, 94 Am. St. Rep. 889.

[20] See Assignments, Vol. 4, p. 279, § 65.

[1] Burditt v. Porter, 63 Vt. 296, 21 A. 955, 25 Am. St. Rep. 763.

Annotation: 2 Am. St. Rep. 471.

[2] People's Bank v. Smith, 75 Miss. 753, 23 So. 428, 65 Am. St. Rep. 618.

See infra, §§ 766 et seq. as to issues triable to court or jury.

[3] Central Loan & T. Co. v. Campbell Commission Co. 173 U. S. 84, 43 L. ed. 623, 19 S. Ct. 346; Davis v. Pawlette, 3 Wis. 300, 62 Am. Dec. 690.

The failure to traverse the answer of a garnishee, which, by statute, makes it conclusive of the truth of the facts therein stated, does not make it conclusive as to statements made by an interplea, wholly independent and distinct from the garnishment, setting up his individual right to the possession of the property. Central Loan & T. Co. v. Campbell Commission Co. 173 U. S. 84, 43 L. ed. 623, 19 S. Ct. 346.

[4] Walters v. Washington Ins. Co. 1 Iowa, 404, 63 Am. Dec. 451; McLean v. Sworts, 69 Minn. 128, 71 N. W. 925, 65 Am. St. Rep. 556.

[5] Central Loan & T. Co. v. Campbell Commission Co. 173 U. S. 84, 43 L. ed. 623, 19 S. Ct. 346.

[6] Hurlburt v. Hicks, 17 Vt. 193, 44 Am. Dec. 329.

[7] Generally, as to pleadings, see supra, § 706; as to the traverse of the garnishment disclosure and the reply of the garnishee thereto, see supra, § 762.

[8] Ruble v. Saretzke, 63 N. D. 631, 249 N. W. 716, 88 A.L.R. 1148.

See Trial [Also 26 R. C. L. p. 1008].

[9] Brenizer v. Supreme Council, R. A. 141

§ 766. Issues Triable to Court or Jury.—Since garnishment is very generally regulated by statute, the governing statute should always be consulted in determining whether an issue is triable to a court or to a jury. Even where the statute does not expressly provide for the manner of trying an issue, its provisions as a whole may bear on the determination of the proper procedure.[13] However, the general rule is that questions of law are determinable by the court and questions of fact are triable by jury.[14]

§ 767. —In Absence of Statutory Provision.—Where the statute does not throw any light on the question of what garnishment issues are triable by jury, the proceeding has been considered in a number of cases to be a common-law proceeding in which the parties are entitled to a jury trial on questions of fact. In some cases, however, the right to a jury on issues in garnishment cases is denied, the garnishment proceedings being viewed as equitable proceedings in the nature of a creditors' bill, and hence involving no constitutional right to trial by jury on issues of fact arising in such proceedings.[15]

§ 768. —Under Statutory Provision.—Statutory provisions in the different jurisdictions vary widely in their provisions on this question. Some provide that garnishment issues shall be tried as ordinary issues between plaintiff and defendant,[16] while others either expressly make issues of fact determinable by the jury, or are construed as mandatory in that regard.[17] Some statutes leave it to the option of the parties to demand a jury trial of garnishment issues.[18]

N. C. 409, 53 S. E. 835, 6 L.R.A.(N.S.) 235. See Jury [Also 16 R. C. L. p. 176].

[10] Cluett v. Rosenthal, 100 Mich. 193, 58 N. W. 1009, 43 Am. St. Rep. 446. See Continuances [Also 6 R. C. L. p. 542]; Trial [Also 26 R. C. L. p. 1008].

[11] Marx v. Hart, 166 Mo. 503, 66 S. W. 260, 89 Am. St. Rep. 715.

[12] Baltimore & O. R. Co. v. Gallahue, 12 Gratt. (Va.) 655, 65 Am. Dec. 254. See Trial [Also 26 R. C. L. p. 1008].

[13] Annotation: 88 A.L.R. 1151.

As to right to jury trial to assess allowance to garnishee for expenses, see infra, § 814.

[14] Wildner v. Ferguson, 42 Minn. 112, 43 N. W. 794, 6 L.R.A. 338, 18 Am. St. Rep. 495.

[15] Annotation: 88 A.L.R. 1153.

Generally, as to conflict of opinion upon legal or equitable character of garnishment, see Vol. 4, p. 554, § 5.

[16] Ruble v. Saretzke, 63 N. D. 631, 249 N. W. 716, 88 A.L.R. 1148; Adams v. Filer, 7 Wis. 306, 73 Am. Dec. 410.

Annotation: 88 A.L.R. 1151.

A statute of this type providing that in the event of an answer of a garnishee being controverted, an issue may be joined which shall be tried in the usual manner, has been construed to entitle either party in such a case to a jury trial. Annotation: 88 A.L.R. 1151.

In several cases under statutes of this type, the question has arisen in connection with the determination of whether or not the findings of the trial court on issues arising in garnishment are triable de novo on appeal. It has been held that where the garnishment statute provides that all provisions of law relating to proceedings in civil actions shall govern such proceedings, an issue which is triable to a jury in a civil action is also triable to a jury in a garnishment action, and under this view the findings of the trial court had the status of findings of a jury, and were not triable anew on appeal. Ruble v. Saretzke, 63 N. D. 631, 249 N. W. 716, 88 A.L.R. 1148. In Staton v. Vernon, 209 Iowa, 1123, 229 N. W. 763, 67 A.L.R. 1200, it was held, under a statute providing that issues in garnishment are to be tried in the usual manner, that the findings of the trial court upon questions of fact in garnishment proceedings will be given the same weight as the findings of the jury, and therefore are not triable de novo on appeal.

[17] **Under such a statute** the issue upon which demand for jury trial has been made must be a proper issue, that is, an issue of fact. It has been held that such a provision for a jury trial, however, does not apply in a scire facias proceeding to determine the amount which shall be paid by the trustee in an action begun by trustee process. Annotation: 88 A.L.R. 1152.

[18] **Under a statute of this type** it was held that where the garnishees, after answering denying indebtedness, failed to appear and support the truth of their answer, the court proceeded properly in trying the issue of indebtedness vel non before the jury. Annotation: 88 A.L.R. 1152.

and still others provide that upon disclosure the creditor may move the court that the question whether such person is trustee or not be tried by the jury.[19] Some statutes provide that if the garnishee makes any legal or equitable claim to the amount in his hands, the controversy must be determined by action, so that the constitutional right of jury trial can be availed of, and under some garnishment statutes the court is held to have no authority to try an issue in garnishment, but may authorize the judgment creditor to institute an independent proceeding and forbid a transfer of interest until such action shall be commenced and prosecuted to judgment.[20]

§ 769. **Evidence.**[1]—The general rules and principles governing the admissibility of evidence apply to garnishment proceedings.[2] Generally the garnishee's answer is evidence against him, and is presumptively conclusive. It is conclusive respecting the indebtedness when no statute provides otherwise, and, until overweighed by competent testimony, is evidence against the plaintiff.[3]

The general rule is that elements of proof by which the defense of double liability is established need not be alleged in the plea itself.[4] Thus, the view has been taken that a garnishee may introduce evidence that he has paid the debt sought to be garnished, although he did not specially plead such payment as a defense.[5] After the overruling of a demurrer to the defense of double liability, plaintiff's admission concerning the danger of such double liability is relevant and admissible.[6]

9. DEFENSES OF GARNISHEE

a. IN GENERAL

§ 770. **Generally.**—A garnishee must be allowed the rights of any other

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Despite a statutory provision for optional jury trial, it is error to submit to the jury the issue of the garnishee's indebtedness, without testimony of a substantial character upon which the jury might predicate a finding that the garnishee owed the principal defendant at the date of the service of the writ. Annotation: 88 A.L.R. 1152.

[19] **Such a provision has been held to apply** to a proceeding which had been appealed from a justice's court to the court of common pleas. Likewise, under this provision a motion for stay of proceedings has been held to effectuate such an election. Annotation: 88 A.L.R. 1152.

[20] Annotation: 88 A.L.R. 1153.

[1] As to the admissibility and conclusiveness of the return of the writ of garnishment at the trial of the garnishment issue, see supra, § 731.

[2] See EVIDENCE [Also 10 R. C. L. p. 847]. In Putnam, Aldrich & Putnam v. McCormick, 159 Iowa, 702, 140 N. W. 886, L.R.A.1918B, 433, Ann. Cas. 1915D, 31, the evidence was held to justify a finding that a third person was not the purchaser of personalty in the possession of a garnishee answering that he had in his possession property of the defendant.

One garnished, in an action for damages for procuring the acceptance of drafts by fraud, for the proceeds of such drafts as indorsee of the defendant, and claiming title to them as a bona fide holder, cannot read in evidence statements in the defendant's answer tending to show his bona fides. J. E. Latham Co. v. Rogers, 170 N. C. 239, 87 S. E. 34, 1 A.L.R. 11.

In J. E. Latham Co. v. Rogers, 170 N. C. 239, 87 S. E. 34, 1 A.L.R. 11, an action for damages for fraud in procuring the acceptance of certain drafts, a bank to which the defendant had indorsed the drafts was made a garnishee, and became an intervener in the action. The issue of fraud was found against the defendant, and the garnishee contended that it had paid him full value for the drafts and was without knowledge of the fraud. In support of the contention the court allowed the garnishee to introduce in evidence certain paragraphs of the defendant's answer, although the whole contest in respect to such issue was between the plaintiff and the garnishee. On appeal it was held that there had been error in admitting such evidence. and a new trial was ordered.

That the principal defendants are the consignees named in the bill of lading issued by the trustee, a carrier, is some evidence that title to the goods is in the defendants so as to charge the carrier with knowledge of their ownership. Rosenbush v. Bernheimer, 211 Mass. 146, 97 N. E. 984, Ann. Cas. 1913A, 1317.

[3] Bassett v. Garthwaite, 22 Tex. 230, 73 Am. Dec. 257.

[4] Parker, Peebles & Knox v. National F. Ins. Co. 111 Conn. 383, 150 A. 313, 69 A.L.R. 599; Robertson v. Robertson, 37 Or. 339, 62 P. 377, 82 Am. St. Rep. 756.

[5] Robertson v. Robertson, 37 Or. 339, 62 P. 377, 82 Am. St. Rep. 756.

[6] Parker, Peebles & Knox v. National F. Ins. Co. 111 Conn. 383, 150 A. 313, 59 A.L.R. 599.

party in court to make such defense as the law allows him against the party seeking to charge him with a liability.[7] When a garnishment suit is brought against a party, it is his duty promptly to defend it, if he has any defense to make, at the proper time, and if he fails to do so and judgment is rendered against him in consequence of his negligence, a court of equity has no power to relieve him, although it might be of the opinion that the original judgment was erroneous.[8] The garnishee occupies the same position as if sued by the principal debtor, and if the defense would not be open in a suit by the latter, it is not a defense in the garnishment proceedings.[9] A garnishee, as well as a defendant, may, by plea in abatement, take advantage of a plaintiff's incapacity to sue.[10]

§ 771. Estoppel against Garnishee to Make Defenses.—The general rules of estoppel against parties to a suit apply to estoppel against a garnishor.[11] Nevertheless, it has been held that although the plaintiff was induced by the garnishee therein to begin the action and to garnish him, solely on the faith of representations made by the latter that he was indebted to the defendant in the action, and that he held funds of the defendant liable to garnishment, thus leading the plaintiff to incur expense and trouble, yet the garnishee is not thereby estopped from denying his indebtedness to the defendant, and he is at most liable to the plaintiff for the actual expenses incurred by him in reliance upon the representations.[12] To allow full recovery in such a case would produce a greater injury than it was intended to prevent.[13]

b. Particular Defenses

§ 772. Generally.—As a rule, the garnishee may avail himself of every defense which he might urge in an action brought against him by the defendant debtor,[14] including the defense that the claim against him is barred by the statute of limitations.[15]

§ 773. Merits of Plaintiff's Claim against Defendant.—The garnishee cannot, in the garnishment proceeding proper, set up a lack of merits in the main action.[16] Accordingly, it has been held that a garnishee cannot set up usury in the indebtedness for which the judgment was rendered against the principal defendants, or otherwise impeach the consideration of such judgment.[17]

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[7] Milwaukee & N. R. Co. v. Brooks Locomotive Works, 121 U. S. 430, 30 L. ed. 995, 7 S. Ct. 1094; Webb v. Miller, 24 Miss. 638, 57 Am. Dec. 189.

[8] Stroup v. Sullivan, 2 Ga. 275, 46 Am. Dec. 389.

As to duty of garnishee to defendant, see supra, §§ 680 et seq.

[9] Nordstrom v. Corona City Water Co. 155 Cal. 206, 100 P. 242, 132 Am. St. Rep. 81.

[10] Shivers v. Wilson, 5 Harr. & J. (Md.) 130, 9 Am. Dec. 497.

[11] See ESTOPPEL [Also 10 R. C. L. p. 669].

[12] Lewis v. Prenatt, 24 Ind. 98, 87 Am. Dec. 321; Henderson v. McMahill, 75 Iowa, 217, 39 N. W. 276, 9 Am. St. Rep. 472; Phillipsburg Bank v. Fulmer, 31 N. J. L. 52, 86 Am. Dec. 193.

[13] Phillipsburg Bank v. Fulmer, 31 N. J. L. 52, 86 Am. Dec. 193.

[14] Milwaukee & N. R. Co. v. Brooks Locomotive Works, 121 U. S. 430, 30 L. ed. 995, 7 S. Ct. 1094; Schuler v. Israel, 120 U. S. 506, 30 L. ed. 707, 7 S. Ct. 648; McLaughlin v. Swann, 18 How. (U. S.) 217, 15 L. ed. 357; Wanzer v. Truly, 17 How. (U. S.) 584, 15 L. ed. 216; Mathis v. Clark, 9 S. C. L. (2 Mill, Const.) 456, 12 Am. Dec. 688.

Annotation: 13 Am. Dec. 341.

A creditor attaching a debt by garnishment takes it subject to all equitable defenses. Wanzer v. Truly, 17 How. (U. S.) 584, 15 L. ed. 216.

A garnishee has a right to set up any defense against attachment process which he could have set up against the debtor in the principal action, and if the debtor is insolvent and owes the garnishee on a note not due, for which he has not sufficient security, he is not bound to risk the loss of his debt in answer to the garnishee process. Schuler v. Israel, 120 U. S. 560, 30 L. ed. 707, 7 S. Ct. 648.

[15] Wilson v. Koontz, 7 Cranch (U. S.) 202, 3 L. ed. 315; Tiger v. Rogers Cotton Cleaner & Gin Co. 96 Ark. 1, 130 S. W. 585, 30 L.R.A.(N.S.) 694, Ann. Cas. 1912B, 488; Clyne v. Easton, 148 Cal. 287, 83 P. 36, 113 Am. St. Rep. 253.

[16] Sutherland Bros. v. Stanley, 250 Ky. 417, 63 S. W. (2d) 487, citing R. C. L.

§ 774. General Denial of Indebtedness to, or Possession of Effects of, Defendant.—A general denial of the garnishor's claim that the garnishee is indebted to the defendant or that he has in his possession, or had at the date of the garnishment, effects of the defendant may, of course, be pleaded as a defense to a garnishment; it is the main issue in the garnishment,[18] and under the rule that a garnishment is not binding unless at the time of the service of the writ on the garnishee he had in his possession some property of, or was indebted to, the defendant,[19] it is sufficient for the garnishee to answer that at the time of such service he had no property of, and was not indebted to, the defendant.[20] The view has been taken that if the goods in question have been taken from the garnishee by a wrongdoer, he has no defense on this ground, though he has good reason for asking for a delay in the proceedings until damages for the taking can be recovered.[21] A trustee carrier cannot assert its right to possess the attached goods for the purpose of earning freight, as a ground of discharge, where the only ground alleged in the answer for not being charged as trustee is that the property is not chargeable because a subject of interstate commerce.[1]

§ 775. Immaturity of Debt to Defendant.—The matter of whether or not the immaturity of the obligation of the garnishee to the defendant is a good defense to the garnishment depends upon whether the particular obligation in question is, under local statutes and practice, attachable or garnishable, the general rule being, however, that it is garnishable where it is certain of maturity at a future time, and that it is not attachable or garnishable where its maturity in the future is speculative and uncertain.[2] However, it has been held broadly that it is a defense to a garnishment that the account is open between the defendant and the garnishee, at least with respect to a trustee's account.[3]

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[17] Wabash R. Co. v. Dougan, 142 Ill. 248, 31 N. E. 594, 34 Am. St. Rep. 74.

[18] Simpson v. Dall, 3 Wall. (U. S.) 460, 18 L. ed. 265; Gunn v. Howell, 35 Ala. 144, 73 Am. Dec. 484; Robertson v. Robertson, 37 Or. 339, 62 P. 377, 82 Am. St. Rep. 756; National Park Bank v. Levy Bros. 17 R. I. 746, 24 A. 777, 19 L.R.A. 475; Acheson-Harder Co. v. Western Wholesale Notions Co. 72 Utah, 323, 269 P. 1032, 60 A.L.R. 881; Larsen v. Allan Line S. S. Co. 45 Wash. 406, 88 P. 753, 9 L.R.A.(N.S.) 1258, 122 Am. St. Rep. 926.

Since a bank, although having many branches and places of business, is, nevertheless, only a single institution, and the bank is the only debtor of a depositor in any of the branches, it has been held, in garnishment proceedings to require payment by a branch bank of money which the debtor was alleged to have there on deposit, that it was a defense that, the debtor having failed to obey a decree for the payment of money, a writ of sequestration was issued, notice of which had been given by the sequestrators to the bank at its head office, and that thereupon, at the request of such principal office, the money on deposit in the branch bank was remitted to the principal office and paid over to the sequestrators, after which the garnishment order in question was served upon the branch bank. Annotation: 50 A.L.R. 1354.

[19] See Vol. 4, p. 649, § 156.

[20] Acheson-Harder Co. v. Western Wholesale Notions Co. 72 Utah, 323, 269 P. 1032, 60 A.L.R. 881.

A judgment against a garnishee cannot be supported by answers to the effect that the principal debtor has placed in the hands of the garnishee certain accounts for collection and has agreed to place certain personal property under his control, followed by a supplemental answer showing that after the date of the garnishment, certain of the accounts had been collected. Ibid.

Such a denial of possession of property or indebtedness to the defendant raises an issue upon which the garnishor and the garnishee may proceed to a trial according to the mode established by local statutes and practice.

[21] Despatch Line v. Bellamy Mfg. Co. 12 N. H. 205, 37 Am. Dec. 203.

[1] Rosenbush v. Bernheimer, 211 Mass. 146, 97 N. E. 984, Ann. Cas. 1913A, 1317.

[2] See Vol. 4, § 192.

[3] The rule that garnishment will not lie to affect funds in the hands of a trustee, before the settlement of his accounts, rests altogether on jurisdictional considerations sufficient for the defense of a trustee as

§ 776. Previous Payment of Debt.—Obviously the garnishee may plead that he has paid the debt due to the principal debtor.[4] Thus, a person garnished in respect of a liability to the defendant on negotiable paper may show that he has paid the amount thereof to the defendant or to a holder who acquired the paper before maturity, but payment to one who did not acquire it until after maturity has been held to be no defense, nor can the garnishee escape liability under the garnishee process by showing that he made payment after service of such process on him.[5] Whether a debt is subject to attachment, garnishment, or trustee process after the debtor has given his creditor a check or has given or accepted some other negotiable instrument for the amount of the debt depends upon whether such act constitutes payment, a question which is beyond the scope of the discussion in this article. Even though a check is given to defeat garnishment, it seems that the defense is complete if the giving of the check constitutes payment.[6]

The view has been taken that under a general denial of indebtedness to the defendant, the garnishee can prove payment of the garnished indebtedness without pleading payment specially.[7] On the other hand, it has been held that payment in garnishment proceedings cannot be shown under a general denial of indebtedness and a plea of payment in an action by the debtor against the garnishee, and that such a defense must be specially pleaded,[8] though at common law it was held that the general issue in assumpsit would let in proof of a previous garnishment and payment thereunder.[9]

§ 777. Defects and Irregularities in Proceedings.—The garnishee cannot urge, as a defense, defects and irregularities which the defendant has waived, at least in so far as only the rights of the defendant are involved, for if the defendant has seen proper to waive them, there is no reason why the garnishee should be allowed to question that in which the defendant has acquiesced.[10] Thus, as a general rule, the garnishee cannot object to mere errors in the

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garnishee, as well as for the protection of the fund in his hands, but it is evident that these are purely matters of defense, of which the trustee should avail himself by motion, pleadings, or proof at some stage of the proceedings, before the final judgment. The trustee is not required to plead these facts specifically, but they should be disclosed to the court by some party to the proceeding before the matter is concluded by a judgment. Groome v. Lewis, 23 Md. 137, 87 Am. Dec. 563.

[4] Gunn v. Howell, 35 Ala. 144, 73 Am. Dec. 484; American Agri. Chemical Co. v. Scrimger, 130 Md. 389, 100 A. 774, L.R.A. 1917F, 394; National Park Bank v. Levy Bros. 17 R. I. 746, 24 A. 777, 19 L.R.A. 475; Larsen v. Allen Line S. S. Co. 45 Wash. 406, 88 P. 753, 9 L.R.A.(N.S.) 1258, 122 Am. St. Rep. 926.

Annotation: L.R.A.1917F, 396; L.R.A. 1918C, 761.

A statute is noted in 20 Texas Jur. p. 885, providing: "It shall be a sufficient answer to any claim of the defendant against the garnishee founded on any indebtedness of such garnishee, or on the possession by him of any effects, or where the garnishee is an incorporated or joint stock company in which the defendant was the owner of shares of stock or other interest therein, for the garnishee to show that such indebtedness was paid, or such effects were delivered, or such shares of stock or other interest in such company were sold under the judgment of the court in accordance with the provisions of this title."

Generally, as to rule that paid indebtedness is not attachable or garnishable, see Vol. 4, p. 673, § 190, p. 676, § 194.

[5] Annotation: L.R.A.1918C, 761.

[6] Larsen v. Allan S. S. Co. 45 Wash. 406, 88 P. 753, 9 L.R.A.(N.S.) 1258, 122 Am. St. Rep. 926.

Annotation: 9 L.R.A.(N.S.) 1258.

[7] Robertson v. Robertson, 37 Or. 339, 62 P. 377, 82 Am. St. Rep. 756.

[8] Walters v. Washington Ins. Co. 1 Iowa, 404, 63 Am. Dec. 451.

[9] Cook v. Field, 3 Ala. 53, 36 Am. Dec. 436; Drew v. Towle, 27 N. H. 412, 59 Am. Dec. 380.

[10] Gunn v. Howell, 35 Ala. 144, 73 Am. Dec. 484; Warthen v. Melton, 132 Ga. 113, 63 S. E. 832, 131 Am. St. Rep. 184; Schneitman v. Noble, 75 Iowa, 120, 39 N. W. 224, 9 Am. St. Rep. 467; Hanna v. Lauring, 10 Mart. (La.) 568, 13 Am. Dec. 339; Mares v. Schuth, 38 N. M. 101, 28 P. (2d) 527, 92 A.L.R. 567; Citizens' Bank & T. Co. v. McCoin, 206 N. C. 272, 173 S. E. 345, citing R. C. L.; Murchison Oil Co. v. Hampton (Tex. Civ. App.) 21 S. W. (2d) 59, citing R. C. L.; Henderson v. Hooper Sugar Co. 65 Utah, 241, 236 P. 239, 45 A.L.R. 637.

Annotation: 100 Am. Dec. 511.

proceedings antecedent to judgment against the defendant unless such errors involve his own rights, which is not usually the case, or are jurisdictional in character.[11] For example, the judgment debtor alone can question the validity of the judgment against him on the ground that the summons in the action in which it was rendered was served by a special officer who had been appointed to make the service without a proper affidavit first having been made.[12] Likewise, it has been said, mere fraud in obtaining the judgment against the debtor is not a defense on the part of the garnishee.[13] However, if the defect is of so serious a character as to make the proceedings void, the garnishee may raise objection on this ground.[14] Indeed, it is said that the garnishee not only may, but must, avail himself of the void character of the judgment as a defense.[15] In accordance with the principles stated in the preceding discussion, a bailee who is garnished for property of a judgment debtor cannot complain of mere irregularities in proceedings leading to an order of sale of the property, as the principal parties or claimants might do; his right of complaint is limited to the court exceeding its jurisdiction or failing to protect him against future attacks by those claiming an interest in, or title to, the property garnished.[16]

§ 778. Exemptions of Defendant.—The general rule is that a garnishee may plead as a defense to the garnishment the exemptions of the defendant from the process.[17] In fact, the duty of one summoned as garnishee to set up or disclose the principal defendant's exemptions has been declared broadly in a number of cases, although the decision in some of these cases is limited by the fact or assumption that the garnishment proceeding was ex parte and the principal defendant was without actual knowledge thereof.[18]

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[11] Gunn v. Howell, 35 Ala. 144, 73 Am. Dec. 484; Schneitman v. Noble, 75 Iowa, 120, 39 N. W. 224, 9 Am. St. Rep. 467; Hanna v. Lauring, 10 Mart. (La.) 568, 13 Am. Dec. 339; Mares v. Schuth, 38 N. M. 101, 28 P. (2d) 527, 92 A.L.R. 567; Illinois C. R. Co. v. Brooks, 90 Tenn. 161, 16 S. W. 77, 25 Am. St. Rep. 673; Murchison Oil Co. v. Hampton (Tex. Civ. App.) 21 S. W. (2d) 59, citing R. C. L.

Annotation: 100 Am. Dec. 511.

A garnishee has no right to complain of errors in the proceedings of the court disposing of the controversy between the plaintiff and the principal defendant which do not go to the jurisdiction of the court to render judgment. Mares v. Schuth, 38 N. M. 101, 28 P. (2d) 527, 92 A.L.R. 567.

[12] Illinois C. R. Co. v. Brooks, 90 Tenn. 161, 16 S. W. 77, 25 Am. St. Rep. 673; Murchison Oil Co. v. Hampton (Tex. Civ. App.) 21 S. W. (2d) 59, citing R. C. L.

[13] Warthen v. Melton, 132 Ga. 113, 63 S. E. 832, 131 Am. St. Rep. 184.

[14] United Collieries v. Martin, 248 Ky. 808, 60 S. W. (2d) 125, 89 A.L.R. 971; Stone v. Magruder, 10 Gill & J. (Md.) 383, 32 Am. Dec. 177; Mares v. Schuth, 38 N. M. 101, 28 P. (2d) 527, 92 A.L.R. 567; Atwood v. Tucker (Atwood v. Roan) 26 N. D. 622, 145 N. W. 587, 51 L.R.A.(N.S.) 597; Murchison Oil Co. v. Hampton (Tex. Civ. App.) 21 S. W. (2d) 59; Henderson v. Hooper Sugar Co. 65 Utah, 241, 236 P. 239, 45 A.L.R. 637.

Annotation: 51 L.R.A.(N.S.) 597; 13 Am. Dec. 341.

A garnishee has the right to raise the question of the validity of the proceeding. United Collieries v. Martin, 248 Ky. 808, 60 S. W. (2d) 125, 89 A.L.R. 971.

[15] Annotation: 13 Am. Dec. 341.

[16] Henderson v. Hooper Sugar Co. 65 Utah, 241, 236 P. 239, 45 A.L.R. 637.

[17] Southern R. Co. v. Fulford, 125 Ga. 103, 54 S. E. 68, 5 Ann. Cas. 168; Czesna v. Lietuva Loan & Sav. Asso. 252 Ill. App. 612, citing R. C. L.; H. & M. Tire Serv. Co. v. Combs, 140 Kan. 35, 34 P. (2d) 943, citing R. C. L.; Missouri P. R. Co. v. Sharitt, 43 Kan. 375, 23 P. 430, 8 L.R.A. 385, 19 Am. St. Rep. 143; Wright v. Chicago, B. & Q. R. Co. 19 Neb. 175, 27 N. W. 90, 56 Am. Rep. 747; Oklahoma Nat. Bank v. Lingo, 131 Okla. 209, 268 P. 257, citing R. C. L.; St. Louis & S. F. R. Co. v. Crews, 51 Okla. 144, 151 P. 879, Ann. Cas. 1918C, 823 (violation of exemption law of other state); Black Hills Teleg. & Teleph. Co. v. Mitchell, 11 S. D. 615, 79 N. W. 999, 74 Am. St. Rep. 830; Clark v. Averill, 31 Vt. 512, 76 Am. Dec. 131.

Annotation: 45 A.L.R. 652.

In Blake v. Alswager, 55 N. D. 776, 215 N. W. 549, 55 A.L.R. 298, it appears that a debtor was adjudicated a bankrupt, and that his entire assets were set aside to him as exempt property. A few days later one of the creditors, the plaintiff in this case, commenced an action against the debtor on her claim, but at that time no attachment was issued. The debtor then filed a petition praying for his discharge in bankruptcy, after which the trial court issued an order staying the proceedings against the debtor. Shortly thereafter the debtor received his discharge in bankruptcy, which he set up as an answer to the action against him. The creditor then caused a warrant of attachment to be issued, and the sheriff levied on the property which had been set aside to the bankrupt as exempt. It was held, the decision of the trial court being reversed, that the plaintiff had no right to seize the defendant's exempt property by warrant of attachment after the defendant's discharge in bankruptcy. Annotation: 55 A.L.R. 303.

It has been held that the failure of the garnishee to answer the garnishment summons does not preclude him from setting up the principal defendant's right of exemption to money garnished, and if he paid it to the defendant after garnishment, he may justify such payment on the ground that the defendant claimed the money to be exempt, where such claim was, in fact, timely made.[19] What property is exempt, and what is the law governing the right to exemptions, are questions outside the scope of this article.[20]

§ 779. Adverse Claim to Garnished Property Generally.—A garnishee may disclose and prove adverse claims to the garnished property,[1] indeed, it is his duty to do so, at least where the adverse claimant is not notified to appear and defend.[2] However, it has been held that if the property sought to be reached has been mortgaged, the garnishee has no defense on this ground; the mortgagee must assert his rights.[3]

§ 780. Assignment by Defendant.[4]—The general rule is that the fact that the principal debtor has, previously to the garnishment, assigned his claim against the garnishee so that the garnishee is liable to the assignee of the debtor defeats garnishment proceedings,[5] providing the garnishee is notified of the assignment at some time during the garnishment, the cases not agreeing, however, upon the exact time during the garnishment that such notice must reach the garnishee. There is authority, however, to the effect that such notice need not be given at any time to preserve the priority of the assignment over the attachment.[6] Thus, after an assignment of a non-negotiable note, for value, by the payee, and notice thereof to the maker, if the maker is summoned as garnishee of the original payee, a disclosure of the assignment and of notice given to him before service of process will discharge him, and he need not show that the assignment was bona fide.[7] The garnishee may, in his own defense, set up the rights of the assignee to whom he is liable;[8] in fact, the general rule is that he must do so to protect himself against subsequent demands of the assignee, at least where he has knowledge of the assignment. However, if the garnishee, while ignorant of the assignment, pays the creditor, he will be protected, but if he pays after notice of the assignee's rights, without disclosing them, he will remain liable to the assignee.[9] If, in garnishment proceedings, an indebtedness is disclosed by the garnishee, but he also discloses the fact of a claim thereto by a third person as assignee, it is error for the court to order judgment against the garnishee until the claimant is duly cited and made a party, and unless this is done, the rights of such claimant cannot be barred or affected by the judgment.[10] If an assignment is only partial, a court of equity will, under proper circumstances, grant equitable relief against the garnishment of the entire amount.[11] An incomplete assignment does not constitute a good defense to a garnishment,[12] for such incompleteness prevents it from having priority over the garnishment.[13]

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[18] Annotation: 45 A.L.R. 646.

[19] Black Hills Teleg. & Teleph. Co. v. Mitchell, 11 S. D. 615, 79 N. W. 999, 74 Am. St. Rep. 830.

[20] See Exemptions [Also 11 R. C. L. p. 487].

[1] Milwaukee & N. R. Co. v. Brooks Locomotive Works, 121 U. S. 430, 30 L. ed. 995, 7 S. Ct. 1094; Rosenbush v. Bernheimer, 211 Mass. 146, 97 N. E. 984, Ann. Cas. 1913A, 1317; Hambley & Co. v. White & Co. 192 N. C. 31, 133 S. E. 399, citing R. C. L. (holding garnishee should set up as a defense a prior attachment).

The fact of ownership of goods attached by trustee process is to be determined by the trustee's answer or, if not shown by it, by other evidence. Rosenbush v. Bernheimer, 211 Mass. 146, 97 N. E. 984, Ann. Cas. 1913A, 1317.

It is competent for garnishees to represent in their own defense the rights of a third party to whom they are in law liable. Milwaukee & N. R. Co. v. Brooks Locomotive Works, 121 U. S. 430, 30 L. ed. 995, 7 S. Ct. 1094.

[2] See supra, § 688.

[3] Boyd v. Chesapeake & O. Canal Co. 17 Md. 195, 79 Am. Dec. 646.

[4] **Priority between assignments and garnishments** is discussed in a subsequent division of this article. See infra, §§ 842 et seq.

[5] Fenton v. Edwards, 126 Cal. 43, 58 P. 320, 46 L.R.A. 832, 77 Am. St. Rep. 141; Walton v. Horkan, 112 Ga. 814, 38 S. E. 105, 81 Am. St. Rep. 77; Weire v. Davenport, 11 Iowa, 49, 77 Am. Dec. 132; Harlow v. Bartlett, 96 Me. 294, 52 A. 638, 90 Am. St. Rep. 346; Schoolfield v. Hirsh, 71 Miss. 55, 14 So. 528, 42 Am. St. Rep. 450; Merchants' & M. Nat. Bank v. Barnes, 18 Mont. 335, 45 P. 218, 47 L.R.A. 737, 56 Am. St. Rep. 586; Nesmith v. Drum, 8 Watts & S. (Pa.) 9, 42 Am. Dec. 260; Hawley v. Hurd, 72 Vt. 122, 47 A. 401, 52 L.R.A. 195, 82 Am. St. Rep. 922.

Annotation: 45 A.L.R. 655.

[6] See infra, §§ 874 et seq.

[7] Newell v. Adams, 1 D. Chip. (Vt.) 346, 12 Am. Dec. 690.

[8] Milwaukee & N. R. Co. v. Brooks Locomotive Works, 121 U. S. 430, 30 L. ed. 996, 7 S. Ct. 1094; Black v. Paul, 10 Mo. 103, 45 Am. Dec. 353; Noble v. Thompson Oil Co. 79 Pa. 354, 21 Am. Rep. 66; Day v. Zimmerman, 68 Pa. 72, 8 Am. Rep. 157; Hawley v. Hurd, 72 Vt. 122, 47 A. 401, 52

§ 781. Protection of Garnishee against Double Liability Generally.—The courts are anxious to protect garnishees against double liability as a consequence of garnishment proceeding.[14] Although in the abstract the courts generally profess to regard a garnishee as a mere disinterested stakeholder who should be spared risk and loss and be inconvenienced as little as possible through the garnishment, practically his path to protection is beset with difficulties to avoid which he is required to be both wary and vigilant.[15]

§ 782. Defenses to Garnishment of Negotiable Instrument.—Danger of double liability is, of course, a good defense to the garnishment of a negotiable instrument.[16] Accordingly, a garnishment has been held to have been rightly discharged where the debt of the garnishee was evidenced by negotiable promissory notes not yet due, not surrendered, and held by unknown persons, and where no indemnity was given or tendered to the garnishee to protect him against liability to the holder. Likewise, an answer averring that the note was indorsed before maturity by the defendant and afterwards by two other persons and was then held for collection by a named bank,[17] or that the garnishee has been notified of its negotiation to a third person,[18] or

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L.R.A. 195, 82 Am. St. Rep. 922; Putney v. Farnham, 27 Wis. 187, 9 Am. Rep. 459.

[9] See supra, § 689.

[10] Levy v. Miller, 38 Minn. 526, 38 N. W. 700, 8 Am. St. Rep. 691.

[11] National Exch. Bank v. McLoon, 73 Me. 498, 40 Am. Rep. 388.

An attaching or garnishing plaintiff cannot claim priority over a previous assignee of a portion of the debt garnished on the ground that the debt could not be divided against the debtor, for the right to refuse to recognize such an assignment is personal to the debtor. Burditt Bros. v. Porter, 63 Vt. 296, 21 A. 955, 25 Am. St. Rep. 763. Annotation: 2 Am. St. Rep. 472.

However, as to attachability or garnishability of joint interests generally, see Vol. 4, p. 655, § 164, p. 664, § 178; as to levy on joint interest or commingled goods, see Vol. 4, p. 895, § 560.

[12] Baer v. English, 84 Ga. 403, 11 S. E. 453, 20 Am. St. Rep. 372.

[13] See infra, §§ 859 et seq.

[14] Chicago, R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 43 L. ed. 1144, 19 S. Ct. 797; Parker, Peebles & Knox v. National F. Ins. Co. 111 Conn. 383, 150 A. 313, 69 A.L.R. 599; Crouse v. Phœnix Ins. Co. 56 Conn. 176, 14 A. 82, 7 Am. St. Rep. 298; Mims v. West, 38 Ga. 18, 95 Am. Dec. 379; Lancashire Ins. Co. v. Corbetts, 165 Ill. 592, 46 N. E. 631, 36 L.R.A. 640, 56 Am. St. Rep. 275; Willis v. Heath, 75 Tex. 124, 12 S. W. 971, 16 Am. St. Rep. 876; Virginia F. & M. Ins. Co. v. New York Carousal Mfg. Co. 95 Va. 515, 28 S. E. 888, 40 L.R.A. 237; Carson v. Allen, 2 Pinney (Wis.) 457, 2 Chand. 123, 54 Am. Dec. 148.

Annotation: 69 A.L.R. 609; 91 A.L.R. 959; L.R.A.1917F, 1016; L.R.A.1918C, 731; 9 Ann. Cas. 478; Ann. Cas. 1916B, 365.

[15] Yarborough v. Thompson, 3 Smedes & M. (Miss.) 291, 41 Am. Dec. 626.

[16] Willis v. Heath, 75 Tex. 124, 12 S. W. 971, 16 Am. St. Rep. 876; Carson v. Allen, 2 Pinney (Wis.) 457, 2 Chand. 123, 54 Am. Dec. 148.

[17] Annotation: L.R.A.1918C, 759.

[18] Yarborough v. Thompson, 3 Smedes & M. (Miss.) 291, 41 Am. Dec. 626.

that that he does not know by whom his notes are held,[19] presents a good defense.

But an answer by a garnishee indebted upon an overdue promissory note, pleading ignorance as to whether or not the defendant still held and owned it when the process was served, is not conclusive so as to shut out further inquiry.[20] Moreover, an answer by the maker of a negotiable promissory note as garnishee upon process in favor of an execution creditor of the payee, setting up that his note had been transferred to another holder before its maturity, may be traversed and proof may be received to show that the transfer was made without consideration and to hinder, delay, and defraud the defendant's creditors.[21]

An admission by a garnishee that he made and delivered to the defendant a negotiable promissory note which is outstanding and not yet due is not an admission of indebtedness upon it to the defendant.[1]

§ 783. Pendency of Other Proceedings on Garnished Claim.[2]—Garnishment proceedings may be instituted by a creditor notwithstanding an action is pending in favor of the debtor against the garnishee to recover the same debt.[3] The view has been taken, however, that this rule applies only when both suits are within the same court or at least within the same jurisdiction, and that while a subsequent garnishment is no answer to a prior action in another jurisdiction, a prior action commenced against the garnishee in one state must be considered a defense to garnishment proceedings begun subsequently in another state.[4]

§ 784. Previous Judgment on Garnished Claim.—A previous judgment on the garnished debt in the same state constitutes no defense to the garnishment in a jurisdiction where the particular debt is liable to the process while it is in suit or where the judgment upon it is bound by the process.[5]

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[19] Sheets v. Culver, 14 La. 449, 33 Am. Dec. 593, wherein the court supported its decision by reasoning thus: "As to notes indorsed in blank which circulate and pass from hand to hand by mere delivery, it has never been, nor can it be pretended, that any notice of transfer is necessary. . . . If, then, no such notice is ever given, how is a garnishee, who has issued his promissory note, indorsed in blank, to know in whose hands it happens to be at the precise moment when he is called upon to answer interrogatories? And if, perchance, he were to know that his note was still the property of the defendant, and were so to declare it, could such a proceeding restrain its negotiability? Could it affect the rights of a bona fide holder? Surely not. The ownership of negotiable paper is incessantly varying, before its maturity, and the obligation of the maker of such instruments is not to pay any particular person, but to the holder, at maturity, whoever he may be. Thus, it is obvious that the garnishee in this case could give no other answer than that which he has made, and it is equally obvious that by pursuing this course, the plaintiffs have attached no property out of which their judgment can be satisfied."

[20] Serviss v. Washtenaw Circuit Judge, 116 Mich. 101, 74 N. W. 310, 72 Am. St. Rep. 507.

[21] Annotation: L.R.A.1918C, 760.

[1] Annotation: L.R.A.1918C, 759.

[2] Generally as to attachability or garnishability of claim in suit, see Vol. 4, p. 687, § 210.

As to subsequent garnishment as defense to previous action by defendant against garnishee on garnished debt, see supra, § 697.

[3] Lancashire Ins. Co. v. Corbetts, 165 Ill. 592, 46 N. E. 631, 36 L.R.A. 640, 56 Am. St. Rep. 275; M'Carty v. Emlen, 2 Dall. (Pa.) 277, 1 L. ed. 380; Smith v. Carroll, 17 R. I. 125, 20 A. 227, 21 A. 343, 12 L.R.A. 301.

[4] Whipple v. Robbins, 97 Mass. 107, 93 Am. Dec. 64; Smith v. Carroll, 17 R. I. 125, 20 A. 227, 21 A. 343, 12 L.R.A. 301; Burke v. Hance, 76 Tex. 76, 13 S. W. 163, 18 Am. St. Rep. 28.

A garnishee will be compelled to defend, although a suit brought by the original debtor is pending against him, provided the suit is in the same court. The reason for this is that where the two suits are pending in the same court, the interests of the defendant and garnishee can be readily protected. But the garnishee is not required to defend in the garnishment action where the pending suit by his creditor is brought in another court. Burke v. Hance, 76 Tex. 76, 13 S. W. 163, 18 Am. St. Rep. 28. Annotation: 93 Am. Dec. 67.

See also supra, § 697.

[5] Skipper v. Foster, 29 Ala. 330, 65 Am. Dec. 405.

As to liability of debt in suit to garnish-

The general rule is that a previous judgment in another state on a garnished claim, rendered without fraud or collusion, is entitled to full faith and credit and constitutes a defense to the garnishment, irrespective of the propriety of the judgment, particularly when the garnishee has satisfied the judgment against him.[6] However, there is some doubt as to whether such judgment has that effect where the action in which it was rendered was commenced subsequent to the garnishment. There is specific authority that in such a case it has that effect,[7] but there is also specific authority to the contrary,[8] and the opinions of the United States Supreme Court apparently support the latter view.[9]

§ 785. Anticipated Refusal of Foreign Court to Give Garnishment Full Faith and Credit.—Presupposing that from the point of view of the court of the forum of garnishment the court would have jurisdiction to render a judgment garnishing the indebtedness, the question arises whether the court should decline to exercise jurisdiction over, or render judgment in, garnishment proceedings because of the danger of subjecting the garnishee to a double liability in consequence of the anticipated refusal of a court of another jurisdiction, in an action by the creditor (principal defendant in garnishment or his representative) against the debtor (garnishee), to recognize or give effect to such judgment if rendered. The doctrine finally adopted by the United States Supreme Court upholding the jurisdiction to garnish a debt due from a resident or a foreign corporation doing business within the state to a nonresident served constructively only, and declaring such a judgment to be entitled to recognition and effect in other states under the full faith and credit provision of the Federal Constitution,[10] leaves but little, if any, scope for this question.[11] Nevertheless, the question may still arise with respect to a foreign jurisdiction to which this clause is not applicable.[12] It

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ment, see Vol. 4, p. 687, § 210; of judgment, see Vol. 4, p. 688, §§ 212 et seq.

As to judgment in garnishment as defense to suit on garnished claim, see infra, §§ 804 et seq.

[6] Scott v. Coleman, 5 Litt. (Ky.) 349, 15 Am. Dec. 71; Baxley v. Linah, 16 Pa. 241, 55 Am. Dec. 494; Virginia F. & M. Ins. Co. v. New York Carousal Mfg. Co. 95 Va. 515, 28 S. E. 888, 40 L.R.A. 237.

One garnished for a debt due a nonresident creditor may, irrespective of the propriety of the foreign judgment under the circumstances, prevent a judgment against him in the garnishment proceedings by showing that without his collusion, and notwithstanding his plea of the pendency of the garnishment proceedings, a court at the creditor's domicil, having jurisdiction, rendered a judgment against him on the debt in favor of the creditor, which, having property in that jurisdiction, he was compelled to pay. Virginia F. & M. Ins. Co. v. New York Carousal Mfg. Co. 95 Va. 515, 28 S. E. 888, 40 L.R.A. 237.

[7] Becker v. Illinois C. R. Co. 250 Ill. 40, 95 N. E. 42, 35 L.R.A.(N.S.) 1154; Lancashire Ins. Co. v. Corbetts, 165 Ill. 592, 46 N. E. 631, 36 L.R.A. 640, 56 Am. St. Rep. 275.

The recovery of a judgment for wages exempt from garnishment before the entry of judgment in a garnishment proceeding in a foreign state, where the wages were not exempt, deprives the employer of the benefit of the foreign judgment as a defense to his liability, although the garnishment proceeding was instituted before the local action; and it is immaterial that an appeal was taken from the local judgment, upon which a decision was not reached until after the judgment was entered in the garnishment proceeding. Becker v. Illinois C. R. Co. 250 Ill. 40, 95 N. E. 42, 35 L.R.A. (N.S.) 1154. Annotation: 35 L.R.A.(N.S.) 1154.

[8] **The effect of a foreign judgment against a garnishee** to protect him from paying the claim a second time to the principal debtor will not be defeated by the fact that after the foreign proceedings were instituted, the principal debtor brought suit upon the claim against the garnishee within the state, which he pressed to judgment before the foreign judgment was entered. Baltimore & O. S. W. R. Co. v. Adams, 159 Ind. 688, 66 N. E. 43, 60 L.R.A. 396.

[9] Sanders v. Armour Fertilizer Works, 292 U. S. 190, 78 L. ed. 1206, 54 S. Ct. 677, rehearing denied in 292 U. S. 612, 78 L. ed. 1472, 54 S. Ct. 855; Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023, 25 S. Ct. 625, 3 Ann. Cas. 1084; King v. Cross, 175 U. S. 396, 44 L. ed. 211, 20 S. Ct. 131; Chicago, R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 43 L. ed. 1144, 19 S. Ct. 797.

Annotation: 91 A.L.R. 959.

[10] See Vol. 4, p. 589, §§ 66, 67.

[11] Annotation: 69 A.L.R. 609.

[12] See Parker, Peebles & Knox v. National F. Ins. Co. 111 Conn. 383, 150 A. 313, 69 A.L.R. 599.

Annotation: 69 A.L.R. 609.

It will be observed that in Parker, Peebles & Knox v. National F. Ins. Co. 111

has been contended: (1) That to refuse to exercise jurisdiction or give judgment against the garnishor in such cases is tantamount to giving comity to the laws of a country which itself does not give comity to judgments of the forum, and that such a policy should not be adopted, even at the cost of double liability to the garnishee; (2) that such a rule is bad law, for the reason that it enables the garnishee, having avoided the payment of the obligation in the residence of his creditor, to avoid it also in the forum, or vice versa.[13] Whatever may be the theoretical merits of these contentions, practical considerations, focusing around the prevention of an obvious and unavoidable injustice to the garnishee, have led the courts to the adoption of the view that wherever the garnishee under such circumstances will be placed in a position where it may be reasonably assumed that he will incur a double liability, they will withhold the judgment in garnishment or refuse to exercise jurisdiction.[14]

c. Set-off or Counterclaim

§ 786. **Generally.**—The garnishee may set off in garnishment proceedings whatever demand he might be able to set off against the principal debtor's claim against him.[15] For example, one who, after selling chattels to an insol-

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Conn. 383, 150 A. 313, 69 A.L.R. 599, it appeared as a fact, and was admitted that the court of Haiti, where the creditor or his representative was domiciled and where the insurance company (debtor and garnishee) would be subject to suit, would not recognize a judgment in garnishment rendered in Connecticut; and the refusal of the court of Haiti to recognize the Connecticut judgment would, of course, not be a violation of the full faith and credit provision of the Federal Constitution, or subject to correction by the Federal Supreme Court. Consequently, in that case the danger of double liability was a fact, and not merely a possibility, and there was no remedy available to the garnishee to avoid it.

[13] Parker, Peebles & Knox v. National F. Ins. Co. 111 Conn. 383, 150 A. 313, 69 A.L.R. 599.

[14] Ibid.

Annotation: 69 A.L.R. 609.

In Parker, Peebles & Knox v. National F. Ins. Co. 111 Conn. 383, 150 A. 313, 69 A.L.R. 599, it does not appear where the debt was payable. It was contended by the counsel for the plaintiffs that it was payable in Connecticut, the residence of the garnishee, and that the doctrine of Swiss Bank Corp. Case [1923] 1 K. B. (Eng.) 673—C. A., should apply. But the court apparently disregarded this contention.

[15] North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co. 152 U. S. 596, 38 L. ed. 565, 14 S. Ct. 710; Schuler v. Israel, 120 U. S. 506, 30 L. ed. 707, 7 S. Ct. 648; Wanzer v. Truly, 17 How. (U. S.) 584, 15 L. ed. 216; United States v. Robertson, 5 Pet. (U. S.) 641, 8 L. ed. 257; J. H. Mulrein Plumbing Supply Co. v. Walsh, 26 Ariz. 152, 222 P. 1046, citing R. C. L.; Hoyt v. Clemans, 167 Iowa, 330, 149 N. W. 442, L.R.A.1915C, 166; J. J. Smith Lumber Co. v. Scott County Garbage Reducing & Fuel Co. 149 Iowa, 272, 128 N. W. 389, 30 L.R.A.(N.S.) 1184; Springfield F. & M. Ins. Co. v. Huntington Nat. Bank, 229 Ky. 674, 17 S. W. (2d) 726, 71 A.L.R. 70; Wunderlich v. Merchants Nat. Bank, 109 Minn. 468, 124 N. W. 223, 27 L.R.A.(N.S.) 811, 134 Am. St. Rep. 788, 18 Ann. Cas. 212; Goodwin v. Claytor, 137 N. C. 224, 49 S. E. 173, 67 L.R.A. 209, 107 Am. St. Rep. 479; Farmers' State Bank v. Van Houten, 52 S. D. 528, 219 N. W. 206, citing R. C. L.; McAlmond v. Bevington, 23 Wash. 315, 63 P. 251, 53 L.R.A. 597; Bowling v. Bluefield-Graham Fair Asso. 84 W. Va. 41, 99 S. E. 184, citing R. C. L.; Wall v. Norfolk & W. R. Co. 52 W. Va. 485, 44 S. E. 294, 64 L.R.A. 501, 94 Am. St. Rep. 948.

Annotation: 30 L.R.A.(N.S.) 1185.

A garnishee, being an indifferent party to the litigation, may interpose all of the equities or defenses to the same extent that he could in an action brought against him by the defendant. Wunderlich v. Merchants Nat. Bank, 109 Minn. 468, 124 N. W. 223, 27 L.R.A.(N.S.) 811, 134 Am. St. Rep. 788, 18 Ann. Cas. 212.

Whatever rights the garnishee may have under existing contracts with the principal debtor, he is entitled to have the benefit as against the attaching creditor. North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co. 152 U. S. 596, 38 L. ed. 565, 14 S. Ct. 710.

One who, after selling chattels to an insolvent, seizes and sells them to another may, upon being garnished for their value by a judgment creditor of the buyer, set off against the claim his account against the buyer for the unpaid purchase price. J. J. Smith Lumber Co. v. Scott County Garbage Reducing & Fuel Co. 149 Iowa, 272, 128 N. W. 389, 30 L.R.A.(N.S.) 1184.

A bank summoned as garnishee in an action against one of its insolvent depositors may set off against the depositor's general account unmatured notes held by it at the time of the service of the garnishment summons, irrespective of whether the bank knew of the insolvency at the time of such service, and notwithstanding the depositor had not at such time been formally adjudged an insolvent. Wunderlich v. Merchants Nat. Bank, 109 Minn. 468, 124 N. W. 223, 27 L.R.A.(N.S.) 811, 134 Am. St. Rep. 788, 18 Ann. Cas. 212.

vent, seizes and sells them to another may, upon being garnished for their value by a judgment creditor of the first buyer, set off against the claim his account against the buyer for the unpaid purchase price.[16] It would seem that an equitable set-off is allowable in an action in equity against liability in the garnishment proceedings upon the usual grounds for the granting of such relief; and in the garnishment proceeding itself, an equitable set-off is sometimes allowed, and sometimes not, upon the ground that garnishment is purely a legal remedy.[17] The garnishee cannot, as a rule, set off any claim which he could not avail himself of in a suit brought against him by the principal debtor.[18] The view has been taken that the garnishee can set off against the claim of the plaintiff not only his claims against the defendant, but, also, his claims against the plaintiff himself existing at the time of the service of the garnishment.[19]

§ 787. Availability of Set-off or Counterclaim with Respect to Time of Maturity or Time of Acquisition of Claim.—The general rule is that a claim acquired by the garnishee against the principal debtor after the service of the garnishment proceedings cannot be made available as a set-off. The reasons usually assigned for this rule are that if such claims were allowed to be set off, the right of priority of the garnishing creditor would be impaired, and also, that the door would be thrown open to fraudulent assignments to the garnishee for the purpose of defeating the garnishing creditor's rights.[20] The view has been taken that the garnishee may set off against the amount due the principal debtor a debt maturing after the service of the garnishment process, where the debt arises out of a contract with the principal debtor which is in existence at the time the garnishment process is served.[1] However, it has been held that to be available as a set-off, a claim in favor of a garnishee against the principal debtor must be due and enforceable at the time the garnishment process is served, since the garnishment proceedings operate as a transfer of the funds of the principal debtor in the hands of the garnishee. According to this view no set-off is allowed, even though the claim matures before disclosure or final adjudication of the garnishment proceedings.[2]

A bank summoned as garnishee in an action against one of its depositors may set off against the depositor's general account unmatured notes held by

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A garnishee acquires no claim against the debtor in a garnishment proceeding in which no answer is made and no issues joined, no judgment entered, and no execution issued by acquiring an assignment of a judgment against the debtor rendered in another action. Alexander v. Clarkson, 100 Kan. 294, 164 P. 294, L.R.A.1917F, 1006.

[16] Smith Lumber Co. v. Scott County Garbage Reducing & Fuel Co. 149 Iowa, 272, 128 N. W. 389, 30 L.R.A.(N.S.) 1184.

Annotation: 30 L.R.A.(N.S.) 1185.

[17] Annotation: 59 L.R.A. 353.

[18] Annotation: 100 Am. Dec. 512.

[19] See Standard Pa. Prac. Vol. 10.

[20] North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co. 152 U. S. 596, 38 L. ed. 565, 14 S. Ct. 710; Warfield v. Campbell, 38 Ala. 527, 82 Am. Dec. 724; Nordstrom v. Corona City Water Co. 155 Cal. 206, 100 P. 242, 132 Am. St. Rep. 81; Springfield F. & M. Ins. Co. v. Huntington Nat. Bank, 229 Ky. 674, 17 S. W. (2d) 726, 71 A.L.R. 70.

The rule that a garnishee may not defeat the right of the attaching creditor to collect the attached debt by acquiring an offset thereto after being served with the attachment does not apply in the case of an insurer of partnership property who was garnished by a creditor of an individual partner, and who, being sued by the owners of the insured property and a mortgagee thereof claiming a right to the insurance, settled the suit by paying the mortgagee the amount claimed by him and took a transfer of the note secured. Springfield F. & M. Ins. Co. v. Huntington Nat. Bank, 229 Ky. 674, 17 S. W. (2d) 726, 71 A.L.R. 70. See also Boston Type & Stereotype Foundry Co. v. Mortimer, 7 Pick. (Mass.) 166, 19 Am. Dec. 266. Annotation: 18 Ann. Cas. 215.

[1] North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co. 152 U. S. 596, 38 L. ed. 565, 14 S. Ct. 710; Boston Type & Stereotype Foundry Co. v. Mortimer, 7 Pick. (Mass.) 166, 19 Am. Dec. 266.

Annotation: 18 Ann. Cas. 214.

[2] Annotation: 18 Ann. Cas. 215.

it at the time of the service of the garnishee summons when it appears that the depositor is insolvent.[3]

§ 788. Necessity of Pleading Set-off or Counterclaim Specially.—As to the necessity of a special plea of the defense of set-off by the garnishee, a conflict of opinion exists. On the one hand, it has been held that the technical rules of set-off are not applicable to a statutory garnishment proceeding, the sole purpose of which is to ascertain what the garnishee may owe the defendant, and that it is not necessary for the garnishee specially to plead the defense of set-off in order to avail himself of that defense. However, in other decisions it has been held that the defense of set-off must be specially pleaded or claimed by the garnishee, such defense not being available under a general denial of indebtedness. Even if it is necessary for a garnishee to plead set-off, the right to take advantage of his failure to plead such defense is waived by a failure to object to evidence of set-off.[4]

10. Judgment and Execution; Voluntary Payment

a. In General

§ 789. Generally.—Judgments in garnishment proceedings and their enforcement constitute a matter of diverse local practice in the various jurisdictions. Such practice tends to differ with respect to the time of entry, the form and contents, and the mode of execution of such judgments. However, it may be said generally: (1) That garnishment statutes and practice contemplate that no final judgment may be entered and enforced against the garnishee except as a form of execution of a final judgment against the defendant, and that consequently, final judgment against the garnishee must always follow final judgment against the defendant;[5] (2) that final judgment may not be entered against the garnishee unless it appears affirmatively that at the time of the garnishment the defendant had a cause of action against the garnishee for the recovery of a legal debt, due or to become due, and that such judgment would be available to the garnishee as a defense against any action afterwards brought against him on the debt in respect of which he is charged.[6]

The view has been taken that judgment may be rendered against the garnishee even though he has not been made a party to the action, in the technical sense, if by statute it is not necessary that he be made a party.[7] The death of the plaintiff before judgment against the garnishee is rendered does not render such judgment null and void. At most, it is merely voidable.[8]

§ 790. Amount of Judgment.[9]—The general rule is that a judgment can charge the garnishee at the most only for the amount of the plaintiff's claim, with interest and costs, against the defendant named in the writ or order of garnishment.[10] Furthermore, the garnishee cannot, ordinarily, be charged by such a judgment with a greater liability than the value of property of, and amount of debts owing to, the defendant which have been attached or garnished in his possession.[11]

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[3] Schuler v. Israel, 120 U. S. 506, 30 L. ed. 707, 7 S. Ct. 648; Boston Type & Stereotype Foundry Co. v. Mortimer, 7 Pick. (Mass.) 166, 19 Am. Dec. 266; Wunderlich v. Merchants Nat. Bank, 109 Minn. 468, 124 N. W. 223, 27 L.R.A.(N.S.) 811, 134 Am. St. Rep. 788, 18 Ann. Cas. 212.

Annotation: 27 L.R.A.(N.S.) 813.

Generally as to rule that validity of garnishment is determined by facts existing at time of service on garnishee and that garnishment is of no force and effect where at that time the garnishee has no property of the defendant in his possession and is not indebted to defendant, see Vol. 4, p. 648, §§ 155, 156.

[4] Melton Hardware Co. v. Heidelberg, 91 Miss. 598, 44 So. 857, 15 Ann. Cas. 704.

[5] Generally as to order of entry between final judgment against defendant and against garnishee, see supra, § 711.

[6] Mims v. West, 38 Ga. 18, 95 Am. Dec. 379; J. Cueva Co. v. R. Lancaster Williams & Co. 145 Md. 526, 125 A. 849, citing R. C. L.

[7] Tiger v. Rogers Cotton Cleaner & Gin Co. 96 Ark. 1, 130 S. W. 585, 30 L.R.A. (N.S.) 694, Ann. Cas. 1912B, 488.

[8] Coleman v. McAnulty, 16 Mo. 173, 57 Am. Dec. 229.

As to the effect of the death of the defendant in garnishment, see supra, § 742.

[9] As to the liability of the garnishee where he fails to retain the garnished

In some jurisdictions, however, judgment may be rendered against a garnishee for an amount exceeding that of the plaintiff's judgment against the defendant,[12] and whatever surplus remains after paying the plaintiff belongs to the principal debtor.[13]

If a garnishee has permitted the attached property to leave his possession, a judgment in personam may be entered against him for its value.[14]

§ 791. Judgment or Favorable Outcome for Garnishee.—A judgment or order discharging the garnishee may be entered.[15]

b. Form of Judgment

§ 792. Conditional Judgment.—Sometimes under local statutes and practice a conditional judgment may be entered against the garnishee upon entry of judgment against the defendant, such judgment not to become absolute until it is established that the garnishee has in his possession property of, or debts owing to, the defendant, not exempt from execution.[16] This practice is frequently followed upon a default of the garnishee, where he has failed to appear at the time and place named in his summons,[17] for example, where he is summoned to appear in the main action and fails to do so.[18] The purpose of such a conditional judgment may be merely to give a garnishee, who has defaulted, additional time to answer the garnishment.[19] In such case a writ of scire facias frequently may issue against the garnishee with the conditional judgment. A conditional judgment rendered against a garnishee, without appearance by, or service of written notice upon, him, is void where the stat-

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property pending garnishment, see supra, §§ 669 et seq.

[10] Davis Bros. v. Choctaw, O. & G. R. Co. 73 Ark. 120, 83 S. W. 318, 3 Ann. Cas. 658; Scott v. Hill, 3 Mo. 88, 22 Am. Dec. 462; Drew v. Towle, 27 N. H. 412, 59 Am. Dec. 380.

Annotation: 3 Ann. Cas. 660.

[11] Strand v. Halverson, — Iowa, —, 264 N. W. 266, 103 A.L.R. 835; Scott v. Hill, 3 Mo. 88, 22 Am. Dec. 462.

Generally as to extent of lien of garnishment, see infra, §§ 820 et seq.

[12] Scott v. Hill, 3 Mo. 88, 22 Am. Dec. 462.

[13] Siegel, C. & Co. v. Schueck, 167 Ill. 522, 47 N. E. 855, 59 Am. St. Rep. 309.

[14] International Bedding Co. v. Terminal Warehouse Co. 146 Md. 479, 126 A. 902 40 A.L.R. 960.

[15] Roman v. Montgomery Iron Works, 156 Ala. 604, 47 So. 136, 19 L.R.A.(N.S.) 604, 130 Am. St. Rep. 106; Maxwell v. Bank of New Richmond, 101 Wis. 286, 77 N. W. 149, 70 Am. St. Rep. 926.

Annotation: 46 Am. Dec. 341.

As to operation and effect of judgment for garnishee, see infra, §§ 800 et seq.

[16] Illinois C. R. Co. v. Brooks, 90 Tenn. 161, 16 S. W. 77, 25 Am. St. Rep. 673; Hillman v. Gray, 163 Wash. 406, 1 P. (2d) 318, 75 A.L.R. 1356.

In Hillman v. Gray, 163 Wash. 406, 1 P. (2d) 318, 75 A.L.R. 1356, the plaintiff had obtained a judgment against the defendant and, some years later, in an action by the defendant against the garnishee, caused a garnishment to be issued and served, and a conditional judgment to be entered against the garnishee, to become absolute on final judgment for the defendant against the garnishee. However, the conditional judgment was subsequently held to be of no force and effect because the plaintiff's judgment against the defendant had expired.

Entry of default of one summoned as trustee without the entry of judgment against the principal defendant is not such a final judgment against him that failure of the plaintiff to make demand on him within thirty days thereafter will operate, under the provisions of a statute, to dissolve the attachment. Smith v. Davis, 131 Me. 9, 158 A. 359, 81 A.L.R. 78.

[17] Illinois C. R. Co. v. Brooks, 90 Tenn. 161, 16 S. W. 77, 25 Am. St. Rep. 673 (where judgment, however, was void for want of notice to the defendant).

[18] See Standard Pa. Prac. Vol. 10.

[19] Illinois C. R. Co. v. Brooks, 90 Tenn. 161, 16 S. W. 77, 25 Am. St. Rep. 673 (where judgment, however, was void for want of notice to the defendant).

ute requires such notice, and the subsequent issuance and service of a scire facias will not cure that defect, but the final judgment will also be void, although the garnishee failed to defend the scire facias.[20]

§ 793. **Personal Judgment or Judgment in Rem.**—Since the judgment generally binds only the res, it is commonly in rem.[21] However, a personal judgment may, under certain circumstances, be taken against the garnishee if jurisdiction of his person has been obtained and if the statute contemplates the entry of such a judgment.[1] However, in most jurisdictions such a judgment is limited by the amount of the judgment against the defendant.[2] The general rule is that a garnishee is bound personally, and a personal judgment can be entered against him for the value of the goods and effects of the defendant garnished in his hands, limited, of course, by the amount of judgment against the defendant, where, through the fault of the garnishee, such property is not forthcoming to satisfy the plaintiff's claim and judgment against the defendant.[3] Accordingly, if a garnishee has permitted the attached property to leave his possession, a judgment in personam may be entered against him for its value.[4]

§ 794. **—Right of Plaintiff to Elect.**—Under certain circumstances a plaintiff may elect between a judgment in rem against property of the defendant in the hands of the garnishee and one in personam for the amount of the plaintiff's claim as limited by the garnishee's liability to the defendant.[5] However, where a plaintiff in a suit of garnishment, in which process has been served on the garnishee, having the right to prevent the garnishee from disposing of the property for which he may be liable, elects to consider the garnishee his debtor and to take personal judgment against him, he will be held to his election, and cannot follow the property or its proceeds.[6]

§ 795. **Order on Garnishee in Lieu of Judgment.**—In some jurisdictions a judgment is not entered against the garnishee. All that the creditor can do is to obtain an order against the garnishee to appear and answer, and upon such appearance, if the debt is admitted, an order may be made for its payment into court, and if the debt is denied, an order may be entered authorizing the judgment creditor to institute an action to recover the alleged debt.[7]

[20] Illinois C. R. Co. v. Brooks, 90 Tenn. 161, 16 S. W. 77, 25 Am. St. Rep. 673.

[21] Strand v. Halverson, — Iowa, —, 264 N. W. 266, 103 A.L.R. 835.

[1] International Bedding Co. v. Terminal Warehouse Co. 146 Md. 479, 126 A. 902, 40 A.L.R. 960; Maxwell v. Bank of New Richmond, 101 Wis. 286, 77 N. W. 149, 70 Am. St. Rep. 926.

A statute is noted in Goodwin v. Claytor, 137 N. C. 224, 49 S. E. 173, 67 L.R.A. 209, 107 Am. St. Rep. 479, which provides: "When an attachment shall be served on any garnishee in manner aforesaid, it shall be lawful upon his appearance and examination to enter up judgment and award execution for the plaintiff against such garnishee for all sums of money due to the defendant from him, and for effects and estates of any kind belonging to the defendant, in his possession or custody, for the use of the plaintiff, or so much thereof as shall be sufficient to satisfy the debt and costs and all charges incident to levying the same; and all goods and effects whatsoever in the hands of the garnishee belonging to the defendant shall be liable to satisfy the plaintiff's judgment, and shall be delivered to the sheriff or other officer serving the attachment."

[2] Maxwell v. Bank of New Richmond, 101 Wis. 286, 77 N. W. 149, 70 Am. St. Rep. 926.

[3] International Bedding Co. v. Terminal Warehouse Co. 146 Md. 479, 126 A. 902, 40 A.L.R. 960.

[4] International Bedding Co. v. Terminal Warehouse Co. 146 Md. 479, 126 A. 902, 40 A.L.R. 960.

As to duty of garnishee to retain garnished property pending garnishment, see supra, §§ 662 et seq.; as to liability for failure to discharge this duty, see supra, §§ 669 et seq.

[5] Maxwell v. Bank of New Richmond, 101 Wis. 286, 77 N. W. 149, 70 Am. St. Rep. 926.

[6] Ibid.

[7] Atlantic & P. R. Co. v. Hopkins, 94 U. S. 11, 24 L. ed. 48; Herrlich v. Kaufmann, 99 Cal. 271, 33 P. 857, 37 Am. St. Rep. 50.

§ 796. Judgment on Default of Garnishee—With Respect to Specific Property Garnished.—Judgment, conditional or absolute, may be entered by default against the garnishee, where he fails to appear at the time and place mentioned in the summons served upon him.[8] The general rule is that a conclusive judgment may be entered against a garnishee with respect to specific property of the defendant attached or garnished in his possession where the garnishee fails to enter an appearance at the time and place named in his summons, for example, where he is summoned and fails to appear in the main action. Local practice, however, may require that such a judgment be conditional only, or at least not subject to final execution until the expiration of a certain period of time.[9] Such a practice will be followed usually where the judgment against the defendant was by default and therefore, under the local practice, conditional only, the defendant having the right, for a certain period after the entry of such judgment, to come into court and disprove the plaintiff's claim.[10] Of course, if judgment against the defendant is conditional only, any judgment against the garnishee must be likewise, for, as has been frequently observed in this article, it is a general rule that final judgment cannot be entered against the garnishee until after the entry of a final judgment against the defendant.[11]

§ 797. —With Respect to Property Not Specifically Attached.—Although a conclusive default judgment is entered against a garnishee, nevertheless, if the attachment or garnishment of the property of, or debts owing to, the defendant has been general, as, for example, where the garnishee has been summoned to answer the process as to all the goods and effects of the defendant in his possession, it is clear that the law must either regard the default as determining conclusively that he is in possession of property of the defendant to the extent of the plaintiff's claim against the defendant, and permit the issuance of an execution against him generally to recover that amount, in which event it can reasonably be said that the judgment is binding upon him personally, or the law must regard the judgment as conclusive only upon the goods and effects of the defendant in his possession and provide a mode of discovery and identification of the same in order that execution may be had thereon. However, the law may regard the default judgment as conditional merely, allowing the garnishee further time in which to make disclosure.[12] Nevertheless, it may be said that although the law contemplates a first default of the garnishee as a basis for a conditional judgment merely, or as a basis for a conclusive judgment upon the goods and effects of the defendant which must, nevertheless, still be discovered and identified in order that they may be subjected to execution, the law is fatally defective if it does not provide in the end some form of final execution against the property of the garnishee to the extent of the plaintiff's claim against the defendant, where the garnishee continually defaults and defeats all endeavor of the law to discover and identify the property of the defendant in his possession.[13]

An order in a proceeding in aid of execution, under the Civil Code of Kansas, § 490, directing a garnishee to pay to the judgment creditor money which he owed to the judgment debtor, is not an adjudication between the parties. Atlantic & P. R. Co. v. Hopkins, 94 U. S. 11, 24 L. ed. 48.

[8] Illinois C. R. Co. v. Brooks, 90 Tenn. 161, 16 S. W. 77, 25 Am. St. Rep. 673 (where judgment, however, was void for want of notice to defendant); Sherman v. Shobe, 94 Tex. 126, 58 S. W. 949, 86 Am. St. Rep. 825.

Annotation: 46 Am. Dec. 341.

[9] Illinois C. R. Co. v. Brooks, 90 Tenn. 161, 16 S. W. 77, 25 Am. St. Rep. 673.

[10] See Standard Pa. Prac. Vol. 10.

[11] See supra, § 711.

[12] Illinois C. R. Co. v. Brooks, 90 Tenn. 161, 16 S. W. 77, 25 Am. St. Rep. 673.

[13] See Standard Pa. Prac. Vol. 10.

§ 798. **Judgment on Disclosure.**—The general rule is that judgment against the garnishee can be entered upon his disclosure of his indebtedness to, or possession of property of, the defendant.[14] However, a judgment against a garnishee cannot be supported by answers to the effect that the principal debtor has placed in the hands of the garnishee certain accounts for collection and has agreed to place certain personal property under his control, followed by a supplemental answer showing that after the date of the garnishment, certain of the accounts had been collected.[15] An answer of a garnishee acknowledging an indebtedness to the defendant at the time of the service of the garnishment upon an unpaid, overdue, negotiable security which had not been transferred makes him liable to the attaching creditor. On the other hand, it has been held that although a garnishee indebted upon a negotiable promissory note may have answered the garnishment and admitted an indebtedness to the defendant, nevertheless, if, in fact, such note had been previously negotiated to a bona fide holder, a payment to him will protect the garnishee against the garnishment plaintiff. But such a garnishee is held bound to diligence in applying for relief. If he delays his application until after the term has expired at which the judgment was taken against him on his admission of indebtedness in his answer, he is considered to be too late; he is held then not to be entitled to have the judgment vacated upon proof that when he answered he was ignorant of the fact that his note had been negotiated and no longer belonged to the defendant.[16]

§ 799. **Judgment on Trial.**—When judgment for the plaintiff has been obtained in the main action, judgment in a garnishment proceeding will be entered upon the outcome of the trial of the garnishment issue,[17] at least the garnishee will be ordered to pay the garnished debt or surrender the garnished property into court.[18]

c. Operation and Effect

(1) In General

§ 800. **Generally.**—In jurisdictions where the garnishment constitutes a lien on the garnished property even before judgment, the general rule is that judgment against the garnishee does not dissolve or vacate the garnishment lien, but that the lien continues to exist as security for the plaintiff's claim against the defendant.[19] In some jurisdictions a garnishment constitutes no lien on property or funds of the defendant in the hands of the garnishee until judgment, but in these jurisdictions the legal effect of the judgment is to sequester or set aside the property or money of the defendant in the hands of the garnishee to the payment of the plaintiff's judgment.[1] The effect of a judgment in garnishment does not make the plaintiff, any more than he was previously, a bona fide purchaser; he may become a bona fide purchaser only by virtue of a sale in pursuance of law.[2] Undoubtedly, however, regardless of the original effect of the garnishment as an assignment, such a judgment does work an assignment so far as the relations of the plaintiff and defendant are concerned, of the debt of the garnishee to the defendant or of specific property of the defendant in the hands of the garnishee.[3]

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[14] Wildner v. Ferguson, 42 Minn. 112, 43 N. W. 794, 6 L.R.A. 338, 18 Am. St. Rep. 495; Bassett v. Garthwaite, 22 Tex. 230, 73 Am. Dec. 257; Acheson-Harder Co. v. Western Wholesale Notions Co. 72 Utah, 323, 269 P. 1032, 60 A.L.R. 881; Adams v. Filer, 7 Wis. 306, 73 Am. Dec. 410; Davis v. Pawlette, 3 Wis. 300, 62 Am. Dec. 690.

Annotation: L.R.A.1918C, 731.

See Standard Pa. Prac. Vol. 10.

A failure, without good excuse timely interposed, to answer each of the statutory inquiries contained in the writ or the filing of an answer which is so evasive that it is no answer at all, may be disregarded and default judgment rendered. Sherman v. Shobe, 94 Tex. 126, 58 S. W. 949, 86 Am. St. Rep. 825.

Where a garnishee proceeding is to be determined on the disclosure alone, no supplemental complaint being filed and no claim made by a third person, no findings of fact are necessary. Wildner v. Ferguson, 42 Minn. 112, 43 N. W. 794, 6 L.R.A. 338, 18 Am. St. Rep. 495.

[15] Acheson-Harder Co. v. Western Wholesale Notions Co. 72 Utah, 323, 269 P. 1032, 60 A.L.R. 881.

[16] Annotation: L.R.A.1918C, 761.

An attaching creditor has been held entitled to a judgment against a garnishee upon his answer which averred that he had made and delivered to the defendant his bill single, and did not allege that it had been negotiated to another, but merely alleged that the defendant had sued him upon it, and that the action was pending. Annotation: L.R.A.1918C, 761.

[17] Tiger v. Rogers Cotton Cleaner & Gin Co. 96 Ark. 1, 130 S. W. 585, 30 L.R.A. (N.S.) 694, Ann. Cas. 1912B, 488.

See Standard Pa. Prac. Vol. 10.

Under the Arkansas statute it is unnecessary to commence a separate action against the garnishee in order to authorize the court to render a final judgment against him on rendering judgment against the principal debtor, and hence, where in a principal action a writ of garnishment is issued and the garnishee answers and denies liability on the allegations contained in the writ, final judgment may be entered against him though he is not a party to the principal action, and no relief is asked against him and no judgment is prayed. Tiger v. Rogers Cotton Cleaner & Gin Co. 96 Ark. 1, 130 S. W. 585, 30 L.R.A.(N.S.) 694, Ann. Cas. 1912B, 488.

[18] See supra, § 795.

It has been held that the judgment against the garnishee gives to the plaintiff a lien upon the lands of the garnishee within the jurisdiction of the court.[4]

A garnishee who has satisfied a judgment against him cannot recover the satisfaction where the main judgment is subsequently reversed because of mere irregularity, at least under the rule that if an irregular judgment has been obtained, and the money recovered, for a debt justly due, proof that the debt was due affords a good defense in an action of assumpsit brought to recover back the money.[5]

If the garnishee answers denying his indebtedness to the defendant, and the plaintiff, failing to file a contest to the answer, permits a judgment of discharge of the garnishee to be entered, this is a judgment on the merits and conclusive between the plaintiff and the garnishee that the latter was not indebted to the defendant.[6]

§ 801. Judgment and Satisfaction in Garnishment as Satisfaction of Plaintiff's Claim.—The obvious rule is that judgment and satisfaction in garnishment constitute satisfaction pro tanto of the plaintiff's claim against the defendant.[7] However, the weight of authority is to the effect that a judgment

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[19] See infra, §§ 817, 825.

[1] Montgomery v. Whitehead, 40 Colo. 320, 90 P. 509, 11 L.R.A.(N.S.) 230; Bowen v. Port Huron Engine & Thresher Co. 109 Iowa, 255, 80 N. W. 345, 47 L.R.A. 131, 77 Am. St. Rep. 539; Hartzell v. Vigen, 6 N. D. 117, 69 N. W. 203, 35 L.R.A. 451, 66 Am. St. Rep. 589.

See also supra, §§ 817, 825.

[2] Columbia Bank v. Jacobs, 10 Mich. 349, 81 Am. Dec. 792.

See JUDICIAL SALES [Also 16 R. C. L. p. 1].

[3] Liddell v. Jones, 76 Ark. 344, 88 S. W. 961, 113 Am. St. Rep. 99; Montgomery v. Whitehead, 40 Colo. 320, 90 P. 509, 11 L.R.A. (N.S.) 230; Bowen v. Port Huron Engine & Thresher Co. 109 Iowa, 255, 80 N. W. 345, 47 L.R.A. 131, 77 Am. St. Rep. 539.

Generally, as to effect of garnishment as subrogation of plaintiff to rights of defendant, see infra, § 821.

[4] Johnson v. Samuelson, 82 Neb. 201, 117 N. W. 470, 130 Am. St. Rep. 666.

[5] Duncan v. Ware, 5 Stew. & P. (Ala.) 119, 24 Am. Dec. 772.

[6] Roman v. Montgomery Iron Works, 156 Ala. 604, 47 So. 136, 19 L.R.A.(N.S.) 604, 130 Am. St. Rep. 106.

A judgment discharging a subscriber to the stock of a corporation as garnishee for its debt upon failure of the plaintiff to contest his answer denying indebtedness is res judicata of the question of indebtedness in a subsequent direct proceeding by the creditor against him to apply his individual stock subscription to the payment of the corporate indebtedness. Roman v. Montgomery Iron Works, 156 Ala. 604, 47 So. 136, 19 L.R.A.(N.S.) 604, 130 Am. St. Rep. 106.

[7] Bowen v. Port Huron Engine & Thresher Co. 109 Iowa, 255, 80 N. W. 345, 47 L.R.A. 131, 77 Am. St. Rep. 539; Doughty v. Meek, 105 Iowa, 16, 74 N. W. 744, 67 Am. St. Rep. 282.

Annotation: 103 A.L.R. 840; 47 L.R.A. 131; 77 Am. St. Rep. 542.

In no event will a judgment in rem, binding as it does only the property or the fund in the hands of the garnishee, conclude the right of the garnishor to proceed against a principal defendant, not served personally in the garnishment action, for the balance remaining due after the against the garnishee will not, before its payment by the garnishee, operate as a bar pro tanto to the right of the garnishor against the principal defendant in the garnishment. Of course, the plaintiff may show, if he can, that the garnishee is not responsible, or that he obtained no valuable right by the garnishment, or that he released the judgment against the garnishee with the defendant's consent. But this rule as to release does not apply if the attempted abandonment of the proceedings was without the defendant's consent or if there was no necessity for the abandonment.[8] Furthermore, judgment against the garnishee without satisfaction constitutes satisfaction of the principal debt where the plaintiff is at fault for failure of satisfaction from the garnishee.[9] Indeed, the admission of indebtedness to the defendant by the garnishee has been held to constitute such satisfaction where it appeared that after such admission no case was ever docketed or judgment rendered against the garnishee, and that he never paid such indebtedness to the plaintiff.[10]

The loss of money paid to a sheriff under garnishment proceedings resulting from the subsequent absconding of that officer must be borne by the plaintiff.[11]

§ 802. **Conclusiveness Generally.**—The general rule is that a judgment in garnishment is conclusive upon the plaintiff, the defendant, and the garnishee, so far as the garnishment issue is concerned, that is, that the garnishee has in his possession property of, or debts owing to, the defendant.[12] However, such a judgment is open to collateral attack for lack of jurisdiction or for fraud in securing it.[13] Such a judgment is effective against the rights of third persons, not parties to the proceedings, only in so far as judgments in other cases are effective against third persons.[14] For example, judgment against the garnishee, adjudging property in his hands to belong to the defendant in the proceedings, does not conclude a third person, not a party to the proceedings, who claims title to the same property.[15] However, it may be said generally that judgment against the garnishee, and satisfaction thereof, constitute a prima facie bar to an action either by the principal defendant or by any third person claiming a recovery upon the debt or property thus

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amount of the judgment in garnishment has been deducted from the entire amount of the garnishor's claim. Strand v. Halverson, — Iowa, —, 264 N. W. 266, 103 A.L.R. 835. Annotation: 103 A.L.R. 842.

[8] Bowen v. Port Huron Engine & Thresher Co. 109 Iowa, 255, 80 N. W. 345, 47 L.R.A. 131, 77 Am. St. Rep. 539.

Annotation: 103 A.L.R. 839.

As to effect of abandonment by plaintiff on right of garnishee to plead garnishment in defense to action by defendant on garnished claim, see infra, § 808.

[9] Bowen v. Port Huron Engine & Thresher Co. 109 Iowa, 255, 80 N. W. 345, 47 L.R.A. 131, 77 Am. St. Rep. 539.

Annotation: 103 A.L.R. 841.

A judgment debtor, for a part of whose debt judgment has also been taken against a solvent garnishee, cannot be required to accept a tender of the latter judgment which the plaintiff has failed, without excuse, to collect, in lieu of having the amount thereof credited on his own judgment. Bowen v. Port Huron Engine & Thresher Co. 109 Iowa, 255, 80 N. W. 345, 47 L.R.A. 131, 77 Am. St. Rep. 539.

[10] Doughty v. Meek, 105 Iowa, 16, 74 N. W. 744, 67 Am. St. Rep. 282.

[11] Re Dawson, 110 N. Y. 114, 17 N. E. 668, 6 Am. St. Rep. 346.

Annotation: 6 Am. St. Rep. 348.

See also Vol. 4, p. 888, § 548.

[12] Hall v. Henderson, 134 Ala. 455, 32 So. 840, 63 L.R.A. 673.

A judgment in favor of subscribers to the stock of a corporation in garnishment proceedings on behalf of corporate creditors to compel payment of the subscriptions is a bar to a suit in equity for the same purpose, notwithstanding infirmities in it, if they are not such as will avail on collateral attack. Hall v. Henderson, 134 Ala. 455, 32 So. 840, 63 L.R.A. 673.

[13] See infra, § 957.

[14] Groveland Bkg. Co. v. City Nat. Bank, 144 Tenn. 520, 234 S. W. 643, citing R. C. L.; Adams v. Filer, 7 Wis. 306, 73 Am. Dec. 410.

[15] Groveland Bkg. Co. v. City Nat. Bank, 144 Tenn. 520, 234 S. W. 643, citing R. C. L.; Adams v. Filer, 7 Wis. 306, 73 Am. Dec. 410.

As to conclusiveness of judgment in main action as against third parties, see infra, § 958.

paid or surrendered to the garnishing creditor.[16] Nevertheless, the judgment is not binding on the garnishee where the judgment in the main action against the defendant is void for want of jurisdiction,[17] for the validity of the garnishment depends upon the validity of the judgment against the defendant.[18] Thus, the garnishee, by defaulting in his answer, is not concluded from raising the question of jurisdiction over the principal defendant by motion to vacate the judgment against such defendant and himself for want of jurisdiction. In some jurisdictions it has been held proper for the garnishee to attack the proceedings on the ground of lack of jurisdiction in rendering the judgment against the defendant, after the garnishee has pleaded non assumpsit and nulla bona, by a motion in arrest of judgment, upon a trial de novo on appeal, on a scire facias upon a judgment against the garnishee, or for the first time on appeal, or by an independent suit.[19]

§ 803. Full Faith and Credit.—Attachment and garnishment proceedings are entitled to the protection of the full faith and credit provision of the United States Constitution. Thus, a valid judgment in a garnishment suit, like any other judgment, is entitled to full faith and credit in any other state.[20]

(2) Judgment and Satisfaction and Voluntary Payment in Garnishment as Defense to Action by Defendant against Garnishee

§ 804. Generally.[1]—The general rule is that a garnishee can plead judgment and satisfaction in the garnishment proceedings as a bar pro tanto to any subsequent recovery by the defendant or his assignee on the garnished debt, at least where he has fully performed his duty in the garnishment proceedings as to disclosure and protection of the rights of the defendant. However, where he has failed to protect by legal and appropriate steps the rights of the defendant, such judgment and satisfaction constitute no defense, even though such satisfaction has been compelled by execution directed against him.[2] A carrier who yields to a valid process of garnishment has a complete defense for failure to deliver the goods to the consignee.[3] However, in entering such a defense, the garnishee should also allege and prove that he discharged his duty to the creditor with respect to giving him notice of the garnishment proceedings and making any defenses thereto in the debtor's behalf of which he is cognizant and which he is able to make.[4] The view has been taken that a judgment against the garnishee in the garnishment proceedings is a defense to an action brought against him by the debtor, without proof of satisfaction,[5] though other courts declare that such a judgment is not a defense unless it has been satisfied.[6]

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[16] Sessions v. Stevens, 1 Fla. 269, 46 Am. Dec. 339.

[17] Smith v. Blatchford, 2 Ind. 184, 52 Am. Dec. 504; Atwood v. Tucker (Atwood v. Roan) 26 N. D. 622, 145 N. W. 857, 51 L.R.A.(N.S.) 597; Adams v. Filer, 7 Wis. 306, 73 Am. Dec. 410.

Annotation: 51 L.R.A.(N.S.) 597.

[18] See supra, § 711.

[19] Atwood v. Tucker (Atwood v. Roan) 26 N. D. 622, 145 N. W. 587, 51 L.R.A.(N.S.) 597.

Annotation: 51 L.R.A.(N.S.) 597.

[20] Sanders v. Armour Fertilizer Works, 292 U. S. 190, 78 L. ed. 1206, 54 S. Ct. 677, 91 A.L.R. 950, rehearing denied in 292 U. S. 612, 78 L. ed. 1472, 54 S. Ct. 855; Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023, 25 S. Ct. 625, 3 Ann. Cas. 1084; King v. Cross, 175 U. S. 396, 44 L. ed. 211, 20 S. Ct. 131; Chicago, R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 43 L. ed. 1144, 19 S. Ct. 797; Hartford F. Ins. Co. v. Citizens' Bank, 166 Ark. 551, 266 S. W. 675, 39 A.L.R. 1458; Chicago, B. & Q. R. Co. v. Moore, 31 Neb. 629, 48 N. W. 475, 28 Am. St. Rep. 534.

Annotation: 91 A.L.R. 959; 28 Am. St. Rep. 538.

A judgment rendered in one state in favor of the plaintiff in a garnishment proceeding against an insurance company doing business there, to reach the proceeds of a policy issued to a resident of another state upon property located at his residence, which, with the assent of the insurer, had been assigned, after loss, to another resident of the state where the property is located, is entitled to full faith and credit in the courts of the latter state where the assignee was interpleaded and duly notified of the proceeding and his rights were fully disclosed by the garnishee. Hartford F. Ins. Co. v. Citizens' Bank, 166 Ark. 551, 266 S. W. 675, 39 A.L.R. 1458.

[1] As to pending proceedings as a defense, see supra, §§ 696 et seq.

[2] Wallace v. M'Connell, 13 Pet. (U. S.) 136, 10 L. ed. 95; Kennedy v. Brent, 6 Cranch (U. S.) 187, 3 L. ed. 194; Joseph Joseph & Bros. Co. v. Hoffman & McNeill, 173 Ala. 568, 56 So. 216, 38 L.R.A.(N.S.) 924, Ann. Cas. 1914A, 718; Cottingham v. Greely Barnham Grocery Co. 129 Ala. 200, 30 So. 560, 87 Am. St. Rep. 58; Gunn v. Howell, 27 Ala. 663, 62 Am. Dec. 785; Smoot v. Eslava, 23 Ala. 659, 58 Am. Dec. 310; Cook v. Field, 3 Ala. 53, 36 Am. Dec. 436; Duncan v. Ware, 5 Stew. & P. (Ala.) 119, 24 Am. Dec. 772; Lancashire Ins. Co. v. Corbetts, 165 Ill. 592, 46 N. E. 631, 36 L.R.A. 640, 56 Am. St. Rep. 275; Baltimore & O. S. W. R. Co. v. Adams, 159 Ind. 688, 66 N. E. 43, 60 L.R.A. 396; Pittsburgh, C. C. & St. L.

§ 805. **Where Judgment or Garnishment Void.**—The courts are agreed that if the judgment in a garnishment proceeding is void, as, for example, where there is no jurisdiction acquired by the court, payment by the garnishee is no protection to him against a subsequent action by his creditor, or the creditor's assignee, to recover the debt.[7] Nor is it a defense to a valid garnishment pro-

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R. Co. v. Cox, 36 Ind. App. 291, 73 N. E. 120, 114 Am. St. Rep. 377; Bowen v. Port Huron Engine & Thresher Co. 109 Iowa, 255, 80 N. W. 345, 47 L.R.A. 131, 77 Am. St. Rep. 539; McAllister v. Brooks, 22 Md. 80, 38 Am. Dec. 282; Perkins v. Grobben, 116 Mich. 172, 74 N. W. 469, 39 L.R.A. 815, 72 Am. St. Rep. 512; Chicago, B. & Q. R. Co. v. Moore, 31 Neb. 629, 48 N. W. 475, 28 Am. St. Rep. 534; Holmes v. Remsen, 20 Johns. (N. Y.) 229, 11 Am. Dec. 269; Peterson v. Johnson, 22 Wis. 21, 94 Am. Dec. 581.

Annotation: 46 A.L.R. 449; 91 A.L.R. 959; Ann. Cas. 1918C, 829.

[3] Stiles v. Davis, 1 Black (U. S.) 101, 17 L. ed. 33; Missouri P. R. Co. v. Whipsker, 77 Tex. 14, 13 S. W. 639, 8 L.R.A. 321, 19 Am. St. Rep. 734; Wells v. American Exp. Co. 55 Wis. 23, 11 N. W. 537, 12 N. W. 441, 42 Am. Rep. 695.

Generally, as to duties of garnishee as to protection of defendant, see supra, §§ 680 et seq.

[4] St. Louis & S. F. R. Co. v. Crews, 51 Okla. 144, 151 P. 879, Ann. Cas. 1918B, 823.

[5] McAllister v. Brooks, 22 Me. 80, 38 Am. Dec. 282.

[6] Wanzer v. Truly, 17 How. (U. S.) 584, 15 L. ed. 216; Cook v. Field, 3 Ala. 53, 36 Am. Dec. 436.

Annotation: 46 Am. Dec. 345.

The claim of an attaching creditor against his debtor is extinguished only by a satisfaction of his demand by the garnishee. Wanzer v. Truly, 17 How. (U. S.) 584, 15 L. ed. 216.

[7] Louisville & N. R. Co. v. Nash, 118 Ala. 477, 23 So. 825, 41 L.R.A. 331, 72 Am. St. Rep. 181; Southern R. Co. v. Newton, 106 Ga. 566, 32 S. E. 658, 71 Am. St. Rep. 279; Pierce v. Carleton, 12 Ill. 358, 54 Am. Dec. 405; Egnatik v. Riverview State Bank, 114 Kan. 105, 216 P. 1100, 49 A.L.R. 1409; Ludvickson v. Severy State Bank, 105 Kan. 225, 182 P. 396, citing R. C. L.; United Collieries v. Martin, 248 Ky. 808, 60 S. W. (2d) 125, 89 A.L.R. 971; Tourville v. Wabash R. Co. 148 Mo. 614, 50 S. W. 300, 71 Am. St. Rep. 650, affirmed in 179 U. S. 322, 45 L. ed. 210, 21 S. Ct. 113; Balk v. Harris, 122 N. C. 64, 30 S. E. 318, 45 L.R.A. 257, on rehearing in 124 N. C. 467, 32 S. E. 799, 45 L.R.A. 260, 70 Am. St. Rep. 606; Pennhoma Oil Co. v. Jens Marie Oil Co. 98 Okla. 211, 224 P. 720, citing R. C. L.; St. Louis & S. F. R. Co. v. Crews, 51 Okla. 144, 151 P. 879, Ann. Cas. 1918C, 823; Stewart v. Northern Assur. Co. 45 W. Va. 734, 32 S. E. 218, 44 L.R.A. 101; Wells v. American Exp. Co. 55 Wis. 23, 11 N. W. 537, 12 N. W. 441, 42 Am. Rep. 695.

Annotation: 49 A.L.R. 1411; 71 Am. St. Rep. 281, 655.

A void judgment in garnishment proceedings is no protection to the garnishee in a subsequent action by his creditor or the creditor's assignee to recover the debt. United Collieries v. Martin, 248 Ky. 808, 60 S. W. (2d) 125, 89 A.L.R. 971.

A judgment against a garnishee in a court that did not acquire jurisdiction of the person of the principal defendant, which does not recite that such garnishee disclosed any defensive matter or any fact other than an admission of his indebtedness to the principal defendant, is not, as against such principal defendant and in favor of such garnishee, an adjudication of any issue as to whether such garnishee discharged his duty to such principal defendant in such garnishment proceedings with respect to notice and defenses. Such judgment would not be accorded faith or credit as such adjudication in the state in which it is rendered, or in any other state. A refusal of a court of a state other than the one in which it was rendered to give such judgment effect as an adjudication of such issue between the garnishee and the principal defendant is not a denial to the same of the full faith and credit to which it is entitled. St. Louis & S. F. R. Co. v. Crews, 51 Okla. 144, 151 P. 879, Ann. Cas. 1918C, 823.

A judgment against a garnishee of a nonresident debtor, who does not appear and is served by constructive service only, when the action is based on a contract which is utterly void in the state where the principal debtor resides, will not protect the garnishee when he is sued by the latter. Stewart v. Northern Assur. Co. 45 W. Va. 734, 32 S. E. 218, 44 L.R.A. 101.

A bank which received checks upon itself in payment of a draft with bill of lading attached sent it for collection cannot avoid liability to the owner of the draft on the ground that the checks were attached as the property of the consignor in the bill of lading, for the checks themselves, as soon as they were accepted by the collecting bank, were paid and canceled, and ceased to exist as commercial ceeding by another creditor of the garnishee's creditor to reach the debt.[8]

§ 806. **Where Judgment or Garnishment Erroneous and Irregular Merely.**—Where the judgment against the garnishee in the garnishment proceeding is erroneous or irregular, but not void, payment by the garnishee in pursuance of the judgment protects him against the subsequent claim of the principal defendant provided he has acted in good faith and has fully discharged his legal duties in protecting the interest of the defendant.[9]

§ 807. **Where Judgment Reversed.**—Even though the judgment against the debtor is afterwards reversed, payment of the judgment against the garnishee protects the latter, if the money paid was actually due from the debtor.[10]

§ 808. **Where Garnishment Abandoned.**—A garnishment proceeding cannot be set up as a defense in an action on a claim, where such proceeding was abandoned before any answer or plea by the garnishee, and where there has been no judgment or satisfaction therein.[11]

§ 809. **Where Garnishee Makes Payment before Judgment or Defaults.**—The general rule is that a voluntary payment by a garnishee cannot protect him against the claim of his creditor.[12] Thus, generally the garnishee should wait until after judgment before making payment,[13] and if the judgment was obtained through his wilful default, its payment will not protect him,[14] although it has been said that the consent of a garnishee to a judgment impounding his debt to the principal debtor does not make the payment under the judgment voluntary, where he was absolutely without defense, so as to prevent him from pleading such payment in bar to an action on the debt.[15]

§ 810. **Where Garnishment Was in Foreign Court.**—A judgment in a garnishment proceeding, rendered, without fraud or collusion, by a court in another state of the Union having jurisdiction to render it, is entitled to the protection of the full faith and credit clause of the United States Constitution. Consequently, such a judgment, at least after satisfaction of the same, can be

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paper. Jersey Shore Trust Co. v. Owosso Sav. Bank, 223 Mich. 513, 194 N. W. 588, 32 A.L.R. 714. Annotation: 32 A.L.R. 721.

[8] Southern R. Co. v. Ward, 123 Ala. 400, 26 So. 234, 82 Am. St. Rep. 129.

[9] Annotation: 49 A.L.R. 1411.

[10] Duncan v. Ware, 5 Stew. & P. (Ala.) 119, 24 Am. Dec. 772.

[11] Alexander v. Clarkson, 100 Kan. 294, 164 P. 294, L.R.A.1917F, 1006; Missouri, K. & T. R. Co. v. Housely, 43 Okla. 794, 144 P. 610, Ann. Cas. 1916B, 363.

In Alexander v. Clarkson, 100 Kan. 294, 104 P. 294, L.R.A.1917F, 1006, it was held that where a garnishment proceeding has been commenced by filing a petition, giving bond, and service of summons, but the garnishee makes no answer and issues are not joined, no judgment is entered, and no execution is issued, the garnishee acquires no claim against the debtor in such abortive garnishment proceeding by acquiring an assignment of a judgment against the debtor rendered in another action.

Where garnishment proceedings in a foreign state are held, in another state, to have been abandoned because of failure to obtain service on the nonresident debtor in accordance with the laws of such foreign state, they neither bar nor abate a cause of action in the latter state by the principal debtor against the garnishee. Missouri, K. & T. R. Co. v. Housley, 43 Okla. 794, 144 P. 610, Ann. Cas. 1916B, 363.

[12] Balk v. Harris, 122 N. C. 64, 30 S. E. 318, 45 L.R.A. 257, rehearings in 124 N. C. 467, 32 S. E. 799, 45 L.R.A. 260, 70 Am. St. Rep. 606, 130 N. C. 381, 41 S. E. 940, 132 N. C. 10, 43 S. E. 477, reversed on other grounds in 198 U. S. 215, 49 L. ed. 1023, 25 S. Ct. 625, 3 Ann. Cas. 1084.

A debtor garnished in a suit against his creditor when out of the state of his residence is not protected from a suit in favor of such creditor by paying the debt to a representative of the foreign plaintiff after returning to his domicil and after the entry of a judgment against him, where he had given no obligation to secure the payment, and he shows nothing which would have made the payment compulsory. Ibid.

[13] Bessemer Sav. Bank v. Anderson, 134 Ala. 343, 32 So. 716, 92 Am. St. Rep. 38.

[14] Whipple v. Robbins, 97 Mass. 107, 93 Am. Dec. 64.

[15] Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023, 25 S. Ct. 625, 3 Ann. Cas. 1084.

pleaded pro tanto in bar of any subsequent recovery on the garnished debt by the defendant or his assignees.[16]

§ **811. —In Wage or Insurance Cases.**—An employer may plead, in bar of an action for wages, that they were garnished by a creditor of the employee in another state and that he performed his duty in disclosing and protecting the interest of the employee in such garnishment, but that a judgment was entered against him in such proceedings, and all the wages owing to the employee were taken in satisfaction of such judgment. The judgment in such a proceeding is entitled to the protection of the full faith and credit clause of the United States Constitution.[17] Violation of a state statute in sending a claim out of the state for the purpose of garnishment of wages will not deprive the garnishee of the protection of the foreign judgment, under which he pays the claim, from liability to pay the debt a second time to his creditor within the state, if he has disclosed all defenses within his knowledge to the foreign court, and has notified the debtor of the proceedings, and, in spite of this, the foreign court, which has jurisdiction over the parties and the res, compelled him to pay the claim.[18] The above rules and principles apply fully to the garnishment in another state of money due on an insurance policy, and entitle such garnishment proceedings to full faith and credit in the forum.[19]

(3) Judgment and Satisfaction in Garnishment as Defense to Claim by Third Persons

§ **812. Generally.**—The general rule is that judgment and satisfaction in garnishment proceedings protect the garnishee from the demands of adverse claimants to the property or debts garnished in his possession, at least where the garnishee has fully discharged his legal obligations with respect to the protection of such claimants' interests,[20] and where the claimant has had notice of the garnishment proceedings and has failed to intervene.[1]

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[16] Sanders v. Armour Fertilizer Works, 292 U. S. 190, 78 L. ed. 1206, 54 S. Ct. 677, 91 A.L.R. 950, rehearing denied in 292 U. S. 612, 78 L. ed. 1472, 54 S. Ct. 855; Chicago, R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 43 L. ed. 1144, 19 S. Ct. 797; Joseph Joseph & Bros. Co. v. Hoffman & McNeill, 173 Ala. 568, 56 So. 216, 38 L.R.A.(N.S.) 924, Ann. Cas. 1914A, 718; Lancashire Ins. Co. v. Corbetts, 165 Ill. 592, 46 N. E. 631, 36 L.R.A. 640, 56 Am. St. Rep. 275; Baltimore & O. S. W. R. Co. v. Adams, 159 Ind. 688, 66 N. E. 43, 60 L.R.A. 396; Holmes v. Remsen, 20 Johns. (N. Y.) 229, 11 Am. Dec. 269.

Annotation: 46 A.L.R. 449; 91 A.L.R. 959.

Where payment has been made by a garnishee under regular legal process of a foreign court at the instance of the assignees of the bankrupt there, it is a bar to an action here for the debt by trustees of the creditors of the bankrupt under an attachment. Holmes v. Remsen, 20 Johns. (N. Y.) 229, 11 Am. Dec. 269.

[17] Chicago, R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 43 L. ed. 1144, 19 S. Ct. 797; Baltimore & O. S. W. R. Co. v. Adams, 159 Ind. 688, 66 N. E. 43, 60 L.R.A. 396; Steltzer v. Chicago, M. & St. P. R. Co. 156 Iowa, 1, 134 N. W. 573, L.R.A.1915E, 1017; Chicago, B. & Q. R. Co. v. Moore, 31 Neb. 629, 48 N. W. 475, 28 Am. St. Rep. 534. See also Sanders v. Armour Fertilizer Works, 292 U. S. 190, 78 L. ed. 1206, 54 S. Ct. 677, 91 A.L.R. 950, rehearing denied in 292 U. S. 612, 78 L. ed. 1472, 54 S. Ct. 855; Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023, 25 S. Ct. 625, 3 Ann. Cas. 1084, and King v. Cross, 175 U. S. 396, 44 L. ed. 211, 20 S. Ct. 131.

A railroad company which is garnished in one state for wages due an employee will be protected by the courts of another state against a second payment to an assignee of the wages, residing there, if, upon receiving due notice of the garnishment, he neglects to appear and protect his claim, so that judgment was rendered in favor of the original creditor and paid. Steltzer v. Chicago, M. & St. P. R. Co. 156 Iowa, 1, 134 N. W. 573, L.R.A.1915E, 1017.

As to pendency of garnishment of wages in a foreign jurisdiction as defense to action for their recovery, see supra, § 700.

[18] Baltimore & O. S. W. R. Co. v. Adams, 159 Ind. 688, 66 N. E. 43, 60 L.R.A. 396.

[19] Sanders v. Armour Fertilizer Works, 292 U. S. 190, 78 L. ed. 1206, 54 S. Ct. 677, 91 A.L.R. 950, rehearing denied in 292 U. S. 612, 78 L. ed. 1472, 54 S. Ct. 855.

See also Vol. 4, p. 603, § 79.

[20] As to duty of garnishee to protect interests of third persons, see supra, §§ 687 et seq.

[1] Molyneux v. Seymour, 30 Ga. 440, 76 Am. Dec. 662; Steltzer v. Chicago, M. & St. P. R. Co. 156 Iowa, 1, 134 N. W. 573,

d. Enforcement

§ 813. **Generally.**—The general practice is to enforce a judgment in garnishment against the garnishee by an execution as in other cases.[2] If specific property has been attached and is held by the garnishee as a bailee of the attaching officer, the property may be sold in course of law, as in other cases, to satisfy the judgment.[3] If no specific property has been attached in the hands of the garnishee, and the judgment is binding, nevertheless, only on property of the defendant in the possession of the garnishee, and not against the garnishee generally,[4] the execution must involve some mode of discovery of, identification of, levy on, and seizure of, the defendant's property in the possession of the garnishee. This is accomplished in some jurisdictions by scire facias proceedings.[5] The practice in some jurisdictions is to proceed by scire facias proceedings in all cases of execution against garnishees, though generally the necessity of scire facias proceedings is limited to cases where the garnishee defaults, and where there has been no specific property garnished, so that it is necessary to discover and identify the property of the defendant in the possession of the garnishee.[6] Since the effect of a garnishment judgment is to sequester or set aside, to the payment of the plaintiff's judgment, property of, or debts owing to, the defendant in the hands of the garnishee,[7] the view has been taken that the court is authorized to make the customary orders to enable the creditor to realize from the interest of the debtor in the property.[8] In some states, where the rule is established that judgment may be rendered against a garnishee for an indebtedness admitted to be due at a future day,[9] execution will be stayed until the maturity of the debt,[10] though an order staying execution is not always required.[11]

L.R.A.1915E, 1017; Henderson v. Hooper Sugar Co. 65 Utah, 241, 236 P. 239, 45 A.L.R. 637.

As to judgment and satisfaction in garnishment as a defense to an action by the defendant against the garnishee, see supra, §§ 804 et seq.

Despite the general rule stated above, the view has been taken that where a judgment creditor assigns his judgment, and the judgment debtor, without notice of the assignment, afterwards pays the amount thereof voluntarily to the sheriff upon being served with garnishment process, the rights of the assignee are not affected, and he may still enforce the judgment, though the garnishee paid in ignorance of the assignment (Brown v. Ayres, 33 Cal. 525, 91 Am. Dec. 655).

A mere bailee for hire who becomes garnishee in a proceeding to reach the property bailed is protected from claims of a subsequent assignee of the property who has knowledge from any reliable source that the proceedings are pending, and fails to assert his claim, even though he is not made a party to the proceeding. Henderson v. Hooper Sugar Co. 65 Utah, 241, 236 P. 239, 45 A.L.R. 637.

A judgment against a garnishee in one state is a protection against an action against him in another state by an assignee of the debt who, although he received due notice of the garnishment, failed to appear and protect his interest. Steltzer v. Chicago, M. & St. P. R. Co. 156 Iowa, 1, 134 N. W. 573, L.R.A.1915E, 1017.

[2] Parker, Peebles & Knox v. El Saieh, 107 Conn. 545, 141 A. 884, 59 A.L.R. 1424; Adams v. Rowe, 11 Me. 89, 25 Am. Dec. 266.

[3] See Standard Pa. Prac. Vol. 10.

[4] See supra, §§ 789, 793.

[5] Parker, Peebles & Knox v. El Saieh, 107 Conn. 545, 141 A. 884, 59 A.L.R. 1424; Adams v. Rowe, 11 Me. 89, 25 Am. Dec. 266.

See Standard Pa. Prac. Vol. 10.

[6] Parker, Peebles & Knox v. El Saieh, 107 Conn. 545, 141 A. 884, 59 A.L.R. 1424; Adams v. Rowe, 11 Me. 89, 25 Am. Dec. 266.

See Standard Pa. Prac. Vol. 10.

On scire facias to enforce a judgment in a garnishment proceeding, the question is open as to the existence of a debt subject to execution, and also the rights of other claimants to the fund, including those of an assignee in bankruptcy. Parker, Peebles & Knox v. El Saieh, 107 Conn. 545, 141 A. 884, 59 A.L.R. 1424.

[7] See supra, § 658.

[8] Hartzell v. Vigen, 6 N. D. 117, 69 N. W. 203, 35 L.R.A. 451, 66 Am. St. Rep. 589.

Annotation: 66 Am. St. Rep. 601.

[9] See Vol. 4, p. 675, § 192.

[10] Cottrell v. Varnum, 5 Ala. 229, 39 Am. Dec. 323; Malone v. Moore, 204 Iowa, 625, 215 N. W. 625, 55 A.L.R. 356.

[11] Anderson v. Wanzer, 5 How. (Miss.) 587, 37 Am. Dec. 170.

11. Costs

§ 814. Generally.—The garnishee's liability is limited to the payment of his debt; he is not liable for the costs of the garnishment proceeding.[12] On the contrary, as a rule, the court may, in its discretion, allow to the garnishee his costs in the garnishment proceedings,[13] and in some jurisdictions the court may allow him compensation to meet his expenses,[14] including a reasonable attorney's fee.[15] But if the garnishee denies all liability, and judgment is subsequently entered against him, he may be held liable for the costs.[16] So also, if the garnishee permits costs to accumulate upon the judgment against him, he cannot charge the principal debtor with such costs.[17] The execution creditor is liable for the costs of a garnishment successfully prosecuted against the person summoned, if the funds in the latter's hands are not sufficient to pay the debt and costs and he has not resisted the proceeding or appealed from the judgment against him.[18]

It has been held that under a statute providing that the court shall make the garnishee a reasonable allowance for his trouble and expense in answering the plaintiff in the principal action, the garnishee is not entitled to a jury trial to assess an allowance.[19]

XI. EFFECT, LIEN, AND PRIORITY

A. Effect and Lien

1. In General

§ 815. Attachment Lien.—The usual and practical theory is that an attachment creates a lien on the property attached.[20] At least it is unquestionably a security for the debt, places the attached property in custodia legis,[1] and gives the attaching officer a special property interest in the same.[2] It is a direct appropriation by authority of law of specific property of the debtor, for the purpose of satisfying the demand, and the lien thereby created is substantial and enduring, as much so as a mortgage or a pledge.[3]

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[12] Annotation: L.R.A.1918C, 756.

[13] Lewis v. Ross, 37 Me. 230, 59 Am. Dec. 49; Drew v. Towle, 27 N. H. 412, 59 Am. Dec. 380; Henderson v. Hooper Sugar Co. 65 Utah, 241, 236 P. 239, 45 A.L.R. 637.

[14] Mattingly v. Boyd, 20 How. (U. S.) 128, 15 L. ed. 845; Moody v. Carroll, 71 Tex. 143, 8 S. W. 510, 10 Am. St. Rep. 734.

A garnishee in accounting is entitled to a credit for his own expenses and services. Mattingly v. Boyd, 20 How. (U. S.) 128, 15 L. ed. 845.

A statute is noted in 20 Texas Jur. p. 874, providing: "Where the garnishee is discharged upon his answer, the costs of the proceeding, including a reasonable compensation to the garnishee, shall be taxed against the plaintiff; where the answer of the garnishee has not been controverted and the garnishee is held thereon, such costs shall be taxed against the defendant and included in the execution provided for in this chapter; where the answer is contested, the costs shall abide the issue of such contest."

A garnishee, required by the court to open a sealed parcel or locked safe-deposit box, would be entitled to reimbursement for expenses incurred in complying with the court's order. Tillinghast v. Johnson, 34 R. I. 136, 82 A. 788, 41 L.R.A.(N.S.) 764, Ann. Cas. 1914A, 960.

[15] Oklahoma State Bank v. Reed, 143 Okla. 131, 288 P. 281, 85 A.L.R. 635; Willis v. Heath, 75 Tex. 124, 12 S. W. 971, 16 Am. St. Rep. 876; Henderson v. Hooper Sugar Co. 65 Utah, 241, 236 P. 239, 45 A.L.R. 637.

It is within the power and discretion of the trial court to determine in the first instance what the allowance shall be to a garnishee for expenses and attorneys' fees. Henderson v. Hooper Sugar Co. 65 Utah, 241, 236 P. 239, 45 A.L.R. 637.

[16] Henderson v. Hooper Sugar Co. 65 Utah, 241, 236 P. 239, 45 A.L.R. 637; Eau Claire Nat. Bank v. Chippewa Valley Bank, 124 Wis. 520, 102 N. W. 1068, 109 Am. St. Rep. 966.

[17] Berry v. Davis, 77 Tex. 191, 13 S. W. 978, 19 Am. St. Rep. 748.

[18] State v. Linaweaver, 3 Head (Tenn.) 51, 75 Am. Dec. 757.

[19] Annotation: 88 A.L.R. 1151.

[20] **In American law there are several kinds of liens:** viz., the common-law lien, which is merely the right to retain the possession of the property of another until some claim or charge on it is satisfied; the equitable lien, which may exist apart from the actual possession of the property, such as a vendor's lien; and certain statutory liens, such as those given by express legislative enactment to mechanics, materialmen, etc. (Ward v. McKenzie, 33 Tex. 297, 7 Am. Rep. 261. See Liens [Also 17 R. C. L. p. 594]; Mechanics' Liens [Also 18 R. C. L. p. 868]; Vendor and Purchaser [Also 27 R. C. L. p. 297]). Applying this test, it may be observed that while the remedial operation of the process of attachment or garnishment is usually designated and treated as a lien by courts and text-writers alike, yet in a proper sense of the word an attachment or garnishment does not create a lien, but merely places in the custody of the law property which has been seized under it (Peck v. Jenness, 7 How. (U. S.)

The view has been taken that the levy of an attachment on real estate does not give the court whence the process issued either actual or constructive possession of the property.[4] But there is specific authority that an attachment constitutes a lien on realty.[5] As distinguished from a lien of a judgment on land, an attachment, properly levied, creates a specific, and not a general, lien.[6]

The lien of attachment exists only under the attachment law and process, and is not a contractual lien.[7]

§ 816. Attachment as Satisfaction of Plaintiff's Claim.—The authorities are not in agreement upon the effect of an attachment as a satisfaction of the plaintiff's claim. One view is that a levy of an attachment on sufficient personalty is not necessarily a satisfaction of the judgment when afterwards obtained, but that in order to have this effect it must be shown that the property levied on was actually applied in satisfaction.[8] Another view is that an attachment of sufficient property to satisfy the attachment debt is, like an execution levied, a satisfaction of the debt, and may be so pleaded.[9] It has been held that a levy on personal property can constitute a satisfaction be-

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612, 12 L. ed. 841; Shirk v. Thomas, 121 Ind. 147, 22 N. E. 976, 16 Am. St. Rep. 381; Rent-A-Car Co. v. Belford, 163 Tenn. 590, 45 S. W. (2d) 49, citing R. C. L.; Keller v. Federal Bob Brannon Truck Co. 151 Tenn. 427, 269 S. W. 914, citing R. C. L.; Ward v. McKenzie, 33 Tex. 297, 7 Am. Rep. 261; Wall v. Norfolk & W. R. Co. 52 W. Va. 485, 44 S. E. 294, 64 L.R.A. 501, 94 Am. St. Rep. 948).

While the statutes in many states never in terms have given the attaching creditor a lien upon the res by virtue of the attachment, yet in substance they have treated the attachment as a lien. Coit v. Sistare, 85 Conn. 573, 84 A. 119, Ann. Cas. 1913C, 248. Annotation: 15 Am. Dec. 253.

It has been held that where, at the time for making a conveyance, the land is subject to attachments against the vendor to an amount exceeding its apparent value, the purchaser will not be compelled to accept the conveyance. Annotation: 38 L.R.A.(N.S.) 32.

[1] Mitchell v. St. Maxent, 4 Wall. (U. S.) 237, 18 L. ed. 326; Coit v. Sistare, 85 Conn. 573, 84 A. 119, Ann. Cas. 1913C, 248; Owen v. Roberts, 81 Me. 439, 17 A. 403, 4 L.R.A. 229; First Nat. Bank v. Corporation Commission, 161 Md. 508, 157 A. 748, 86 A.L.R. 1407; Roehl Storage Co. v. Wilson, 268 Mich. 691, 256 N. W. 598, 95 A.L.R. 1525; Barnes v. Verry, 154 Minn. 252, 191 N. W. 589, 31 A.L.R. 707; Pitkin v. Burnham, 62 Neb. 385, 87 N. W. 160, 55 L.R.A. 280, 89 Am. St. Rep. 763; Rent-A-Car Co. v. Belford, 163 Tenn. 590, 45 S. W. (2d) 49, citing R. C. L.; Keller v. Federal Bob Brannon Truck Co. 151 Tenn. 427, 269 S. W. 914, citing R. C. L.; Herman Bros. L. & Co. v. Katz Bros. 101 Tenn. 118, 47 S. W. 86, 41 L.R.A. 700.

[2] See Vol. 4, p. 886, § 545.

[3] Martinovich v. Marsicano, 150 Cal. 597, 89 P. 333, 119 Am. St. Rep. 254; Thoms v. Southard, 2 Dana (Ky.) 475, 26 Am. Dec. 467; Locke v. Coleman, 2 T. B. Mon. (Ky.) 12, 15 Am. Dec. 118; Hinds v. Scott, 11 Pa. 19, 51 Am. Dec. 506; Humphrey v. Hitt, 6 Gratt. (Va.) 509, 52 Am. Dec. 133.

[4] Kilgo v. Castleberry, 38 Ga. 512, 95 Am. Dec. 406; Leigh v. Green, 62 Neb. 344, 86 N. W. 1093, 89 Am. St. Rep. 751.

[5] Westervelt v. Hagge, 61 Neb. 647, 85 N. W. 852, 54 L.R.A. 333.

However, no valid lien is acquired by an attachment on real estate by a creditor of a fraudulent grantee to whom the legal title has been conveyed in fraud of the rights of the creditors of the fraudulent grantor, and who has no actual interest therein, and who restores and reconveys the real estate to the fraudulent grantor, who voluntarily encumbers the same for the benefit of his creditors, as against such creditors of the grantor under their liens thus acquired. Ibid.

[6] Carter v. Champion, 8 Conn. 549, 21 Am. Dec. 695; Barnes v. Verry, 154 Minn. 252, 191 N. W. 589, 31 A.L.R. 707; Katz v. Obenchain, 48 Or. 352, 85 P. 617, 120 Am. St. Rep. 821.

[7] Wall v. Norfolk & W. R. Co. 52 W. Va. 485, 44 S. E. 294, 64 L.R.A. 501, 94 Am. St. Rep. 948.

[8] Maxwell v. Stewart, 22 Wall. (U. S.) 77, 22 L. ed. 564.

See 27 Tex. Jur. p. 502.

As to judgment against garnishee and satisfaction of same as satisfaction of plaintiff's claim against defendant, see supra, § 801.

[9] Annotation: 91 Am. Dec. 314.

See EXECUTIONS [Also 10 R. C. L. p. 1369, § 157].

cause the defendant is deprived of the possession of his property, whereas this is not so in the case of a levy on realty, and that therefore a levy on realty is not a satisfaction of the claim.[10] It would seem that since an attachment constitutes a seizure on execution in advance of judgment,[11] and since the plaintiff must bear the loss of the attached property, as to the defendant, while it is in the custody of the law,[12] the attachment should constitute a satisfaction of his claim, to the extent, at least, that he must bear such loss.[13]

§ 817. Garnishment Lien.—With respect to the binding effect of garnishment on the property garnished, the weight of opinion is that such process operates as an attachment and fastens upon the property or debt a lien by which it is brought under the jurisdiction of the court. According to this view, then, a garnishment has the same effect as an attachment in bringing the property or debt garnished into custodia legis, although the garnished property is left in the hands of the garnishee or a receiptor, whose office with respect to the garnished property is said to be that of a bailee of the attaching or garnishing officer which, in many jurisdictions, he is expressly called.[14] The service of process in garnishment proceedings may thus be said to operate as an equitable levy upon property belonging to the principal defendant in the hands of the garnishee, which levy may be enforced against such property in the hands of any other than an innocent purchaser for value, unless such right of enforcement is waived.[15] The lien of garnishment may be regarded as vesting the plaintiff with security, within the meaning of the bankruptcy act.[16]

§ 818. View that Garnishment Constitutes No Lien until Judgment. — According to some authorities, the plaintiff does not acquire a lien upon specific chattels in the hands of the garnishee by service upon him[17] or upon any of the property of the debtor in the garnishee's hands, capable of manual delivery,[18] but merely a subrogation of the plaintiff's right to proceed against the defendant,[19] and it has been held that no lien on a fund represented only by a negotiable instrument is obtained by an attempted garnishment.[20] There is likewise authority to the effect that the service of garnishment on the assignee of a corporation without the levy of an attachment on its property does not transfer such property to the officer or give him any right to control it, and that the creditor acquires no lien.[21] However, a judgment in the garnishment undoubtedly effects an assignment of the defendant's interest to the plaintiff in property and credits in the hands or control of the garnishee,[22] and constitutes a lien upon the same.[23]

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[10] Trapnall v. Richardson, 13 Ark. 543, 58 Am. Dec. 338; Scott v. Aultman Co. 211 Ill. 612, 71 N. E. 1112, 103 Am. St. Rep 215.
Annotation: 58 Am. Dec. 360 et seq.; 91 Am. Dec. 314.

[11] See Vol. 4, p. 552, § 3.

[12] See Vol. 4, p. 888, § 548.

[13] Annotation: 91 Am. Dec. 314.

A levy under an attachment does not as a general rule discharge the debt, although if a debt levied on by the sheriff is paid to him, and he has misappropriated the money, the plaintiff must bear the loss. 7 Carmody, N. Y. Prac. pp. 541, 542.

[14] Miller v. United States (Page v. United States) 11 Wall. (U. S.) 268, 20 L. ed. 135; Mattingly v. Boyd, 20 How. (U. S.) 128, 15 L. ed. 845; Brashear v. West, 7 Pet. (U. S.) 608, 8 L. ed. 801; Smith v. Davis, 131 Me. 9, 158 A. 359, 81 A.L.R. 78; Farrington v. F. E. Fleming Commission Co. 94 Neb. 108, 142 N. W. 297, 47 L.R.A.(N.S.) 742; Pennsylvania R. Co. v. Rogers, 52 W. Va. 450, 44 S. E. 300, 62 L.R.A. 178; Bragg v. Gaynor, 85 Wis. 468, 55 N. W. 919, 21 L.R.A. 161.

A writ of garnishment or attachment, or other form of service on a party holding a fund which becomes the subject of litigation, brings that fund under the jurisdiction of the court, even though the money may remain in the actual custody of one not an officer of the court. Cooper v. Reynolds, 10 Wall. 308, 19 L. ed. 931.

The service of an attachment binds debt or stock in the hands of the garnishee from the time of service. Miller v. United States (Page v. United States) 11 Wall. (U. S.) 268, 20 L. ed. 135.

Although an attaching creditor cannot, under the Pennsylvania statute, take the property out of the hands of the garnishee, where the latter furnishes the delivery bond provided for by the statute, yet the property is in the custody of the law. Brashear v. West, 7 Pet. (U. S.) 608, 8 L. ed. 801.

In the case of the garnishment of a debt, the lien of garnishment requires the court to preserve, so far as lies in its power, the right of the garnishor against a subsequent creditor who invokes its process in hostility to the right of the garnishee. Montana Nat. Bank v. Merchants Nat. Bank, 19 Mont. 586, 49 P. 149, 61 Am. St. Rep. 532.

[15] Griswold v. Szwanek, 82 Neb. 761, 118 N. W. 1073, 21 L.R.A.(N.S.) 222; Maxwell v. Bank of New Richmond, 101 Wis. 286, 77 N. W. 149, 70 Am. St. Rep. 926; Wyman, P. & Co. v. Tierney, 42 Wyo. 321, 294 P. 781, 75 A.L.R. 667.

Garnishment gives the garnishing creditor a prior right over general creditors to subject the indebtedness garnished to the payment of his claim. Wyman, P. & Co. v. Tierney, 42 Wyo. 321, 294 P. 781, 75 A.L.R. 667.

[16] Annotation: Ann. Cas. 1914D, 624.
See BANKRUPTCY [Also 3 R. C. L. p. 293].

§ 819. **Binding Effect on Garnishee Personally.**—The general rule is that the service of a writ of attachment or garnishment on one in possession of property of the defendant, or indebted to him, binds him personally with respect to attachable or garnishable property or credits of the defendant in his possession or control.[24] Consequently, after a levy on real property in the possession of a debtor, he cannot, with a view to defeating the creditor, transfer the possession, even to the real owner, who must pursue his title by intervention in the attachment[25] or by an action in ejectment against the purchaser at the sheriff's sale.[26]

2. Effect as Assignment and Extent of Lien

§ 820. **Generally.**—The general rule is that an attachment or garnishment is binding upon the attached or garnished property to the extent of the defendant's interest in the same, but not to any greater extent.[1] Consequently, it does not generally have the full effect of a bona fide assignment for value. An attaching or garnishing creditor does not stand in the position of a bona

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[17] Bowen v. Port Huron Engine & Thresher Co. 109 Iowa, 255, 80 N. W. 345, 47 L.R.A. 131, 77 Am. St. Rep. 539; Riddle v. Dow, 98 Iowa, 7, 66 N. W. 1066, 32 L.R.A. 811; Irwin v. McKechnie, 58 Minn. 145, 59 N. W. 987, 26 L.R.A. 218, 49 Am. St. Rep. 495; McGarry v. Lewis Coal Co. 93 Mo. 237, 6 S. W. 81, 3 Am. St. Rep. 522; Hulley v. Chedic, 22 Nev. 127, 36 P. 783, 58 Am. St. Rep. 729; Corning v. Records, 69 N. H. 390, 46 A. 462, 76 Am. St. Rep. 178.

No lien is obtained by the process of garnishment, but only a right to proceed against the garnishee personally. Riddle v. Dow, 98 Iowa, 7, 66 N. W. 1066, 32 L.R.A. 811.

While garnishment of a debt is often called a mode of attachment, it does not effect a specific lien on any property of the garnishee, such as is acquired by the actual seizure of property. Irwin v. McKechnie, 58 Minn. 145, 59 N. W. 987, 26 L.R.A. 218, 49 Am. St. Rep. 495.

[18] Johnson v. Gorham, 6 Cal. 195, 65 Am. Dec. 501.

[19] See infra, § 821.

[20] Disconto Gesellschaft v. Umbreit, 127 Wis. 651, 106 N. W. 821, 15 L.R.A.(N.S.) 1045, 115 Am. St. Rep. 1063, affirmed in 208 U. S. 570, 52 L. ed. 625, 28 S. Ct. 337.

[21] Calumet Paper Co. v. Haskell Show Printing Co. 144 Mo. 331, 45 S. W. 1115, 66 Am. St. Rep. 425.

[22] See supra, § 800.

[23] See supra, § 800.

[24] Miller v. United States (Page v. United States) 11 Wall. (U. S.) 268, 20 L. ed. 135; Kennedy v. Brent, 6 Cranch (U. S.) 187, 3 L. ed. 194; International Bedding Co. v. Terminal Warehouse Co. 146 Md. 479, 126 A. 902, 40 A.L.R. 960; Rickman v. Rickman, 180 Mich. 224, 146 N. W. 609, Ann. Cas. 1915C, 1237; Montana Nat. Bank v. Merchants Nat. Bank, 19 Mont. 586, 49 P. 149, 61 Am. St. Rep. 532.

[25] Generally, as to claim and intervention, see infra, §§ 964 et seq.

[26] Feigenspan v. Driesigacker, 195 Pa. 17, 45 A. 481, 78 Am. St. Rep. 799.

[1] North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co. 152 U. S. 596, 38 L. ed. 565, 14 S. Ct. 710; Green v. Van Buskirk, 7 Wall. (U. S.) 139, 19 L. ed. 109; McLaughlin v. Swann, 18 How. (U. S.) 217, 15 L. ed. 357; United States v. Robertson, 5 Pet. (U. S.) 641, 8 L. ed. 257; Beach v. Viles, 2 Pet. (U. S.) 675, 7 L. ed. 559; Ellery v. Cumming, 40 Ariz. 512, 14 P. (2d) 709, 83 A.L.R. 1081; Walker v. Doak, 210 Cal. 30, 290 P. 290, citing R. C. L.; National Bank v. Western P. R. Co. 157 Cal. 573, 108 P. 676, 27 L.R.A.(N.S.) 987, 21 Ann. Cas. 1391; Clyne v. Easton, E. & Co. 148 Cal. 287, 83 P. 36, 113 Am. St. Rep. 253; Parker, Peebles & Knox v. El Saieh, 107 Conn. 545, 141 A. 884, 59 A.L.R. 1424; Hall v. Page, 4 Ga. 428, 48 Am. Dec. 235; Cunningham v. Bank of Nampa, 13 Idaho, 167, 88 P. 975, 10 L.R.A.(N.S.) 706, 121 Am. St. Rep. 257; Wilson v. Kruse, 270 Ill. 298, 110 N. E. 359,

citing R. C. L.; Shirk v. Thomas, 121 Ind. 147, 22 N. E. 976, 16 Am. St. Rep. 381; Malone v. Moore, 204 Iowa, 625, 215 N. W. 625, 55 A.L.R. 356; Hoyt v. Clemans, 167 Iowa, 330, 149 N. W. 442, L.R.A.1915C, 166; J. J. Smith Lumber Co. v. Scott County Garbage Reducing & Fuel Co. 149 Iowa, 272, 128 N. W. 389, 30 L.R.A.(N.S.) 1184; Rogers v. Highland, 69 Iowa, 504, 29 N. W. 429, 58 Am. Rep. 230; H. & M. Tire Serv. Co. v. Combs, 140 Kan. 35, 34 P. (2d) 943, citing R. C. L.; Lewis v. Barnett, 139 Kan. 821, 33 P. (2d) 331, 93 A.L.R. 1082; Hall v. Kansas City Terra Cotta Co. 97 Kan. 103, 154 P. 210, L.R.A.1916D, 361, Ann. Cas. 1918D, 605; Day v. Traders' Nat. Bank, 232 Ky. 662, 24 S. W. (2d) 576, citing R. C. L.; Springfield F. & M. Ins. Co. v. Huntington Nat. Bank, 229 Ky. 674, 17 S. W. (2d) 726, 71 A.L.R. 70; Grooms v. National Bank, 218 Ky. 846, 292 S. W. 513, citing R. C. L.; Metropolitan L. Ins. Co. v. Hightower, 211 Ky. 36, 276 S. W. 1063, 44 A.L.R. 1158; Kentucky Lumber & Mill Work Co. v. Kentucky Title Sav. Bank & T. Co. 184 Ky. 244, 211 S. W. 765, 5 A.L.R. 391; Hepp v. Glover, 15 La. 461, 35 Am. Dec. 206; Boyle v. Clukey, 126 Me. 443, 139 A. 461, citing R. C. L.; O'Gasapian v. Danielson, 284 Mass. 27, 187 N. E. 107, 89 A.L.R. 1159; Isaac Van Dyke Co. v. Moll, 241 Mich. 255, 217 N. W. 29, 57 A.L.R. 692; Columbia Bank v. Jacobs, 10 Mich. 349, 81 Am. Dec. 792; Nall v. Granger, 8 Mich. 450, 77 Am. Dec. 462; Wunderlich v. Merchants Nat. Bank, 109 Minn. 468, 124 N. W.. 223, 27 L.R.A.(N.S.) 811, 134 Am. St. Rep. 788, 18 Ann. Cas. 212; Lyman v. Gaar, S. & Co. 75 Minn. 207, 77 N. W. 828, 74 Am. St. Rep. 452; Shuler v. Murphy, 91 Miss. 518, 44 So. 810, 14 L.R.A.(N.S.) 333, 124 Am. St. Rep. 708; Hope v. Blair, 105 Mo. 85, 16 S. W. 595, 24 Am. St. Rep. 366; Friedlander v. Ryder (Friedlander v. Hewitt) 30 Neb. 783, 47 N. W. 83, 9 L.R.A. 700; Goodwin v. Claytor, 137 N. C. 224, 49 S. E. 173, 67 L.R.A. 209, 107 Am. St. Rep. 479; Baird v. Meyer, 55 N. D. 930, 215 N. W. 542, 56 A.L.R. 175; Market Nat. Bank v. Raspberry, 34 Okla. 243, 124 P. 758, L.R.A.1916E, 79; Graf v. Wilson, 62 Or. 476, 125 P. 1005, Ann. Cas. 1914C, 462; Speise v. M'Coy, 6 Watts & S. (Pa.) 485, 40 Am. Dec. 579: Johnson v. Union P. R. Co. 29 R. I. 80, 69 A. 298, 132 Am. St. Rep. 799; H. J. Baker & Bro. v. Doe, 88 S. C. 69, 70 S. E. 431, 34 L.R.A.(N.S.) 510; Bank of Centerville v. Gelhaus, 60 S. D. 31, 242 N. W. 642, 83 A.L.R. 1380; Braddock v. Gambill (Tex. Civ. App.) 291 S. W. 306, citing R. C. L.; Home Nat. Bank v. Barnes-Piazzek Co. (Tex. Civ. App.) 278 S. W. 299, citing R. C. L.; Acheson-Harder Co. v. Western Wholesale Notions Co. 72 Utah, 323, 269 P. 1032, 60 A.L.R. 881; Armington v. Houston, 38 Vt. 448, 91 Am. Dec. 366; Sanborn v. Kittredge, 20 Vt. 632, 50 Am. Dec. 58; Beaston v. Portland Trust & Sav. Bank, 89 Wash. 627, 155 P. 162, Ann. Cas. 1917B, 488; McAlmond v. Bevington, 23 Wash. 315, 63 P. 251, 53 L.R.A. 597; Neufelder v. German American Ins. Co. 6 Wash. 336, 33 P. 870, 22 L.R.A. 287, 36 Am. St. Rep. 166; Lipscomb v. Condon, 56 W. Va. 416, 49 S. E. 392, 67 L.R.A. 670, 107 Am. St. Rep. 938; Wall v. Norfolk & W. R. Co. 52 W. Va. 485, 44 S. E. 294, 64 L.R.A. 501, 94 Am. St. Rep. 948; Commercial Invest. Trust v. William Frankfurth Hardware Co. 179 Wis. 21, 190 N. W. 1004, citing R. C. L.; Drake v. Harrison, 69 Wis. 99, 33 N. W. 81, 2 Am. St. Rep 717.

An attaching creditor stands in the light of a purchaser and as such will be protected. Green v. Van Buskirk, 7 Wall. (U. S.) 139, 19 L. ed. 109.

The Act of 1818, concerning the garnishment of debts due to corporations sued by the United States, operates as a transfer, from the corporations sued to the United States, of those debts which might be due from the persons who should be summoned as garnishees. They become, by the service of the summons, the debtors of the United States, and cease to be the debtors of the corporation. But they owe to the United States precisely what they owed to the corporation, and no more, and any offset against the corporation must be deducted. United States v. Robertson, 5 Pet. (U. S.) 641, 8 L. ed. 257.

An attachment invests the plaintiff with the same right of action with respect to the property attached that belonged to the defendant, and is subject to the same defenses. A legal defense to an action for money had and received, if brought by the defendant, is also a defense to the attachment, but if the property pursued consists in outstanding equities that a court of law cannot notice, the remedy is by bill in equity or interpleader by the trustee. McLaughlin v. Swann, 18 How. (U. S.) 217, 15 L. ed. 357.

A plaintiff in garnishment proceedings can never obtain a garnishment lien upon more in the hands of the garnishee than the defendant owns; and, where the property or fund is exempt from judicial process, he cannot obtain a lien upon even that much. H. & M. Tire Serv. Co. v. Combs, 140 Kan. 35, 34 P. (2d) 943, citing R. C. L.

Garnishment is in effect a formal judicial assignment of property, money, and credits capable of being voluntarily assigned. Lewis v. Barnett, 139 Kan. 821, 33 P. (2d) 331, 93 A.L.R. 1082.

The right of the creditor against the garnishee cannot, by garnishment, rise higher than the right of the debtor against the garnishee. If the right of the debtor is subject to a right of the garnishee, the right of the creditor is subject to the same right. Wall v. Norfolk & W. R. Co. 52 W. Va. 485, 44 S. E. 294, 64 L.R.A. 501, 94 Am. St. Rep. 948.

Service of a writ of garnishment upon a bank in which the debtor has a deposit has been held to create no such lien or equity having the effect of a lien on the assets of the bank as will entitle the garnishing creditor to a preference upon the bank's becoming insolvent before the rendition of the judgment in the garnishment proceeding. Ellery v. Cumming, 40 Ariz. 512, 14 P. (2d) 709, 83 A.L.R. 1081. Annotation: 83 A.L.R. 1085.

When a garnishee has reserved to himself by contract the right to discharge the obligation in two or more different ways,

fide purchaser for value,[2] and the attachment lien does not displace prior equities or rights,[3] but is subject to all equities to which the property was liable in the debtor's hands,[4] and therefore, if a debtor has done any act or entered into any agreement which precludes him from asserting an equity that he once had, his creditor will likewise be precluded.[5] It is the duty of the courts to protect every equity belonging to other persons.[6]

§ 821. Effect as Subrogation.—Garnishment is in effect an action by the defendant in the plaintiff's name against the garnishee, the purpose and the result of which are to subrogate the plaintiff to the right of the defendant against the garnishee.[7]

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he may elect, at any time before the date of payment has passed, in which way he will discharge it, and when he has a peculiar interest in discharging the obligation in a certain manner, he cannot be deprived of his right to do so, either by the act of his creditor without his consent, or by garnishment in a suit against the creditor. Drake v. Harrison, 69 Wis. 99, 33 N. W. 81, 2 Am. St. Rep. 717. Annotation: 59 L.R.A. 374.

A contract liability is not changed or converted by garnishment into another kind of liability; the sole effect of the garnishment is to work a contingent transfer of the alleged indebtedness from the creditor to the garnishor, without any change in the nature of the liability. Clyne v. Easton, E. & Co. 148 Cal. 287, 83 P. 36, 113 Am. St. Rep. 253.

[2] Jones v. Chenault, 124 Ala. 610, 27 So. 515, 82 Am. St. Rep. 211; Hall v. Kansas City Terra Cotta Co. 97 Kan. 103, 154 P. 210, L.R.A.1916D, 361, Ann. Cas. 1918D, 605; Burke v. Johnson, 37 Kan. 337, 15 P. 204, 1 Am. St. Rep. 252; Dinsmore v. Maag-Wahmann Co. 122 Md. 177, 89 A. 399, Ann. Cas. 1916A, 1270; Columbia Bank v. Jacobs, 10 Mich. 349, 81 Am. Dec. 792; Wunderlich v. Merchants Nat. Bank, 109 Minn. 468, 124 N. W. 223, 27 L.R.A.(N.S.) 811, 134 Am. St. Rep. 788, 18 Ann. Cas. 212; Westervelt v. Hagge, 61 Neb. 647, 85 N. W. 852, 54 L.R.A. 333; Cleveland Mach. Works v. Lang, 67 N. H. 348, 31 A. 20, 68 Am. St. Rep. 675; Market Nat. Bank v. Raspberry, 34 Okla. 243, 124 P. 758, L.R.A.1916E, 79.

Garnishment, like other proceedings in invitum, only affects the actual property, money, credits, and effects of the debtor in the hands of the garnishee, and the rule relating to bona fide holders or purchasers without notice has no application. Hall v. Kansas City Terra Cotta Co. 97 Kan. 103, 154 P. 210, L.R.A.1916D, 361, Ann. Cas. 1918D, 605.

A lien acquired by garnishment is, in the absence of some special and superior right in the plaintiff, subject to all the equities existing between the garnishee and the defendant. Wunderlich v. Merchants Nat. Bank, 109 Minn. 468, 124 N. W. 223, 27 L.R.A.(N.S.) 811, 134 Am. St. Rep. 788, 18 Ann. Cas. 212.

An attachment creditor perfecting his lien after the lis pendens stands on the same footing as a judgment creditor and is governed by the rule applicable to a purchaser pendente lite. Whitney v. Higgins, 10 Cal. 547, 70 Am. Dec. 748. Annotation: Ann. Cas. 1918C, 66.

[3] Wilson v. Kruse, 270 Ill. 289, 110 N. E. 359, citing R. C. L.; Shirk v. Thomas, 121 Ind. 147, 22 N. E. 976, 16 Am. St. Rep. 381; Day v. Traders' Nat. Bank, 232 Ky. 662, 24 S. W. (2d) 576, citing R. C. L.; People's Bank v. West, 67 Miss. 729, 7 So. 513, 8 L.R.A. 727.

[4] Day v. Traders' Nat. Bank, 232 Ky. 662, 24 S. W. (2d) 576, citing R. C. L.; Westervelt v. Hagge, 61 Neb. 647, 85 N. W. 852, 54 L.R.A. 333; Mott v. Holbrook, 28 N. D. 251, 148 N. W. 1061, citing R. C. L.; Watts v. Kinney, 3 Leigh (Va.) 272, 23 Am. Dec. 266.

An attachment lien on land, the legal title to which is in the attachment debtor, is subject to every equity which exists against the debtor at the time of the levy of the attachment, and courts of equity will limit the lien to the actual interest of the attachment debtor in such real estate. Westervelt v. Hagge, 61 Neb. 647, 85 N. W. 852, 54 L.R.A. 333.

[5] Day v. Traders' Nat. Bank, 232 Ky. 662, 24 S. W. (2d) 576, citing R. C. L.

Annotation: 42 Am. Dec. 432.

[6] Good v. Williams, 81 Kan. 388, 105 P. 433, 135 Am. St. Rep. 392.

[7] Hoyt v. Clemans, 167 Iowa, 330, 149 N. W. 442, L.R.A.1915C, 166; J. J. Smith Lumber Co. v. Scott County Garbage Reducing & Fuel Co. 149 Iowa, 272, 128 N. W. 389, 30 L.R.A.(N.S.) 1184; Metropolitan L. Ins. Co. v. Hightower, 211 Ky. 36, 276 S. W. 1063, 44 A.L.R. 1158; Isaac Van Dyke Co. v. Moll, 241 Mich. 255, 217 N. W. 29, 57 A.L.R. 692; Wunderlich v. Merchants Nat. Bank, 109 Minn. 468, 124 N. W. 223, 27 L.R.A.(N.S.) 811, 134 Am. St. Rep. 788, 18 Ann. Cas. 212; Goodwin v. Claytor, 137 N. C. 224, 49 S. E. 173, 67 L.R.A. 209, 107 Am. St. Rep. 479; Graf v. Wilson, 62 Or. 476, 125 P. 1005, Ann. Cas. 1914C, 462; Braddock v. Gambill (Tex. Civ. App.) 291 S. W. 306, citing R. C. L.; McAlmond v. Bevington, 23 Wash. 315, 63 P. 251, 53 L.R.A. 597; Neufelder v. German American Ins. Co. 6 Wash. 336, 33 P. 870, 22 L.R.A. 287, 36 Am. St. Rep. 166; Wall v. Norfolk & W. R. Co. 52 W. Va. 485, 44 S. E. 294, 64 L.R.A. 501, 94 Am. St. Rep. 948; Commercial Invest. Trust v. William Frankfurth Hardware Co. 179 Wis. 21, 190 N. W. 1004, citing R. C. L.

One who obtains judgment against a ward and garnishes his guardian becomes subrogated to the claims of the ward against the guardian to the amount of such judgment. Hazelton v. Douglas, 97 Wis. 214, 72 N. W. 637, 65 Am. St. Rep. 122.

§ 822. Where Plaintiff Acquires Greater or Less Interest or Rights than Defendant.—It is sometimes said that the attaching or garnishing creditor stands in the shoes of the defendant.[8] However, it is not entirely correct to say that in all instances an attaching creditor acquires all the rights and interests of the debtor in the attached property, for the reason that certain rights and interests in attached property are sometimes incapable of being owned or exercised by anyone other than the defendant.[9] The view has been taken that an attaching or garnishing creditor cannot compel the performance of merely personal services, not constituting property, due his debtor.[10] For example, the right of a debtor to refuse to recognize an assignment of a portion of a debt is personal to him and cannot be claimed by one attaching or garnishing such debt.[11] Likewise, it has been held that a debt or note payable in specific articles, rather than in money, cannot be attached or garnished, at least under statutory provision.[12] Undoubtedly a creditor cannot compel his debtor to change his contract or make a new and different one in order that he may reach and subject it to the payment of his debt.[13]

§ 823. —In Case of Fraudulent Transfers.—There is at least one exception to the rule that the garnishing creditor can avail himself only of the legal rights of his debtor against the garnishee. When the garnishee has possession of property of the debtor under a fraudulent transfer, though such transfer is valid against the debtor, the creditor may assert its invalidity and in many instances reach the property by garnishment. This exception is, of course, founded upon the theory that as the law makes the transfer void as to the creditor, there is, as to him, no transfer at all, and the title to the property, for his benefit, remains in the debtor, notwithstanding a previous legal transfer good as against all others.[14]

§ 824. Effect on Title.—An attachment or garnishment does not in any way affect the general title of the owner of the property: at most, it creates only a lien on it.[15] Accordingly, an attachment or garnishment does not prevent the defendant from assigning or transferring the attached property subject to the attachment or garnishment, and this the plaintiff cannot do, although, of course, the attached property may be sold under order of court, where it is perishable, or on execution after final judgment.[16]

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[8] J. J. Smith Lumber Co. v. Scott County Garbage Reducing & Fuel Co. 149 Iowa, 272, 128 N. W. 389, 30 L.R.A.(N.S.) 1184.

The general rule as to garnishment is that the plaintiff in garnishment stands in the shoes of the original defendant and can have no greater rights than the judgment defendant, and the garnishee is not to be placed in any worse condition than if the defendant himself were enforcing his claim. J. J. Smith Lumber Co. v. Scott County Garbage Reducing & Fuel Co. 149 Iowa, 272, 128 N. W. 389, 30 L.R.A.(N.S.) 1184.

[9] Skewes v. Tennessee Coal, I. & R. Co. 124 Ala. 629, 27 So. 435, 82 Am. St. Rep. 214; Holt v. Lucas, 77 Kan. 710, 96 P. 30, 17 L.R.A.(N.S.) 203, 127 Am. St. Rep. 459; Baltimore v. Root, 8 Md. 95, 63 Am. Dec. 692; Burditt Bros. v. Porter, 63 Vt. 296, 21 A. 955, 25 Am. St. Rep. 763; Boisseau v. Bass (Boisseau v. Penn) 100 Va. 207, 40 S. E. 647, 57 L.R.A. 380, 93 Am. St. Rep. 956.

An attaching creditor may acquire greater and better rights to mortgaged personal property belonging to his debtor than the debtor himself could claim at the time the attachment is levied. Holt v. Lucas, 77 Kan. 710, 96 P. 30, 17 L.R.A.(N.S.) 203, 127 Am. St. Rep. 459.

[10] See Vol. 4, p. 691, § 217.

[11] Burditt Bros. v. Porter, 63 Vt. 296, 21 A. 955, 25 Am. St. Rep. 763.

[12] See Vol. 4, p. 685, § 205.

[13] Boisseau v. Bass (Boisseau v. Penn) 100 Va. 207, 40 S. E. 647, 57 L.R.A. 380, 93 Am. St. Rep. 956.

[14] Cottingham v. Greely Barnham Grocery Co. 129 Ala. 200, 30 So. 560, 87 Am. St. Rep. 58; Nicrosi v. Irvine, 102 Ala. 648, 15 So. 429, 48 Am. St. Rep. 92; National Bank v. Western P. R. Co. 157 Cal. 573, 108 P. 676, 27 L.R.A.(N.S.) 987, 21 Ann. Cas. 1391; Shelton v. Wolthausen, 80 Conn. 599, 69 A. 1030, 125 Am. St. Rep. 131; Boyle v. Clukey, 126 Me. 443, 139 A. 460, citing R. C. L.; Holker v. Hennessey, 143 Mo. 80, 44 S. W. 794, 65 Am. St. Rep. 642; Westervelt v. Hagge, 61 Neb. 647, 85 N. W. 852, 54 L.R.A. 333; Baird v. Meyer, 55 N. D. 930, 215 N. W. 542, 56 A.L.R. 175; Mott v. Holbrook, 28 N. D. 251, 148 N. W. 1061, citing R. C. L.

Generally, as to attachability or garnishability of property fraudulently conveyed, see Vol. 4, p. 694, § 222; p. 700, § 230; infra, § 860.

[15] J. H. Mulrein Plumbing Supply Co. v. Walsh, 26 Ariz. 152, 222 P. 1046, citing R. C. L.; Tetzloff v. May, 151 Iowa, 441, 131 N. W. 647, Ann. Cas. 1913A, 341; Fettyplace v.

3. Commencement and Duration of Lien

§ 825. Commencement.—The general rule, frequently established by statute, is that an attachment operates as a lien from the time of levy[17] or from the time that the officer executing the writ has complied with the law governing attachments,[18] and does not become effective when the attachment is issued.[19] Thus, it has been held that a lien of attachment upon real estate takes effect immediately upon levy thereof and the deposit of a copy, with a description of the land attached, with the county recorder.[20] According to some authorities it is not requisite to the validity of a levy of attachment on real estate that the officer should go upon the land, or into its vicinity, in making the levy, but that the lien acquired upon property attached dates from the time the officer indorses the levy on the writ,[1] though it has been held by others that the lien does not become effective until the officer goes on to the land and declares the levy of the writ.[2]

Dutch, 13 Pick. (Mass.) 388, 23 Am. Dec. 688; Columbia Bank v. Jacobs, 10 Mich. 349, 81 Am. Dec. 792; Herman Bros. L. & Co. v. Katz Bros. 101 Tenn. 118, 47 S. W. 86, 41 L.R.A. 700.

A mere lien under an attachment of land does not constitute property or interest in the land itself. Tetzloff v. May, 151 Iowa, 441, 131 N. W. 647, Ann. Cas. 1913A, 341.

The mere levy of an execution or attachment on insured property without an actual change of possession is not such a change in the interest, title, or possession as will avoid a policy providing that such change will work a forfeiture. Annotation: 24 L.R.A.(N.S.) 803.

[16] Tilton v. Cofield, 93 U. S. 163, 23 L. ed. 858; J. H. Mulrein Plumbing Supply Co. v. Walsh, 26 Ariz. 152, 222 P. 1046, citing R. C. L.; Stillman v. Hamer, 70 Kan. 469, 78 P. 836, 109 Am. St. Rep. 465; Nichols v. Patten, 18 Me. 231, 35 Am. Dec. 713; Arnold v. Brown, 24 Pick. (Mass.) 89, 35 Am. Dec. 296; Allen v. Wells, 22 Pick. (Mass.) 450, 33 Am. Dec. 757; Whipple v. Thayer, 16 Pick. (Mass.) 25, 26 Am. Dec. 626; Fettyplace v. Dutch, 13 Pick. (Mass.) 388, 23 Am. Dec. 688; Denny v. Willard, 11 Pick. (Mass.) 519, 22 Am. Dec. 389; Columbia Bank v. Jacobs, 10 Mich. 349, 81 Am. Dec. 792; Duxbury v. Dahle, 78 Minn. 427, 81 N. W. 198, 79 Am. St. Rep. 408; Mussey v. Perkins, 36 Vt. 690, 86 Am. Dec. 688.

Yates v. Terry [1902] 1 K. B. (Eng.) 527, 5 B. R. C. 446—C. A.

Annotation: 5 B. R. C. 450.

[17] Doe ex dem. Vaillant v. Childress, 21 Wall. (U. S.) 642, 22 L. ed. 549; Mitchell v. St. Maxent, 4 Wall. (U. S.) 237, 18 L. ed. 326; Pratt v. Law, 9 Cranch (U. S.) 456, 3 L. ed. 791; Taffts v. Manlove, 14 Cal. 47, 73 Am. Dec. 610; Johnson v. Gorham, 6 Cal. 195, 65 Am. Dec. 501; Reeves v. Sebern, 16 Iowa, 234, 85 Am. Dec. 513; Burke v. Johnson, 37 Kan. 337, 15 P. 204, 1 Am. St. Rep. 252; Columbia Bank v. Jacobs, 10 Mich. 349, 81 Am. Dec. 792; Verry v. Barnes, 154 Minn. 252, 191 N. W. 589, 31 A.L.R. 707; Martin v. McBryde, 182 N. C. 175, 108 S. E. 739, 21 A.L.R. 12; Dickinson v. First Nat. Bank, 64 N. D. 273, 252 N. W. 54, 93 A.L.R. 739; Jackman v. Hallock, 1 Ohio, 318, 13 Am. Dec. 627.

The lien of an attachment levied on land fraudulently alienated becomes effective and enforceable after the real estate is reconveyed and restored to the fraudulent grantor, the same as though the conveyance in the first instance had not been made. Westervelt v. Hagge, 61 Neb. 647, 85 N. W. 852, 54 L.R.A. 333.

An attachment levied on real estate fraudulently alienated by the attachment debtor and grantor for the purpose of hindering, delaying, and defrauding creditors, even though the legal title of record is in another, gives the attachment creditor a lien upon the interest of the debtor in the land attached, which he may enforce by appropriate proceedings after recovery of judgment. Ibid.

The lien sought to be created by an attachment proceeding is dependent on seizure and possession. Crisman v. Dorsey, 12 Colo. 567, 21 P. 920, 4 L.R.A. 664.

[18] Zimmerman v. Boynton, 59 N. D. 112, 229 N. W. 3, citing R. C. L.

[19] Atchison, T. & S. F. R. Co. v. Schwarzschild & S. Co. 58 Kan. 90, 48 P. 591, 62 Am. St. Rep. 604.

At common law the rule was that an execution was a lien on personal property from the time of its issuance although there was no levy. Lawson v. Jordan, 19 Ark. 297, 70 Am. Dec. 596; Lean v. Givens, 146 Cal. 739, 81 P. 128, 106 Am. St. Rep. 79; Johnson v. McLane, 7 Blackf. (Ind.) 501, 43 Am. Dec. 102; Brewster v. Vail, 20 N. J. L. 56, 38 Am. Dec. 547; Giles v. Grover, 1 Clark & F. 72, 6 Eng. Reprint, 843, 9 Bing. 128, 131 Eng. Reprint, 563, 2 Moore & S. 197, 11 Eng. Rul. Cas. 550.

[20] Ritter v. Scannell, 11 Cal. 238, 70 Am. Dec. 775; Zimmerman v. Boynton, 59 N. D. 112, 229 N. W. 3, citing R. C. L.

[1] Riordan v. Britton, 69 Tex. 198, 7 S. W. 50, 5 Am. St. Rep. 37.

[2] People's Bank v. West, 67 Miss. 729, 7 So. 513, 8 L.R.A. 727.

In reference to the time of the commencement of a garnishment lien, it has been held that service of notice upon the garnishee creates a lien on the goods of the debtor in his hands, and such goods are not subject to levy and sale upon process thereafter levied during the continuance of such lien.[3]

In some instances the plaintiff is required by statute to perfect his lien within a specified time, as in the case of other liens.[4]

§ 826. Duration.[5]—The general rule is that an attachment or garnishment lien continues as security for any judgment the plaintiff may have obtained unless the attachment or garnishment is abandoned, withdrawn, dissolved, or discharged.[6]

A writ of garnishment issued within the statutory period of limitation will not serve to extend the lien of the judgment upon which it is founded, as the judgment lien can only be extended by the filing of another suit before the expiration of seven years from the date of the rendition thereof.[7]

The issuance of a negotiable warehouse receipt after the property has been attached cannot affect the lien of the attachment.[8]

§ 827. Contingent and Inchoate Character of Lien.—An attachment or garnishment lien is said to be contingent[9] or inchoate,[10] at least until final judgment against the defendant and the garnishee.[11] Accordingly, it has been held that it may be impaired, displaced, or destroyed by legislative enactments, in the absence of any prohibition of retroactive or retrospective laws.[12] However, on the entry of judgment a vested right accrues in favor of the attachment or garnishment creditor, which cannot be impaired by subsequent legislation, especially where the lien of an attachment after judgment is of as high an order as that of an execution.[13] Thereafter, in the absence of some affirmative act of surrender or abandonment, the attachment lien will ordinarily endure as long as the judgment itself,[14] and it will expire with the expiration of the judgment.[15] Nevertheless, a judgment by default against the debtor in an attachment suit does not establish the lien against the claim of an intervening mortgage creditor so as to prevent a subsequent statute validating mortgages from operating to defeat the attachment lien.[16]

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[3] Warfield v. Campbell, 38 Ala. 527, 82 Am. Dec. 724; Cottrell v. Varnum, 5 Ala. 229, 39 Am. Dec. 323; Rickman v. Rickman, 180 Mich. 224, 146 N. W. 609, Ann. Cas. 1915C, 1237; Pitkin v. Burnham, 62 Neb. 385, 87 N. W. 160, 55 L.R.A. 280, 89 Am. St. Rep. 763; Northfield Knife Co. v. Shapleigh, 24 Neb. 635, 39 N. W. 788, 8 Am. St. Rep. 224.

[4] Coit v. Sistare, 85 Conn. 573, 84 A. 119, Ann. Cas. 1913C, 248.

[5] As to bond, see infra, §§ 901 et seq.

[6] Bagley v. Ward, 37 Cal. 121, 99 Am. Dec. 256; Shuck v. Quackenbush, 75 Colo. 592, 227 P. 1041, 38 A.L.R. 259; Hogue v. Corbit, 156 Ill. 540, 41 N. E. 219, 47 Am. St. Rep. 232; Stillman v. Hamer, 70 Kan. 469, 78 P. 836, 109 Am. St. Rep. 465; Andersen v. Land, 5 Wash. 493, 32 P. 107, 34 Am. St. Rep. 875.

It has been held that the lien acquired by the seizure of and levy on the lands of a debtor under an attachment is not divested by the subsequent occupation of the land for homestead purposes, but that the lands may be sold to satisfy the claim of the attaching creditor, under execution issued on a judgment founded on the attachment, notwithstanding the fact that after the levying of the attachment, but before the issuance of the execution or the entering of the judgment in the attachment proceedings, the debtor occupies the property for homestead purposes. Annotation: Ann. Cas. 1913B, 1149.

Generally, as to dissolution or discharge of attachment, see Vol. 4, p. 925, §§ 622 et seq.; as to dissolution or discharge of garnishment, see supra, §§ 738 et seq.

[7] Grace v. Pierce, 127 Miss. 831, 90 So. 590, 21 A.L.R. 1035.

Annotation: 21 A.L.R. 1052.

[8] International Bedding Co. v. Terminal Warehouse Co. 146 Md. 479, 126 A. 902, 40 A.L.R. 960.

[9] Stillman v. Hamer, 70 Kan. 469, 78 P. 836, 109 Am. St. Rep. 465.

[10] Sanders v. Armour Fertilizer Works, 292 U. S. 190, 78 L. ed. 1206, 54 S. Ct. 677, 91 A.L.R. 950, rehearing denied in 292 U. S. 612, 78 L. ed. 1472, 54 S. Ct. 855; Pratt v. Law, 9 Cranch (U. S.) 456, 3 L. ed. 791; Evans-Snider-Buel Co. v. McFadden (C. C. A. 8th) 105 F. 293, 58 L.R.A. 900, affirmed in 185 U. S. 505, 46 L. ed. 1012, 22 S. Ct. 758; Montana Nat. Bank v. Merchants Nat. Bank, 19 Mont. 586, 49 P. 149, 61 Am. St. Rep. 532.

A legislative body like the Congress of the United States, which is not prohibited from passing retrospective or retroactive laws, has an undoubted power to divest or impair an attachment lien, at least until there has been an adjudication that adequate grounds for the attachment exist and that the lien of the attachment be enforced. Evans-Snider-Buel Co. v. McFadden (C. C. A. 8th) 105 F. 293, 58 L.R.A. 900, affirmed in 185 U. S. 505, 46 L. ed. 1012, 22 S. Ct. 758.

A judgment by default against the debtor in an attachment suit does not establish the lien against the claim of an intervening mortgage creditor so as to prevent a subsequent statute validating mortgages from operating to defeat the attachment lien. Evans-Snider-Buel Co. v. McFadden (C. C. A. 8th) 105 F. 293, 58 L.R.A. 900, affirmed in 185 U. S. 505, 46 L. ed. 1012, 22 S. Ct. 758.

[11] In Pratt v. Law, 9 Cranch (U. S.) 456, 3 L. ed. 791, the court holds that levying an attachment has the double effect of creating a lien and instituting an action. But the lien is only inchoate; it awaits the judgment of the court for its consummation, and must fall with the suit. To decide otherwise would be to permit the defendant, by collusion or his own act, to nullify the lien of the subsequent attachment.

§ 828. Effect of Defects and Irregularities.—The effect of defects and irregularities in an attachment or garnishment upon the commencement or duration of the attachment or garnishment lien depends upon the jurisdictional effect of the same. It has been noted herein that the courts are in fundamental disagreement as to when, and what, defects and irregularities have the effect of preventing the court from acquiring or continuing to have jurisdiction of such proceedings.[17] Undoubtedly, however, an attachment or garnishment lien cannot be instituted by a void proceeding, and will be vacated or discharged by a subsequent loss of jurisdiction.[18] Consequently, the rights of a garnishing creditor against the garnishee are generally to be determined as of the time of the filing of a supplemental affidavit to cure a jurisdictional defect in the petition for the garnishment, at least in so far as an intervening assignment by the defendant to an assignee in good faith is concerned.[19] The general rule is that where there is no statute to the contrary, the failure of an officer to make a return on or before the return day will not affect the lien of an attachment that was duly levied,[20] and it has been said that the validity or continuation of an attachment lien is not dependent upon the entry of the judgment in the judgment lien docket.[1]

B. PRIORITY

1. IN GENERAL

§ 829. Generally.—Priority between attachment or garnishment liens and other liens or claims upon the same property is generally determined by priority of time. The right first acquired is, as a rule, superior.[2] The rule is applicable to priority between an attachment or garnishment and the claim of a general creditor,[3] a judgment lien,[4] or an execution.[5] An attorney's lien on a judgment he has secured for his client is superior to the claim of a creditor of the client who levies on the judgment before the giving of notice of the claim for the lien. The rule holds good, although the lien was asserted by two attorneys, one of whom was not a resident of the state and not licensed to practice in its courts.[6] The right of subrogation which arises upon payment by sureties of a judgment against the principal debtor takes priority over a lien acquired by garnishment entered after the judgment.[7] The right of a surety on a contractor's bond, who is entitled under the contract to complete the work upon the contractor's default, and be subrogated to all rights and properties of the principal arising out of the contract, is, in case he takes possession and completes the contract, superior to that of attaching creditors of the contractor to the percentage of the contract price retained by the owner, as the work progressed, to secure compliance with the contract.[8]

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[12] Evans-Snider-Buel Co. v. McFadden (C. C. A. 8th) 105 F. 293, 58 L.R.A. 900, affirmed in 185 U. S. 505, 46 L. ed. 1012, 22 S. Ct. 758.

[13] McFadden v. Blocker, 2 Ind. Terr. 260, 48 S. W. 1043, 58 L.R.A. 878.

[14] Bagley v. Ward, 37 Cal. 121, 99 Am. Dec. 256; Stillman v. Hamer, 70 Kan. 469, 78 P. 836, 109 Am. St. Rep. 465.

[15] See JUDGMENTS [Also 15 R. C. L. pp. 554 et seq.].

[16] Evans-Snider-Buel Co. v. McFadden (C. C. A. 8th) 105 F. 293, 58 L.R.A. 900, affirmed in 185 U. S. 505, 46 L. ed. 1012, 22 S. Ct. 758.

[17] See Vol. 4, p. 607, §§ 85, 86.

[18] United Collieries v. Martin, 248 Ky. 808, 60 S. W. (2d) 125, 89 A.L.R. 971.

[19] Ibid.

[20] Hogue v. Corbit, 156 Ill. 540, 41 N. E. 219, 47 Am. St. Rep. 232; Mott v. Holbrook, 28 N. D. 251, 148 N. W. 1061, citing R. C. L.

[1] Mott v. Holbrook, 28 N. D. 251, 148 N. W. 1061, citing R. C. L.; Katz v. Obenchain, 48 Or. 352, 85 P. 617, 120 Am. St. Rep. 821.

[2] Handley v. Pfister, 39 Cal. 283, 2 Am. Rep. 449; Bowker v. Smith, 48 N. H. 111, 2 Am. Rep. 189; Hatcher v. Plumley, 38 N. D. 147, 164 N. W. 698, citing R. C. L.; Payne v. Finley (Tex. Civ. App.) 291 S. W. 944; First Nat. Bank v. Harkness, 42 W. Va. 156, 24 S. E. 548, 32 L.R.A. 408.

§ 830. As to Right to Reformation of Contract.—It has been held that attaching creditors of a mortgagor or grantor cannot successfully object to the reformation of a mortgage or deed which, by mutual mistake of the parties, does not embrace all of the lands intended to be included, or give the security intended, as their lien is only upon the lands and tenements of the mortgagor, and not upon lands that do not in fact belong to him.[9] However, there is a conflict of authority on this point, and it has been held that notwithstanding that equity will correct written instruments as against general judgment creditors, the equity to have a mortgage rectified so as to express the intention of the parties is not superior to the lien of an attachment judgment recovered before the attachment creditor had notice of the mistake.[10]

§ 831. As to Possessory Interest.[11]—The general rule is that an attachment or garnishment cannot interfere with an existing possessory interest which the defendant has no right himself to disturb. Generally, however, the possessory interest of another in property will not prevent its attachment or garnishment where the attaching officer performs the condition, i. e., payment of purchase price, upon which the defendant becomes entitled to the property free from such possessory interest.[12] Thus, the right of a domestic railroad company to the use of a car which it has received from a railroad company in another state under a contract that it will carry it loaded to its destination, and then reload and return it to the owner, paying for its use in the meantime, is superior, in a court of law, to that of an attaching creditor who, without any other lien, seeks to subject the car to attachment by service of a summons of attachment upon the domestic railroad company.[13]

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[3] Ellery v. Cumming, 40 Ariz. 512, 14 P. (2d) 709, 83 A.L.R. 1080; Wyman, P. & Co. v. Tierney, 42 Wyo. 321, 294 P. 781, 75 A.L.R. 667.

[4] Slattery v. Jones, 96 Mo. 216, 8 S. W. 554, 9 Am. St. Rep. 344.

The lien of an attachment has priority over the lien of an ordinary judgment that has been obtained upon a suit filed after the levy of the attachment. Georgia Code 1933, § 8 905. See Kilgo v. Castleberry, 38 Ga. 512, 95 Am. Dec. 406.

See JUDGMENTS [Also 15 R. C. L. p. 814, §§ 280 et seq.].

[5] Commerce Vault Co. v. Barrett, 222 Ill. 169, 78 N. E. 47, 113 Am. St. Rep. 382, 6 Ann. Cas. 652.

The surplus arising on a foreclosure sale may be garnished, and the lien acquired thereby takes precedence over an execution on a judgment rendered after the sale. Ibid.

An execution creditor who consents to the postponement of the sale from time to time, for the mere purpose of giving the debtor an opportunity to negotiate with his creditors, so as to secure from them some compromise or other advantage, loses his priority of lien as against a junior execution coming into the hands of the sheriff during the pendency of such postponement, although his motive is that of kindness or leniency to the debtor, with no actual intention to hinder or defraud creditors, and the postponements do not in fact hinder, delay, or defraud other creditors. Sweetser v. Matson, 153 Ill. 568, 30 N. E. 1086, 27 L.R.A. 374, 46 Am. St. Rep. 911.

[6] Barnes v. Verry, 154 Minn. 252, 191 N. W. 589, 31 A.L.R. 707; Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 570, 48 Am. Rep. 821.

[7] Watts v. Kinney, 3 Leigh (Va.) 272, 23 Am. Dec. 266.

[8] Illinois Surety Co. v. Mitchell, 177 Ky. 367, 197 S. W. 844, L.R.A.1918A, 931.

[9] Annotation: 44 A.L.R. 110.

[10] Yarnell v. Brown, 170 Ill. 362, 48 N. E. 909, 62 Am. St. Rep. 380.

Annotation: 44 A.L.R. 109.

But the assignee of such judgment will prevail over the equity of the mortgagee to have a mortgage reformed only to the extent of the consideration given by him for the assignment before he acquired notice of the mortgagee's equity of reformation; and so, where the assignment is a security for services performed and for future services, a mortgagee is entitled to priority over any claim of the assignee for services and expenses subsequent to his acquiring notice of the mortgagee's equity, since after such notice the assignee is not bound to perform the services or incur the expenses upon the faith of the security. Yarnell v. Brown, 170 Ill. 362, 48 N. E. 909, 62 Am. St. Rep. 380. Annotation: 44 A.L.R. 109.

[11] As to attachment or garnishment, of

§ 832. **As to Right of Stoppage in Transitu.**—A vendor's right of stoppage in transitu is paramount to attachment liens of other creditors of the vendee, and the goods, if seized under attachment at the instance of a creditor prior to the termination of their transit, are held subject to the superior lien of the vendor.[14] This has also been held to be the rule where the attachment is levied at an intermediate point while the goods are in the hands of an agent of the vendee to be forwarded. But in a few instances the courts have seemingly regarded a seizure upon execution as upon a different footing than an attachment or garnishment, and have held that goods while in transit may be seized on execution so as to terminate the vendor's right of stoppage in transitu, and it has been held that where the vendor of goods himself attaches them as the property of the vendee while they are in transit, such attachment destroys the right of the vendor subsequently to stop them in

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mortgaged, bailed, pledged, leased, etc., property, see Vol. 4, p. 693, §§ 220 et seq.

As to priority with respect to deeds, mortgages, conveyances, pledges, and bailments, see infra, §§ 842 et seq.

[12] Wood v. Weimar, 104 U. S. 786, 26 L. ed. 779; Southern Flour & Grain Co. v. Northern P. R. Co. 127 Ga. 626, 36 S. E. 742, 9 L.R.A.(N.S.) 853, 119 Am. St. Rep. 356, 9 Ann. Cas. 437; Hall v. Page, 4 Ga. 428, 48 Am. Dec. 235; Baker v. Doe, 88 S. C. 69, 70 S. E. 431, 34 L.R.A.(N.S.) 510; First Nat. Bank v. Harkness, 42 W. Va. 156, 24 S. E. 548, 32 L.R.A. 408.

Where property mortgaged remained in the possession of the mortgagor, it was held that although the property could be taken in attachment, the officer would have to surrender it to the mortgagee on demand, unless the attaching creditors disputed the validity of the mortgage; and to compel such surrender of the mortgaged goods, an action in replevin would lie at the suit of the mortgagee. Wood v. Weimar, 104 U. S. 786, 26 L. ed. 779.

The rights of a creditor in possession are paramount to the rights of an attaching creditor. Baker v. Doe, 88 S. C. 69, 70 S. E. 431, 34 L.R.A.(N.S.) 510.

An attachment levied upon pledged property as that of pledgeor is subject to the lien of the pledge. First Nat. Bank v. Harkness, 42 W. Va. 156, 24 S. E. 548, 32 L.R.A. 408.

The liability of equitable interests to attachment will not authorize the attaching creditor to take the property out of the hands of the legal owner before the latter's claims on it are satisfied. Gibson v. Stevens, 8 How. (U. S.) 384, 12 L. ed. 1123.

[13] Southern Flour & Grain Co. v. Northern P. R. Co. 127 Ga. 626, 56 S. E. 742, 9 L.R.A.(N.S.) 853, 119 Am. St. Rep. 356, 9 Ann. Cas. 437.

[14] Bayonne Knife Co. v. Umbenhauer, 107 Ala. 496, 18 So. 175, 54 Am. St. Rep. 114; Rucker v. Donovan, 13 Kan. 251, 19 Am. Rep. 84 (writ of execution); Hause v. Judson, 4 Dana (Ky.) 7, 29 Am. Dec. 377; Wood v. Yeatman, 15 B. Mon. (Ky.) 270; Blum v. Marks, 21 La. Ann. 268, 99 Am. Dec. 725; Hepp v. Glover, 15 La. 461, 35 Am. Dec. 206; O'Brien v. Norris, 16 Md. 122, 77 Am. Dec. 284; Naylor v. Dennie, 8 Pick. (Mass.) 198, 19 Am. Dec. 319; Langstaff v. Stix, 64 Miss. 171, 1 So. 97, 60 Am. Rep. 49; Fenkhausen v. Fellows, 20 Nev. 312, 21 P. 886, 4 L.R.A. 732; Farrell v. Richmond & D. R. Co. 102 N. C. 390, 9 S. E. 302, 3 L.R.A. 647, 11 Am. St. Rep. 760; Calahan v. Babcock, 21 Ohio St. 281, 8 Am. Rep. 63; Chandler v. Fulton, 10 Tex. 2, 60 Am. Dec. 188; Harris v. Tenney, 85 Tex. 254, 20 S. W. 82, 34 Am. St. Rep. 796.

Annotation: 7 A.L.R. 1408.

The Uniform Sales Act, § 59, provides: "When notice of stoppage in transitu is given by the seller to the carrier, or other bailee in possession of the goods, he must redeliver the goods to, or according to the direction of, the seller. The expenses of such delivery must be borne by the seller. If, however, a negotiable document of title representing the goods has been issued by the carrier or other bailee, he shall not be obliged to deliver or justified in delivering the goods to the seller unless such document is first surrendered for cancelation."

transit, at least unless the vendor, in the belief that he still has a right of stoppage in transitu, promptly dismisses the writ and seeks to stop the transit. Furthermore, it has been held that after the goods have reached the point of destination, they may be taken on attachment sued out by the creditors of the vendee, so as to work a delivery and terminate the right of stoppage in transitu.[15]

§ 833. **As to Lien of Warehouseman or Bailee of Attached Property.** — While the authorities are not clear as to the nature or extent of the lien that a warehouseman has upon property stored by an officer who has seized it under a writ of attachment, there are cases in which the warehouseman's lien has been recognized. Thus, it has been held that where the officer stores goods seized under an attachment which is subsequently released by payment of the judgment and costs taxed in the attachment suit, the warehouseman has a common-law lien for reasonable storage charges, and need not surrender the possession of the property on the demand of the owner, although the property is no longer in custodia legis. The cases denying a lien as to property stored by an officer under an attachment may be reconciled with those permitting it, on the ground that it appears that the attachment plaintiff was successful in the cases upholding the lien, while in the cases denying the lien, the attachment was either held invalid or dismissed before final judgment.[16]

§ 834. **Priority between Attaching Creditor-Stockholder and Other Corporate Creditors.**—The statutory liability of a stockholder will not defeat his rights as an attaching creditor of the corporation, which will be superior to those of subsequent attaching creditors,[17] even though he is an officer of the corporation.[18] But in a proceeding to wind up the affairs of a corporation, where both the corporation and a creditor-stockholder are insolvent, and the latter is liable upon his subscription for stock in the company in an amount greatly in excess of his claims against the corporation, he cannot enforce against the corporation, to the exclusion of other creditors, an attachment proceeding, and such proceeding and the lien obtained thereby will be postponed to that of subsequent attaching creditors, where necessary to their payment, and where, without such postponement, they would lose their demands and the entire assets of the corporation, which would go to satisfy the individual debt of the stockholder.[19]

§ 835. **As to Landlord's Lien.**[20]—Priority between an attachment or garnishment and a landlord's statutory lien generally depends upon priority in time,[1] but is sometimes affected by the fact of notice [2] or the effect of recording statutes.[3] Generally, however, a landlord's lien for rent has priority over an attachment or execution of the tenant's goods only to the extent of rent accrued,[4] but this does not prevent the lien from covering rent payable in advance.[5] However, a different practice has been adopted in some states, and the landlord has been permitted to claim his rent to the time of levy, though under the terms of the lease it was not yet due, and though the courts have recognized that the wording of the statute did not authorize this, the practice has been continued and upheld by the courts on the principle of stare decisis.[6] The rule of common law was that property taken on execution against a tenant could not, so long as it was in the actual or constructive possession of the sheriff, though it remained on the demised premises, be taken on distress. The statute of 3 Anne, chap. 14, § 1, relating to distress, which has been in effect re-enacted or adopted in some jurisdictions in this country, provides that no goods or chattels upon any demised premises shall be liable to be taken by virtue of an execution, unless the party at whose suit the execution is issued shall, before the removal of such goods, pay the rent due, not exceeding a year's rent.[7] By analogy to this statute, the claim of an attaching creditor must yield precedence to the rent in arrear for a similar period.[8] However, goods seized by an officer under a writ of execution or attachment, in good faith and for the purpose of its enforcement, are not subject to distraint for rent in arrear, though left on the premises in the possession of the debtor as agent of the officer making the seizure.[9] Under such a statute as this statute of Anne, though the authorities are not in entire accord, it is generally held that notice to the sheriff of the rent due previous to the removal of the goods is not necessary, that since the statute in terms does not require it, to give a construction to it requiring such notice previous to a removal would in most cases defeat the very object and intent of the statute, and that therefore notice, even after a sale, provided it is before money is paid over to the plaintiff in the execution, is good.[10] If, however, the statute requires that notice be given to the sheriff before the chattels are removed, effect must be given to such requirement.[11] Where a lease containing a security clause for the rent reserved has not been filed, as required by law, when levies of attachment are made, the attachment is superior to the right of the landlord.[12] Title to the hay, oats, and straw is not reserved to the owner of a farm as against attaching creditors of a tenant, under a lease by which the tenant agrees to raise enough stuff to feed the stock of the place, or, if he fails to do so, to buy what may be necessary.[13]

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[15] Annotation: 7 A.L.R. 1408.

[16] Annotation: 95 A.L.R. 1530.

Where an attachment suit was dismissed for want of prosecution, a warehouseman with whom the attached property had been stored by a constable, under an agreement that the sheriff would not be responsible for the cost, had no lien, either of an equitable nature or under a statute which required the consent of the owner of stored property as a prerequisite to a warehouseman's lien. Roehl Storage Co. v. Wilson, 268 Mich. 691, 256 N. W. 598, 95 A.L.R. 1525.

[17] Annotation: 41 L.R.A.(N.S.) 987.

[18] Rollins v. Shaver Wagon & Carriage Co. 80 Iowa, 380, 45 N. W. 1037, 20 Am. St. Rep. 427.

[19] Annotation: 41 L.R.A.(N.S.) 987.

[20] See Landlord and Tenant [Also 16 R. C. L. p. 988, § 504, p. 1013, §§ 531, 532].

[1] First Nat. Bank v. Corporation Commission, 161 Md. 508, 157 A. 748, 86 A.L.R. 1407.

Annotation: 12 L.R.A. 848.

[2] Annotation: 12 L.R.A. 849.

[3] Annotation: 12 L.R.A. 849.

§ 836. Priority of Attachment of Fixtures.—As a general rule, the creditor who attaches removable fixtures as such must remove them from the premises while the tenant's right to do so exists. In other words, the creditor acquires no greater rights in this respect than the tenant under whom he claims. Therefore, if, pending the attachment, the rights of the tenant in and to the fixtures cease, then, as a general rule, the rights of those claiming under him also cease. Hence, an attachment of fixtures by the creditor of a tenant is defeated when the lease is terminated by lawful re-entry before a sale in the attachment suit or removal of the property, unless there is a special agreement, or special circumstances entitle the tenant to remove the fixtures after his term has expired.[14]

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[4] First Nat. Bank v. Corporation Commission, 161 Md. 508, 157 A. 748, 86 A.L.R. 1407.
Annotation: 119 Am. St. Rep. 129.

[5] Platt v. Johnson, 168 Pa. 47, 31 A. 935, 47 Am. St. Rep. 877.

[6] Lichtenthaler v. Thompson, 13 Serg. & R. (Pa.) 157, 15 Am. Dec. 581.
Annotation: 15 Am. Dec. 588.

[7] See LANDLORD AND TENANT [Also 16 R. C. L. p. 1013, §§ 531, 532].

[8] First Nat. Bank v. Corporation Commission, 161 Md. 508, 157 A. 748, 86 A.L.R. 1407.

[9] Ibid.

[10] Beekman v. Lansing, 3 Wend. (N. Y.) 446, 20 Am. Dec. 707.

[11] Annotation. 20 Am. Dec. 711.

[12] Annotation: 12 L.R.A. 848.

[13] Colville v. Miles, 127 N. Y. 159, 27 N. E. 809, 12 L.R.A. 848, 24 Am. St. Rep. 433.
Annotation: 12 L.R.A. 848.

§ 837. **Effect of Defects and Irregularities.**—Attachment or garnishment proceedings, jurisdictionally defective, constitute no lien on the property of the defendant or debts owing to him and no basis for any claim of priority over other claims or liens on such property; nor will a subsequent amendment validating the proceedings,[15] or a subsequent valid attachment or garnishment, have priority over intervening rights and interests in the defendant's property.[16] Thus, an attachment or garnishment issued on a jurisdictionally defective affidavit is, until the affidavit is corrected, ineffectual as to bona fide liens subsequently acquired on the property.[17] Likewise, it has been held that a return on a writ of attachment that it was levied upon lands described, and executed personally upon the defendant by giving him a copy, without stating that the officer went upon the lands, or to the house of the person in whose possession they were, and then and there declared the levy of the writ,[18] as required by statute in case of a levy on occupied premises, is insufficient to sustain the validity of the attachment, even after judgment, as against the intervening rights of other persons.[19] Nor will the judgment in an action in which a jurisdictionally defective attachment or garnishment has issued operate retroactively to validate the attachment or garnishment and to cut out intervening rights of others.[20] Similarly, the ratification of the act of an attorney in bringing an unauthorized attachment suit will not relate back to the time of the commencement of the suit so as to give the attachment lien priority over the liens of third parties which have been acquired in good faith during the interval between the bringing of the suit and the ratification.[1] However, the view has been taken that amendments of mere irregularities in attachment proceedings relate back to the beginning thereof so as to preserve the priority of the attachment over other liens taking effect before amendment and after the original attachment.[2] It has been ruled that where the fact of making the levy of an attachment upon land is indorsed on the writ of attachment, but notice thereof is not given to the defendant until a reasonable time thereafter, the lien of the attachment accrues at the date of the indorsement and is superior to the lien of a mortgage upon the same land given by the defendant subsequent to the attachment, but before notice thereof is given.[3]

§ 838. **Effect of Dissolution of Attachment or Garnishment.**—The lien of an attachment is ended when the attachment is dissolved, and after such dissolution the owner of the property attached can dispose of it as he sees fit, whether it has been actually turned over to him by the officer or not.[4] Hence, the rights of one to whom property has been transferred by a bona fide bill of sale, after an attachment thereon has been dissolved, are superior to those acquired by a second writ of attachment under which a levy is made after the sale.[5]

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[14] Morey v. Hoyt, 62 Conn. 542, 26 A. 127, 19 L.R.A. 611.

[15] **Jurisdictional defects and irregularities** in attachment and garnishment proceedings cannot be supplied by amendment. See Vol. 4, p. 607, §§ 84 et seq.; p. 843, § 475.

[16] United Collieries v. Martin, 248 Ky. 808, 60 S. W. (2d) 125, 89 A.L.R. 971; People's Bank v. West, 67 Miss. 729, 7 So. 513, 8 L.R.A. 727.

[17] United Collieries v. Martin, 248 Ky. 808, 60 S. W. (2d) 125, 89 A.L.R. 971.

[18] Generally, as to sufficiency of levy on realty, see supra, §§ 567 et seq.

[19] People's Bank v. West, 67 Miss. 729, 7 So. 513, 8 L.R.A. 727.

[20] Ibid.

[1] Caruth-Byrnes Hardware Co. v. Deere, M. & Co. 53 Ark. 140, 13 S. W. 517, 7 L.R.A. 405.

[2] Goodman Bros. & Co. v. Henry, 42 W. Va. 526, 26 S. E. 528, 35 L.R.A. 847.

[3] Schoonover v. Osborne, 111 Iowa, 140, 82 N. W. 505, 82 Am. St. Rep. 496.

2. Priority among Rival Attachments and Garnishments

§ 839. Generally.[6]—Where several writs of attachment are placed in the hands of a sheriff, they are entitled to priority in the order in which they are received,[7] and this priority is not affected by the order in which the officer serves the writs, nor does the fact that he levies the writs on different items of property restrict the right of the holder of the senior writ to the property actually levied on under it, but under such circumstances the court may require the officer's return to be corrected, and may give the benefit to the creditor whose order of attachment was first delivered to the sheriff.[8]

Where writs of attachment are placed in the hands of different officers to be levied, the one first levied upon the defendant's personalty acquires priority.[9] The rule is applicable to attachments levied respectively by Federal and by state officers.[10]

It has been ruled that simultaneous attachments regularly levied constitute the attachment creditors tenants in common in equal proportions.[11]

The fact that an attachment is levied on personalty in an action to recover the purchase price thereof does not create a lien superior to that created by a prior levy of a general attachment on the same property.[12]

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[4] Anderson v. Land, 5 Wash. 493, 32 P. 107, 34 Am. St. Rep. 875.

[5] Ibid.

[6] As to rights of parties to proceeds on sale under junior attachment or execution, see Judicial Sales [Also 16 R. C. L. p. 1].

[7] Atchison, T. & S. F. R. Co. v. Schwarzschild & S. Co. 58 Kan. 90, 48 P. 591, 62 Am. St. Rep. 604; Kennon v. Ficklin, 6 B. Mon. (Ky.) 414, 44 Am. Dec. 776.

Annotation: 82 Am. St. Rep. 301.

A previous attachment of property as the right of another cannot divest the interest of the actual owner of the property in the same so as to prevent the sheriff attaching it under a writ of attachment issued for a debt of the same actual owner. Livingston v. Smith, 5 Pet. (U. S.) 90, 8 L. ed. 57.

[8] Atchison, T. & S. F. R. Co. v. Schwarzschild & S. Co. 58 Kan. 90, 48 P. 591, 62 Am. St. Rep. 604.

The view has been taken that a junior attaching creditor who has been given leave to defend the debtor against a prior attachment may plead the statute of limitations. Annotation: L.R.A.1918C, 1021.

[9] Dooley v. Hadden, 179 U. S. 646, 45 L. ed. 357, 21 S. Ct. 259; Beaston v. Farmers' Bank, 12 Pet. (U. S.) 102, 9 L. ed. 1017; Pratt v. Law, 9 Cranch (U. S.) 456, 3 L. ed. 791; Prince v. Bartlett, 8 Cranch (U. S.) 431, 3 L. ed. 614; Arkadelphia Lumber Co. v. McNutt, 68 Ark. 417, 59 S. W. 761, 82 Am. St. Rep. 299; Coit v. Sistare, 85 Conn. 573, 84 A. 119, Ann. Cas. 1913C, 248; Hollingsworth v. Hamelin, 1 Dall. (Pa.) 151, 1 L. ed. 77.

Annotation: 30 L.R.A. 474.

Every attachment takes precedence over any subsequent attachment or assignment of the attached property and is perfected by a timely issue and levy of execution on the property attached. Coit v. Sistare, 85 Conn. 573, 84 A. 119, Ann. Cas. 1913C, 248.

In Beaston v. Farmers' Bank, 12 Pet. (U. S.) 102, 9 L. ed. 1017, the court held that money attached before the issuing of an attachment in behalf of the United States was bound for the debt for which it was legally attached by a writ in the nature of an execution, and that the right of a private creditor, thus acquired, could not be defeated by the process subsequently issued on the part of the United States. See also Prince v. Bartlett, 8 Cranch (U. S.) 431, 3 L. ed. 146.

The state is not entitled to a preference for duties for which bond had been given by an absconding debtor, to the collector, who was not so named in the bond, where a domestic attachment was issued, notice to creditors given, and a dividend made among the creditors who filed their claims. Hollingsworth v. Hamelin, 1 Dall. (Pa.) 151, 1 L. ed. 77.

Where a subsequent attachment has been first levied by the sheriff or his deputies, and the fund attached is under the control of the court, and the parties are all before the court, the chancellor should distribute the fund among the attaching creditors in the order in which the attachments came into the sheriff's office. Kennon v. Ficklin, 6 B. Mon. (Ky.) 414, 44 Am. Dec. 776. Annotation: 62 Am. St. Rep. 606.

Where property is sold under an attachment fraudulently issued, the money realized therefrom is subject to a garnishment issued subsequent to the attachment. Stern v. Butler, 123 Ala. 606, 26 So. 359, 82 Am. St. Rep. 146.

[10] Pulliam v. Osborne, 17 How. (U. S.) 471, 15 L. ed. 154; Brown v. Clarke, 4 How. (U. S.) 4, 11 L. ed. 850; Prince v. Bartlett, 8 Cranch (U. S.) 431, 3 L. ed. 614.

[11] Sigourney v. Eaton, 14 Pick. (Mass.) 414, 25 Am. Dec. 414.

While a second affidavit and attachment on a different ground may be had in the same suit, the second attachment does not, as a rule, relate to the first attachment, and is a lien only from its levy as to personalty, or its date as to land, and is not therefore prior to an attachment levied after the first attachment but before the second.[13] Likewise, the union in the same parties of the lien of an attachment not prosecuted to judgment, and the interest attached, does not defeat the lien of an intermediate attachment.[14]

Where an attaching creditor has good reason to believe that his debtor is about to dispose of his property with intent to defraud his creditors, and attaches on that ground, the fact that the debtor afterwards changes his mind and absconds does not invalidate the attachment or give priority to another creditor subsequently attaching on the ground that the debtor had left the state.[15]

In reference to the satisfaction of attachment, the rule is that the first attaching creditor is entitled to a full satisfaction of his judgment and costs in preference to others whose attachments were of later date.[16]

Circumstances have been urged in some cases as changing the rules heretofore discussed. Each case must be decided on its own facts.[17]

§ 840. Effect of Irregularities in, or Insufficiency of, First Attachment. — The effect of irregularities in, or insufficiency of, the first attachment depends upon the nature thereof. If the first attachment or garnishment is so defective that it does not create a lien or impound the property, a subsequent attachment or garnishment takes priority.[18] If, on the other hand, the irregularities or deficiencies are not such as to prevent the creation of a lien or the impounding of the property, the subsequent attachment or garnishment does not take priority.[19]

An attachment in the hands of an officer who is prevented from levying on personal property through his inability to gain access thereto is not prior to an attachment, subsequently issued, under which a levy is actually made.[20] Where an attempted levy of an attachment is insufficient and inoperative, a notification to one having a prior contract to purchase the property attempted to be attached will not affect his rights.[1] Likewise, an attachment which is issued on an affidavit containing false allegations does not give priority of lien over a subsequent attachment validly issued and levied.[2] An unauthorized action brought in the name of a creditor may be ratified and adopted by him, but such ratification does not relate back so as to give the lien of an attachment theretofore sued out priority over the attachment liens of third persons which have been acquired in good faith during the interval between the bringing of the suit and the ratification,[3] and it is the rule that an attachment issued upon a debt not due may be avoided by a junior attaching creditor, and postponed to his attachment lien, where there is no statute authorizing the issuance of an attachment for a debt not due.[4] In some states there are statutes requiring that a copy of the return of a writ of attachment be filed for record, and the general rule is that failure to comply with such a requirement is fatal to the attachment as against a subsequent attaching creditor or purchaser in good faith.[5]

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[12] Arkadelphia Lumber Co. v. McNutt, 68 Ark. 417, 59 S. W. 761, 82 Am. St. Rep. 299.

[13] Miller v. White, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791.

[14] Pratt v. Law, 9 Cranch (U. S.) 456, 3 L. ed. 791.

[15] Annotation: 30 L.R.A. 474.

[16] Hepp v. Glover, 15 La. 461, 35 Am. Dec. 206.

Annotation: 62 Am. St. Rep. 606; 82 Am. St. Rep. 301.

[17] **Equity will not give priority** to a subsequent attachment because the first attaching creditor falsely represented to the second that he had already levied his attachment, and thereby caused the second creditor to delay levying until the first had had time to make his levy. Bardwell v. Perry, 19 Vt. 292, 47 Am. Dec. 687.

One who has actual possession of the goods of a debtor under an unfounded claim of title is not precluded from obtaining a lien by attachment thereon, which shall have priority over an attachment subsequently levied by other creditors whose attachment was first issued, by the fact that he has put the goods in the nominal possession of his attorney in a place known only to himself, so as to prevent the levy of attachments by other parties until after he has perfected his own attachment. Dooley v. Hadden, 179 U. S. 646, 45 L. ed. 357, 21 S. Ct. 259.

[18] Meyer v. Missouri Glass Co. 65 Ark. 286, 45 S. W. 1062, 67 Am. St. Rep. 927; Caruth-Byrnes Hardware Co. v. Deere, 53 Ark. 140, 13 S. W. 517, 17 L.R.A. 405; Webster v. Haworth, 8 Cal. 21, 68 Am. Dec. 287; Crisman v. Dorsey, 12 Colo. 567, 21 P. 920, 4 L.R.A. 664; Henderson v. Thornton, 37 Miss. 448, 75 Am. Dec. 70.

Annotation: 93 A.L.R. 748; 35 L.R.A. 767.

A groundless attachment based on false allegations of the debtor's fraudulent intent to hinder and delay creditors is a constructive fraud on the part of the creditor which will postpone him to a junior attachment creditor. Davis v. H. B. Claflin Co. 63 Ark. 157, 38 S. W. 662, 1117, 41 S. W. 996, 35 L.R.A. 776, 58 Am. St. Rep. 102.

[19] Davis v. H. B. Claflin Co. 63 Ark. 157, 38 S. W. 662, 1117, 41 S. W. 996, 35 L.R.A. 776, 58 Am. St. Rep. 102.

A junior attaching creditor cannot take advantage of irregularities or informalities in the proceedings in a prior attachment, although they are such as to be good grounds for setting aside the attachment if motion therefor were made by the defendant. Ibid.

Subsequent attaching creditors may show **defects in prior attachments** and thereby get the prior liens out of their way. Annotation: 35 L.R.A. 767.

§ 841. **Priority among Rival Garnishments.**—Priority among rival garnishments of the same property is determined generally by their priority in time.[6] There is some difference of opinion, however, as to whether such priority is determined from the time when the writ is placed in the officer's hands for service or from the time of service on the garnishee.[7] The fact that the creditor who instituted the subsequent proceedings is the one who first prosecuted his proceedings to judgment will not alter the order of priority.[8] Accordingly, if two garnishments are directed against the same debt due from a garnishee, and a judgment is obtained against him on the second garnishment, which he satisfies, he cannot plead that fact in bar to the first, where he gave the prior creditor no notice of the second garnishment, and did not plead the first garnishment in bar of the second.[9]

§ 842. **Under Prorating Attachment and Garnishment Statutes.**—Prorating attachment and garnishment statutes are found, in some jurisdictions, under which all creditors filing claims in the attachment proceedings are placed on an equality, and the estate of the debtor distributed among them equally and impartially.[10] Prorating provisions are frequently found in statutes making the ground of the attachment the fraudulent absconding of the debtor or the fraudulent removal of his property.[11] However, the practice is sometimes followed of giving an attaching creditor a priority because of his superior diligence in pursuing the absconding debtor or his property.[12]

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[20] Meyer v. Missouri Glass Co. 65 Ark. 286, 45 S. W. 1062, 67 Am. St. Rep. 927.

[1] Crisman v. Dorsey, 12 Colo. 567, 21 P. 920, 4 L.R.A. 664.

[2] Davis v. H. B. Claflin Co. 63 Ark. 157, 38 S. W. 662, 1117, 41 S. W. 996, 35 L.R.A. 776, 58 Am. St. Rep. 102.

[3] Caruth-Byrnes Hardware Co. v. Deere, 53 Ark. 140, 13 S. W. 517, 7 L.R.A. 405.

[4] Davis v. H. B. Claflin Co. 63 Ark. 157, 38 S. W. 662, 1117, 41 S. W. 996, 35 L.R.A. 776, 58 Am. St. Rep. 102; Henderson v. Thornton, 37 Miss. 448, 75 Am. Dec. 70.

[5] Webster v. Haworth, 8 Cal. 21, 68 Am. Dec. 287.

Annotation: 93 A.L.R. 748.

[6] Beaston v. Farmers' Bank, 12 Pet. (U. S.) 102, 9 L. ed. 1017, affirming 7 Gill & J. (Md.) 421, 28 Am. Dec. 226; Prince v. Bartlett, 8 Cranch (U. S.) 431, 3 L. ed. 614; Williams v. Androscoggin & K. R. Co. 36 Me. 201, 58 Am. Dec. 742; Oklahoma Tool & Supply Co. v. Drumright State Bank, 97 Okla. 165, 222 P. 975, citing R. C. L.; McCord-Brady Co. v. Mills, 8 Wyo. 258, 56 P. 1003, 46 L.R.A. 737.

An attachment of funds at the suit of a private person is not defeated by a subsequent attachment at the suit of the United States. Beaston v. Farmers' Bank, 12 Pet. (U. S.) 102, 9 L. ed. 1017, affirming 7 Gill & J. (Md.) 421, 28 Am. Dec. 226; Prince v. Bartlett, 8 Cranch (U. S.) 431, 3 L. ed. 614.

[7] See supra, § 825.

[8] Maier v. Freeman, 112 Cal. 8, 44 P. 357, 53 Am. St. Rep. 151.

See supra, § 784, as to priority between rival garnishments in different states where judgment is obtained in the subsequent garnishment before it is obtained in the prior garnishment.

[9] Farmers' Bank v. Beaston, 7 Gill & J. (Md.) 421, 28 Am. Dec. 226, affirmed in 12 Pet. (U. S.) 102, 9 L. ed. 1017.

3. Priority as to Deeds, Mortgages, Conveyances, Pledges, and Bailments

a. In General

§ 843. Generally.—Priority between an attachment or garnishment and an assignment, transfer, or conveyance depends in general upon priority in time.[13] Assuming that there has been a compliance with all governing statutes, priority in time generally determines priority between an attachment or garnishment and a mortgage,[14] pledge,[15] bailment,[16] or conditional sale.[17]

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[10] Howard v. Grimes Pass Placer Min. Co. 21 Idaho, 12, 120 P. 170, Ann. Cas. 1913C, 284.

Annotation: Ann. Cas. 1913C, 285; 5 B. R. C. 450.

Under the Idaho statute no creditor is entitled to prorate in the proceeds of attached property unless he has procured his judgment within the sixty-day period prescribed by the statute. Howard v. Grimes Pass Placer Min. Co. 21 Idaho, 12, 120 P. 170, Ann. Cas. 1913C, 284.

[11] Annotation: Ann. Cas. 1913C, 285.

See Standard Pa. Prac. Vol. 10.

[12] Annotation: Ann. Cas. 1913C, 292.

[13] Jackson v. Lawrence, 117 U. S. 679, 29 L. ed. 1024, 6 S. Ct. 915; Green v. Van Buskirk, 7 Wall. (U. S.) 139, 19 L. ed. 109; Van Ness v. Hyatt, 13 Pet. (U. S.) 294, 10 L. ed. 168; Canterbury v. Marengo Abstract Co. 166 Ala. 231, 52 So. 388, 139 Am. St. Rep. 30; Wheatley v. Strobe, 12 Cal. 92, 73 Am. Dec. 522; Hotchkiss v. Higgins, 52 Conn. 205, 52 Am. Rep. 582; Lewis v. McCabe, 49 Conn. 141, 44 Am. Rep. 217; Walton v. Horkan, 112 Ga. 814, 38 S. E. 105, 81 Am. St. Rep. 77; Shirk v. Thomas, 121 Ind. 147, 22 N. E. 976, 16 Am. St. Rep. 381; Sheehy v. Scott, 128 Iowa, 551, 104 N. W. 1139, 4 L.R.A.(N.S.) 365; Hall v. Kansas City Terra Cotta Co. 97 Kan. 103, 154 P. 210, L.R.A. 1916D, 361, Ann. Cas. 1918D, 605; Burke v. Johnson, 37 Kan. 337, 15 P. 204, 1 Am. St. Rep. 252; Harlow v. Bartlett, 96 Me. 294, 52 A. 638, 90 Am. St. Rep. 346; Gardner v. Lane, 9 Allen (Mass.) 492, 83 Am. Dec. 779; Fettyplace v. Dutch, 13 Pick. (Mass.) 388, 23 Am. Dec. 688; Columbia Bank v. Jacobs, 10 Mich. 349, 81 Am. Dec. 792; Hope v. Blair, 105 Mo. 85, 16 S. W. 595, 24 Am. St. Rep. 366; Merchants' & M. Nat. Bank v. Barnes, 18 Mont. 335, 45 P. 218, 56 Am. St. Rep. 586, 47 L.R.A. 737; Westervelt v. Hagge, 61 Neb. 647, 85 N. W. 852, 54 L.R.A. 333; Cleveland Mach. Works v. Lang, 67 N. H. 348, 31 A. 20, 68 Am. St. Rep. 675; Butler v. Maynard, 11 Wend. (N. Y.) 548, 27 Am. Dec. 100; Nesmith v. Drum, 8 Watts & S. (Pa.) 9, 42 Am. Dec. 260; Fitzgerald v. Nickerson, 43 R. I. 396, 113 A. 290, 16 A.L.R. 373; Burditt Bros. v. Porter, 63 Vt. 296, 21 A. 955, 25 Am. St. Rep. 763; Armington v. Houston, 38 Vt. 448, 91 Am. Dec. 366; Anderson v. Land, 5 Wash. 493, 32 P. 107, 34 Am. St. Rep. 875; Wiedenbeck-Dobelin Co. v. Anderson, 168 Wis. 212, 169 N. W. 615, 12 A.L.R. 500. Yates v. Terry [1902] 1 K. B. (Eng.) 527, 5 B. R. C. 446—C. A.

Annotation: 52 A.L.R. 109; 33 L.R.A. 309; L.R.A.1918A, 1089; 74 Am. St. Rep. 454; 5 B. R. C. 450.

Any transfer of property made after the filing of an attachment at law or equity affecting it is void as against the plaintiff in the attachment procedings. Doe ex dem. Valliant v. Childress, 21 Wall. (U. S.) 642, 22 L. ed. 549.

Any levy which in law is valid as against the defendant and will justify a sale will operate to defeat a subsequent purchase, though bona fide and for a valuable consideration. A bona fide purchaser for value after a levy of an attachment takes the title subject thereto. Butler v. Maynard, 11 Wend. (N. Y.) 548, 27 Am. Dec. 100.

One who has acquired a lien on real estate, pending litigation, after the levy of an attachment thereon, is charged with notice and takes subject to the rights of the plaintiff in the action wherein the attachment was levied and final judgment rendered. Westervelt v. Hagge, 61 Neb. 647, 85 N. W. 852, 54 L.R.A. 333.

Where the principal defendant has made a valid assignment of the garnishee's indebtedness, or conveyance of the property in his possession belonging to such defendant, before the service of the summons upon the garnishee, the latter cannot be charged on account of such debt or property. Hall v. Kansas City Terra Cotta Co. 97 Kan. 103, 154 P. 210, L.R.A.1916D, 361, Ann. Cas. 1918D, 605.

The rule has been applied to a conveyance even though the sale was made with intent to prefer another creditor, in violation of the provisions of an insolvent law. Gardner v. Lane, 9 Allen (Mass.) 492, 85 Am. Dec. 779.

A garnishment, by creditors, of property taken from prisoners by police officials for use as evidence if needed will defeat a replevin suit by subsequent assignees of the prisoners. Fitzgerald v. Nickerson, 43 R. I. 396, 113 A. 290, 16 A.L.R. 373. Generally, as to attachability or garnishability of property taken from prisoner, see Vol. 4, p. 803, §§ 400 et seq.

As to jurisdiction to garnish debt previously assigned by nonresident defendant to nonresident assignee without notice to assignee, see Vol. 4, p. 596, § 75.

A creditor may waive his priority.[18]

An attaching or garnishing plaintiff cannot claim priority over a previous assignment of a portion of the debt attached or garnished, on the ground that the debt could not be divided against the debtor, for the right to refuse to recognize such an assignment is personal to the debtor.[19]

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[14] Wood v. Weimar, 104 U. S. 786, 26 L. ed. 779; Smead v. Chandler, 71 Ark. 505, 76 S. W. 1066, 65 L.R.A. 353; Ritter v. Scannell, 11 Cal. 238, 70 Am. Dec. 775 (realty); Tollerton & S. Co. v. Skelton, 118 Iowa, 543, 92 N. W. 651, 96 Am. St. Rep. 409; Riddle v. Dow, 98 Iowa, 7, 66 N. W. 1066, 32 L.R.A. 811; Allen v. McCalla, 25 Iowa, 464, 96 Am. Dec. 56; Hart v. Oliver Farm Equipment Sales Co. (Hart v. Thompson) 37 N. M. 267, 21 P. (2d) 96, 87 A.L.R. 962.

A mortgage on chattels duly recorded is entitled to priority over a subsequent attachment or garnishment. Wood v. Weimar, 104 U. S. 786, 26 L. ed. 779.

A lessor's mortgage of his interest in crops raised by a tenant on leased land, and still in the possession of the tenant and undivided, gives the mortgagee a right paramount to that of the creditors of the mortgagor under garnishment proceedings subsequent to the mortgage. Riddle v. Dow, 98 Iowa, 7, 66 N. W. 1066, 32 L.R.A. 811.

However, a lien may be given to a second mortgagee and to a receiver of a corporation for money advanced to pay interest on the first mortgage and taxes, as against attachment creditors of the corporation. Dummer v. Smedley, 110 Mich. 466, 68 N. W. 260, 38 L.R.A. 490.

In Jackson v. Lawrence, 117 U. S. 679, 29 L. ed. 1024, 6 S. Ct. 915, where land was conveyed to a person as security for the payment of a promissory note, conditioned that upon default in payment the grantee had the right to sell the premises conveyed, the court held that the transaction was in the nature of a mortgage, and a purchaser of the land upon default of the mortgagor took the same free from the claims of an attaching creditor of the mortgagor, for the attachment was subject to the right of the grantee or mortgagee to sell in default of the payment of the note, as it would have been the latter's right to foreclose a mortgage given in the usual form.

As to priority between mortgage and subsequent attachment in another state to which mortgaged property has been removed, see CHATTEL MORTGAGES [Also 5 R. C. L. p. 399, § 21].

[15] First Nat. Bank v. Harkness, 42 W. Va. 156, 24 S. E. 548, 32 L.R.A. 408.

Where property has been pledged for the payment of a sum of money, an attachment subsequently issued is not entitled to priority over the pledge. First Nat. Bank v. Harkness, 42 W. Va. 156, 24 S. E. 548, 32 L.R.A. 408.

[16] Southern Flour & Grain Co. v. Northern P. R. Co. 127 Ga. 626, 56 S. E. 742, 9 L.R.A.(N.S.) 853, 9 Ann. Cas. 437.

[17] Lewis v. McCabe, 49 Conn. 141, 44 Am. Rep. 217; Cleveland Mach. Works v. Lang, 67 N. H. 348, 31 A. 20, 68 Am. St. Rep. 675; Armington v. Houston, 38 Vt. 448, 91 Am. Dec. 366; Wiedenbeck-Dobelin Co. v. Anderson, 168 Wis. 212, 169 N. W. 615, 12 A.L.R. 500.

A levy on property sold conditionally, under a judgment against the conditional vendee, is ineffectual against the vendor's assignee for value of the conditional sales contract, who took possession of the property before the rights of the creditor attached. Wiedenbeck-Dobelin Co. v. Anderson, 168 Wis. 212, 169 N. W. 615, 12 A.L.R. 500.

A contract for a conditional sale of chattels in one state, executed therein and valid by its laws, is valid as against the attaching creditors of the buyer in another state, to which the property has subsequently been removed. Cleveland Mach. Works v. Lang, 67 N. H. 348, 31 A. 20, 68 Am. St. Rep. 675.

However, the conditional vendor of an automobile has no right of possession thereto as against a sheriff who takes the same into his possession under an attachment issued in an action begun by a creditor of the vendee before the date upon which the first deferred payment specified in the contract becomes due. Nevada Motor Co. v. Bream, 51 Nev. 89, 269 P. 602, 61 A.L.R. 776.

A conditional sales contract is invalid as to attaching creditors where the property purported to be covered is described only as "one ten foot Oliver Gold Digger One Way Plow," and no other facts are contained in the body of the instrument from which the identity of the plow may be definitely ascertained, such as the name of the person in whose possession it is, or its location, save as it may be inferred that it is located in the filing district. Hart v. Oliver Farm Equipment Sales Co. (Hart v. Thompson) 37 N. M. 267, 21 P. (2d) 96, 87 A.L.R. 962.

Where goods are sold with an option to the purchaser to return them in whole or in part, there is an absolute sale, so that an attachment levied on them in an action against the purchaser prior to his exercising the right to return the goods is prior to any claims of the vendor arising after the exercise of the option by the buyer. Hotchkiss v. Higgins, 52 Conn. 205, 52 Am. Rep. 582.

[18] **Although a chattel mortgage is prior to an attachment,** the mortgagee may waive his priority and the attachment will not only be prior to that mortgage but also to mortgages subsequently issued. Hoyt v. Clemans, 167 Iowa, 330, 149 N. W. 442, L.R.A.1915C, 166; Tollerton & S. Co. v. Skelton, 118 Iowa, 543, 92 N. W. 651, 96 Am. St. Rep. 409. Annotation: L.R.A.1915C, 166.

It has been held that a chattel mortgagee, by consenting to a sale of the property by the mortgagor and the application of the proceeds to the latter's own use (the proceeds being deposited in a bank in the name of bondsmen of the mortgagor in a replevin action by a prior mortgagee of the property), waives his lien, so that the balance of the proceeds in the bank after satisfying the prior mortgage is subject to garnishment by a creditor of the mortgagor. Annotation: L.R.A.1915C, 169.

A transfer of the property subject to an attachment does not in any way affect the rights of the attachment creditor.[1]

§ 844. —Conveyance of Real Property.—At common law the owner of real property who conveys the same by a sufficient deed parts with his title absolutely, no record being necessary. The rule as to priority between claimants of the same title was found in the maxim, "prior in tempore, potior in jure." [2] In the absence, therefore, of a statute requiring a record, the holder of an unrecorded conveyance or mortgage has priority over a subsequent attaching creditor,[3] at least, a grantee who takes possession is so protected.[4]

§ 845. Validity of Conveyance, Pledge, or Bailment.—The rule that priority in time determines priority in right assumes that the mortgage, pledge, or bailment is valid; if the contract is invalid, as, for example, a chattel mortgage covering property which is not subject to mortgage, the attaching creditor acquires priority.[5] An incomplete assignment will not have priority over a subsequent attachment or garnishment.[6]

If an unrecorded deed of real property is defective, the vendor still has an interest in the land capable of being attached, and if the land is attached and sold as his property, an innocent purchaser without notice takes a good title.[7] Likewise, where a deed is made with the intent to defraud creditors and is never passed to the pretended grantee, it has been held that it does not stand in the way of an attachment to be levied on the land by a creditor of the fraudulent vendor, and it is equally ineffectual to interfere with the title of a purchaser under a sale on the judgment rendered in the attachment action.[8] Similarly, a purchaser in foreclosure of a mortgage executed by the grantee under a deed, which is void as being to defraud creditors, takes the land subject to a prior attachment levied thereon by a creditor of the fraudulent grantor.[9]

§ 846. Effect of Retention of Possession of Personal Property.—At common law, an owner of personal property who retains possession of the property after he has sold and conveyed the same is, according to the general rule, held to have such indicia of title as enables him to pass title to a bona fide purchaser or encumbrancer. It is likewise subject to the claims of his creditors, and an attachment levied on such property while still in his possession has priority over the rights of his vendee.[10] The attaching creditor is considered as a purchaser for a valuable consideration, within the rule that of two purchasers of the same goods, he who first lawfully secures possession has the better title.[11]

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[19] Burditt Bros. v. Porter, 63 Vt. 296, 21 A. 955, 25 Am. St. Rep. 763.

Generally, as to rule that purely personal rights and obligations not constituting property are not attachable or garnishable, see Vol. 4, p. 690, §§ 215 et seq.

[1] Tilton v. Cofield, 93 U. S. 163, 23 L. ed. 858; Doe ex dem. Vaillant v. Childress, 21 Wall. (U. S.) 642, 22 L. ed. 549; Martinovich v. Marsicano, 150 Cal. 597, 89 P. 333, 119 Am. St. Rep. 254; Rollins v. Shaver Wagon & Carriage Co. 80 Iowa, 380, 45 N. W. 1037, 20 Am. St. Rep. 427; Goff v. McLain, 48 W. Va. 445, 37 S. E. 566, 86 Am. St. Rep. 64.

The transfer of his real estate by a debtor against whom an attachment has been issued, and before judgment or decree, whether by his own act or by operation of law, cannot impair or invalidate the title of a purchaser under such decree or judgment. Doe ex dem. Vaillant v. Childress, 21 Wall. (U. S.) 642, 22 L. ed. 549.

Purchasers of property after seizure under a writ of attachment and pending the suit in which it was issued take the title subject to the rights of the attaching creditor. Tilton v. Cofield, 93 U. S. 163, 23 L. ed. 858.

[2] **Deeds were not required by the English law to be registered or recorded except** with respect to the enrolment of deeds of bargain and sale.

[3] Russell v. Bohlin, 200 Ala. 525, 76 So. 851, citing R. C. L.

[4] Shirk v. Thomas, 121 Ind. 147, 22 N. E. 976, 16 Am. St. Rep. 381.

[5] Holt v. Lucas, 77 Kan. 710, 96 P. 30, 17 L.R.A.(N.S.) 203, 127 Am. St. Rep. 459.

[6] Baer v. English, 84 Ga. 403, 11 S. E. 453, 20 Am. St. Rep. 372.

Where the acceptance of a bill of exchange, to be binding, must be made in writing, it has been held that an oral promise to pay so much of it as may be found to be due, made by the drawee, will not act as an equitable assignment to the payee, so as to prevent other creditors of the drawer from securing the debt by garnishment against the drawee before the bill is accepted in writing or paid to the amount of the debt due. Baer v. English, 84 Ga. 403, 11 S. E. 453, 20 Am. St. Rep. 372.

[7] Paine v. Mooreland, 15 Ohio, 435, 45 Am Dec. 585.

[8] Thompson v. Baker, 141 U. S. 648, 35 L. ed. 889, 12 S. Ct. 89.

[9] Ibid.

§ 847. Effect of Filing or Recording Laws Relating to Personalty.—Statutes have now been generally enacted requiring either a change of possession or a record of the conveyance or encumbrance of personal property in order to make it valid against certain persons variously designated in the different statutes, as, for instance, subsequent purchasers, encumbrancers, creditors, etc. It is usually, although not invariably, a condition of such protection that the party attacking the unrecorded conveyance be without notice thereof. For an attaching or garnishing creditor to be protected against an unrecorded conveyance, it is essential, first, that he fall within the class enumerated by the statute, and second, that he meet the condition which is usually, although not invariably, contained in these statutes,—viz., that he be without notice.[12] Transfers not within the statute are not affected by it.[13]

§ 848. —Effect of Change of Possession.—A transfer of the possession of personal property to the transferee, mortgagee, etc., is generally held to obviate the necessity of filing or recording. The rights of the buyer of personal property or of the chattel mortgagee, to whom the property is thus transferred, are superior to those of a subsequent attaching creditor.[14] This is true, according to some authorities, even though the change of possession does not take place at the time of sale, if it does take place thereafter and before the levy of the attachment.[15] Some statutes have been construed to render absolutely void, as against creditors, any sale of goods and chattels, where a change in the possession was not substantially contemporaneous with the sale. In jurisdictions where such a rule prevails, a change in the possession sometime after the sale, although prior to the attachment of any liens upon the property in favor of the creditors of the seller, does not cure the invalidity, and hence the property is subject to the seller's creditors, although at the time it is in the hands of the buyer.[16]

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[10] W. P. Chamberlain Co. v. Tuttle, 75 N. H. 171, 71 A. 865, 25 L.R.A.(N.S.) 604.

Annotation: 25 L.R.A.(N.S.) 604.

See Sales [Also 24 R. C. L. p. 50, § 313], where the majority and minority rules are discussed.

[11] Bridgham v. Hinds, 120 Me. 444, 115 A. 197, 21 A.L.R. 1024.

Annotation: 21 A.L.R. 1031.

In Lanfear v. Sumner, 17 Mass. 110, 9 Am. Dec. 119, it was said that the general rule is well established that the delivery of possession is necessary in a conveyance of chattels, as against everyone but the vendor, that when the same goods are sold to two different persons, by conveyances equally valid, he who first lawfully acquires the possession will hold them against the other, and that attaching creditors are to be considered as purchasers for a valuable consideration.

[12] **There is no want of good faith in levying on property subject to a chattel mortgage** as that of the mortgagor, if the mortgage is invalid as to the creditors. J. D. Best & Co. v. Wolf Co. 67 Colo. 42, 185 P. 371, 29 A.L.R. 899.

[13] Hall v. Kansas City Terra Cotta Co. 97 Kan. 103, 154 P. 210, L.R.A.1916D, 361, Ann. Cas. 1918D, 605.

An assignment is not a chattel mortgage, requiring registration in order to be valid against the claim of another creditor subsequently proceeding by writ of attachment. Hall v. Kansas City Terra Cotta Co. 97 Kan. 103, 154 P. 210, L.R.A.1916D, 361, Ann. Cas. 1918D, 605.

[14] Van Brunt v. Pike, 4 Gill (Md.) 270, 45 Am. Dec. 126.

A bona fide transfer of goods by a nonresident need not be recorded, as required by statute, to render it valid against subsequent attaching creditors, where there is actual or constructive delivery of the property. Van Brunt v. Pike, 4 Gill (Md.) 270, 45 Am. Dec. 126.

[15] Shumway v. Rutter, 8 Pick. (Mass.) 443, 19 Am. Dec. 340; Western Min. Supply Co. v. Quinn, 40 Mont. 156, 105 P. 732, 28 L.R.A.(N.S.) 214, 135 Am. St. Rep. 612, 20 Ann. Cas. 173.

Annotation: 28 L.R.A.(N.S.) 214, 215; 20 Ann. Cas. 176.

See Chattel Mortgages [Also 5 R. C. L. p. 416, § 44].

§ 849. —Effect of Failure to Comply with Filing or Recording Laws. — Failure on the part of a chattel mortgagee, conditional seller, pledgee, or bailee to comply with any statute there may be as to filing or recording invalidates such instrument as against an attaching creditor where such creditor is within the meaning of the filing or recording law. The attachment creates a superior lien in such cases.[17] The attachment also creates a superior lien where the recording of the mortgage, conditional sale, pledge, or bailment is substantially defective.[18] Accordingly, the recording of an instrument having an insufficient description[19] or of one in the wrong place[20] is of no effect; it constitutes no record, and the attaching creditor acquires priority.

§ 850. —Effect of Notice of Unrecorded Instrument.—The protection of the recording laws is conditioned under some statutes upon the fact that the person seeking such protection is without notice of the unrecorded or unfiled instrument.[1] Under such a statute, an attaching creditor with notice does not acquire priority over the prior unrecorded instrument.[2] But if the protection of the statute is not conditioned on the attaching creditor being without notice, the fact that he has notice does not defeat his priority.[3]

§ 851. —Under Statutes Giving No Protection to Attaching Creditors.— If the attaching creditor is not within the protection of the recording laws—that is, does not belong to a class mentioned therein—he cannot obtain priority because of the failure to comply with such laws.[4] When at-

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[16] Chenery v. Palmer, 6 Cal. 119, 65 Am. Dec. 493.

Annotation: 28 L.R.A.(N.S.) 215; 20 Ann Cas. 176.

As to effect of recording chattel mortgage in giving priority over subsequent attachment in another state, see CHATTEL MORTGAGES [Also 5 R. C. L. p. 399, § 21].

[17] Green v. Van Buskirk, 7 Wall. (U. S.) 139, 19 L. ed. 109 (construing the law of Illinois); Smead v. D. W. Chandler & Co. 71 Ark. 505, 76 S. W. 1066, 65 L.R.A. 353; Vines v. Sparks, 148 Miss. 219, 114 So. 322, citing R. C. L.

[18] J. D. Best & Co. v. Wolf Co. 67 Colo. 42, 185 P. 371, 29 A.L.R. 899 (improperly acknowledged); Southern Iron & Equipment Co. v. Voyles, 138 Ga. 258, 75 S. E. 248, 41 L.R.A.(N.S.) 375, Ann. Cas. 1913D, 369 (notary who took acknowledgment disqualified).

[19] Hart v. Oliver Farm Equipment Sales Co. (Hart v. Thompson) 37 N. M. 267, 21 P. (2d) 96, 87 A.L.R. 962.

[20] McFadden v. Blocker, 2 Ind. Terr. 260, 48 S. W. 1043, 58 L.R.A. 878.

[1] See RECORDS AND RECORDING LAWS [Also 23 R. C. L. p. 170, § 24].

[2] Allen v. McCalla, 25 Iowa, 464, 96 Am. Dec. 56.

Attaching creditors who had actual knowledge of the existence of a mortgage covering the property attached before suing out the attachment acquired no property rights therein by virtue of a default judgment in the attachment suit in their favor and against their judgment debtor, of which they were deprived without due process of law by the Act of February 3, 1897, validating mortgages recorded like the one in question, which enactment went into effect while the issue in such attachment suit between the attaching creditors and the mortgagees, who had intervened claiming the property, was still pending and undetermined. McFaddin v. Evans-Snider-Buel Co. 185 U. S. 505, 46 L. ed. 1012, 22 S. Ct. 758.

[3] **Under a statute requiring the recording of a chattel mortgage** for validity against the rights of a third person, unless the property is delivered to the mortgagee, it has been held that if the mortgage cannot be acknowledged in the manner required by the act, there is no way of making it effective except to deliver the property, and that even actual notice of the mortgage to the creditor, if it is not properly recorded, will not prevent him from attaching and holding the property. Green v. Van Buskirk, 7 Wall. (U. S.) 139, 19 L. ed. 109.

[4] Edison Electric Illuminating Co. v. Horace E. Frick Co. (Edison Electric Illuminating Co. v. People's Nat. Bank) 221 N. Y. 1, 116 N. E. 369, L.R.A.1917F, 1123.

In Edison Electric Illuminating Co. v. Horace E. Frick Co. (Edison Electric Illuminating Co. v. People's Nat. Bank) 221 N. Y. 1, 116 N. E. 369, L.R.A.1917F, 1123, it was held that a provision of the Mechantaching creditors are within such protection depends upon the wording of the statute. A statute invalidating the unrecorded mortgage against the rights and interest of any third person or persons invalidates it as against an attaching creditor.[5]

§ 852. Effect of Filing or Recording Laws Relating to Realty.—Recording statutes vary in their provisions in the different states, but in general, they provide that an unrecorded deed of real property or mortgage of the same shall be effectual against certain classes of persons, usually subsequent purchasers and encumbrancers and, less generally, creditors, unless the deed or mortgage is recorded. It is quite a common condition of the protection of the classes designated in the statute that they be without notice of the prior conveyance or mortgage. Two questions arise under these statutes. The first is whether attaching creditors are of the class of persons protected against a prior unrecorded conveyance. This depends upon the terms of the statute. The next two succeeding sections discuss the construction of typical statutes. The second question, assuming that attaching creditors are within the protection of the statute, is, has the creditor in the particular case met the conditions imposed by the statute, usually that he be without notice of the unrecorded transfer, and sometimes that he be a person who has paid value for his right or interest.

§ 853. —Unrecorded Instruments under Statutes Not Protecting Attaching or Garnishing Creditors.—If the attaching creditor is not within the class designated by the statute for protection against the unrecorded conveyance, the unrecorded conveyance takes priority over the attachment.[6] Whether or not an attaching creditor is within the protection of the statute depends upon the wording thereof. Such creditor is generally held not to be within the protection of statutes avoiding the unrecorded conveyance in favor of subsequent purchasers, lessees, and mortgagees, or even judgment creditors.[7] It is also held that he is not within the protection of a statute making the unrecorded conveyance inferior against purchasers and creditors where, from the context, it is clear that creditors are not within its contemplation.[8] And it has been held that the unrecorded instrument will prevail over the subsequent attachment even under a statute declaring that the unrecorded instrument shall not be valid except between "the parties thereto and such as have actual notice thereof."[9]

An attaching creditor, though not entitled to protection as a "creditor," may, upon purchasing the property at a sale under his attachment proceeding, assume a new rôle—namely, that of purchaser. The right to protection as a purchaser depends upon the status at the time he becomes such. If before such purchase the unrecorded deed or mortgage has been recorded, he is bound to take notice thereof and his rights are inferior to those of the

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ic's Lien Law, that no assignment by a building contractor of funds due under the contract should be valid unless recorded, did not apply in favor of a subsequent attaching creditor of the contractor.

[5] J. D. Best & Co. v. Wolf Co. 67 Colo. 42, 185 P. 371, 29 A.L.R. 899; Southern Iron & Equipment Co. v. Voyles, 138 Ga. 258, 75 S. E. 248, 41 L.R.A.(N.S.) 375, Ann. Cas. 1913D, 369.

[6] A. J. Minor Lumber Co. v. Thompson, 91 Neb. 93, 135 N. W. 429, L.R.A.1918A, 1088; Mahoney v. Salsburg, 83 Neb. 488, 120 N. W. 144, 131 Am. St. Rep. 647; Seeley v. Goodwin, 39 Nev. 315, 156 P. 934, citing R. C. L.

[7] Annotation: L.R.A.1918A, 1090.

[8] A. J. Minor Lumber Co. v. Thompson, 91 Neb. 93, 135 N. W. 429, L.R.A.1918A, 1088; Mahoney v. Salsburg, 83 Neb. 488, 120 N. W. 144, 13 Am. St. Rep. 647.
Annotation: L.R.A.1918A, 1091.

[9] Annotation: L.R.A.1918A, 1091.

grantee or mortgagee.[10] Moreover, the view has been taken that an attaching creditor whose claim is an antecedent debt and who becomes a purchaser on such consideration is not a bona fide purchaser within the meaning of the recording laws confining their protection to such purchasers.[11]

§ 854. **—Unrecorded Instruments under Statutes Giving Protection to Attaching or Garnishing Creditors.**—If an attaching creditor is of the class protected by the statute against an unrecorded conveyance, then he is protected. In other words, his attachment has priority over the unrecorded conveyance, provided he meets the other conditions of the statute, such as that he be without notice.[12] An attaching creditor has been held to be within the class protected by a statute declaring that deeds and other instruments shall take effect from and after the filing thereof for record in such office, and not before, "as to subsequent bona fide purchasers and encumbrancers by mortgage, judgment, or otherwise, not having notice thereof,"[13] or as to all creditors and subsequent purchasers without notice; and all such deeds and title papers shall be adjudged void until the same shall be filed for record.[14] The creditor is also protected under a statute providing that no conveyance or deed shall be effectual to hold lands against any other person but the grantor and his heirs unless recorded,[15] and also under a statute which does not invalidate the unrecorded deed as between the parties, but makes notice to subsequent purchasers and creditors the sole object of recording the conveyances.[16] Some statutes expressly mention attachment creditors as the subject of protection; and under such a statute, it is obvious that the creditor is protected against the unrecorded conveyance.[17]

§ 855. **—Effect of Knowledge or Notice of Unrecorded Conveyance.** — An attaching creditor who has notice of a prior unrecorded deed or conveyance by his debtor is not protected against the unrecorded conveyance, but takes subject thereto under statute, making it a condition of the protection afforded by the recording act that he be without notice.[18] Notice acquired after the levy of the attachment and the acquisition of a lien to buy does not defeat the priority.[19] While notice of an unrecorded deed may destroy the legal effect of an attachment levied on land as belonging to the grantor, knowledge of an intent to convey will not produce this result.[20]

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[10] Shirk v. Thomas, 121 Ind. 147, 22 N. E. 976, 16 Am. St. Rep. 381; A. J. Minor Lumber Co. v. Thompson, 91 Neb. 93, 135 N. W. 429, L.R.A.1918A, 1088; Mahoney v. Salsburg, 83 Neb. 488, 120 N. W. 144, 13 Am. St. Rep. 647.

Annotation: L.R.A.1918A, 1091.

If, however, a mortgagee withholds a trust deed from record until after a deed based upon attachment proceedings has been recorded, his lien would, by the operation of the recording act, be postponed and subsequent to that of the purchaser at sheriff's sale. A. J. Minor Lumber Co. v. Thompson, 91 Neb. 93, 135 N. W. 429, L.R.A.1918A, 1088.

[11] Shirk v. Thomas, 121 Ind. 147, 22 N. E. 976, 16 Am. St. Rep. 381.

[12] Thomas v. Burnett, 128 Ill. 37, 21 N. E. 352, 4 L.R.A. 222; Haines v. Connell, 48 Or. 469, 87 P. 265, 88 P. 872, 120 Am. St. Rep. 835.

[13] Annotation: L.R.A.1918A, 1094.

[14] Thomas v. Burnett, 128 Ill. 37, 21 N. E. 352, 4 L.R.A. 222.

[15] Carter v. Champion, 8 Conn. 549, 21 Am. Dec. 695; Cushing v. Hurd, 4 Pick. (Mass.) 253, 16 Am. Dec. 335; Priest v. Rice, 1 Pick. (Mass.) 164, 11 Am. Dec. 156 (rule not applied, as creditor had notice); Davis v. Blunt, 6 Mass. 486, 4 Am. Dec. 168 (rule not applied, as creditor had notice); Farnsworth v. Childs, 4 Mass. 637, 3 Am. Dec. 249.

Where the statute provides: "No title or estate in fee simple . . . shall be defeated or encumbered by any bond or other deed, or instrument of defeasance, in the hands or possesion of any person but the original party to such bond, deed, or other instrument or his heirs, unless such bond, deed, or other instrument of defeasance, be recorded . . .," the attaching creditor is protected. McLaughlin v. Shepherd, 32 Me. 143, 52 Am. Dec. 646; Roberts v. Bourne, 23 Me. 165, 39 Am. Dec. 614.

As to effect of possession, however, see infra, § 856.

[16] Bigelow v. Topliff, 25 Vt. 273, 60 Am. Dec. 264 (rule not applied, as conveyance was sufficiently recorded).

[17] Lyman v. Gaar, S. & Co. 75 Minn. 207, 77 N. W. 828, 74 Am. St. Rep. 452 (rule not applied, as attachment defendant had no title of record); Jennings v. Lentz, 50 Or. 483, 93 P. 327, 29 L.R.A.(N.S.) 584 (rule not applied, as deed to attachment debtor, as well as deed from him, was unrecorded); Haines v. Connell, 48 Or. 469, 87 P. 265, 88 P. 872, 120 Am. St. Rep. 835.

[18] Priest v. Rice, 1 Pick. (Mass.) 164, 11

§ 856. —Effect of Possession by Grantee or Mortgagee.—Possession by the grantee under an unrecorded deed is regarded as notice to the world of his interest, so that an attaching creditor of the grantor cannot thereafter acquire priority under statutes conditioning protection upon the lack of notice.[1] Possession by a tenant of the grantee is equivalent to possession by the grantee.[2]

§ 857. —Effect of Conveyance as Security for Future Advances.—It is well settled that a mortgage on land properly recorded is entitled to priority over a subsequent attachment on the same land; but where land subject to a mortgage given to secure future advances is attached, the attachment is entitled to priority over the lien of the mortgagee in respect of instalments paid after the levy.[3]

§ 858. —Effect of Title in Another.—A conveyance is void as against attaching and judgment creditors only when the attachment or judgment is against the person in whose name the title to the land appears of record. Hence, where a judgment creditor attaches land to which the judgment debtor never had any title of record, his only interest being under a contract of purchase which had been previously assigned, the judgment creditor acquires no interest as against the assignee of the contract of purchase.[4]

§ 859. Priority as to Subsequent Assignment or Assignment between First or Second Attachments.—An attachment or garnishment does not divest the defendant of title to his property, and he can sell it subject to the attachment or garnishment.[5] It has been held that if he can, without a trespass, make actual delivery of the attached property, a sale with such delivery takes precedence over a subsequent attachment.[6] Likewise, a debtor may assign an attached or garnished debt subject to the attachment or garnishment,[7] and such assignment will have priority over a subsequent attachment or garnishment.[8] Nevertheless, a prorating attachment or garnishment statute[9]

Am. Dec. 156; Hope v. Blair, 105 Mo. 85, 16 S. W. 595, 24 Am. St. Rep. 366.

[19] Carter v. Champion, 8 Conn. 549, 21 Am. Dec. 695; Thomas v. Burnett, 128 Ill. 37, 21 N. E. 352, 4 L.R.A. 222.

[20] Cushing v. Hurd, 4 Pick. (Mass.) 253, 16 Am. Dec. 335.

[1] Thomas v. Burnett, 128 Ill. 37, 21 N. E. 352, 4 L.R.A. 222.
Annotation: 4 L.R.A. 222.

[2] Thomas v. Burnett, 128 Ill. 37, 21 N. E. 352, 4 L.R.A. 222.
It has been held that a grantor's attaching creditor has constructive notice of the grantee's rights under an unrecorded deed of land improved and fenced where the grantee has taken possession of the land by his agent, who has kept the place in repair and rented it as that of the grantee to tenants who raised a crop and retained possession until the end of the term, notwithstanding a short time before the attachment they had surrendered the premises and other tenants had not yet been found and placed in possession. Thomas v. Burnett, 128 Ill. 37, 21 N. E. 352, 4 L.R.A. 222.

[3] Dummer v. Smedley, 110 Mich. 466, 68 N. W. 260, 38 L.R.A. 490.
Attachments levied on the property of a mortgagor subsequently to the execution of the mortgage are properly given priority over money afterwards paid over on the security of the mortgage in accordance with the agreement under which it was executed. Dummer v. Smedley, 110 Mich. 466, 68 N. W. 260, 38 L.R.A. 490.

[4] Lyman v. Gaar, S. & Co. 75 Minn. 207, 77 N. W. 828, 74 Am. St. Rep. 452.
Annotation: L.R.A.1918A, 1089.

[5] See supra, § 824.

[6] Fettyplace v. Dutch, 13 Pick. (Mass.) 388, 23 Am. Dec. 688.

[7] See supra, § 824.

[8] Yates v. Terry [1902] 1 K. B. (Eng.) 527, 5 B. R. C. 446.
Annotation: 5 B. R. C. 450.

[9] See supra, § 842.

may give the creditor proceeding under the second garnishment a right to prorate under the first garnishment which will have priority over the intervening assignment. Notwithstanding such statute, if the first garnishing creditor fails in his action or dismisses his suit, subsequent attaching or garnishing creditors will lose the benefit of the right to prorate under the first attachment or garnishment and will take subject to the intervening lien.[10]

§ 860. Priority between Attachment or Garnishment and Fraudulent Conveyance; Effect of Participation of Purchaser in Fraud.—Generally, the right of a creditor to attach property fraudulently conveyed is recognized.[11] It has been held [12] and denied [13] that in order to establish a conveyance as fraudulent for the purpose of sustaining an attachment or garnishment, it must be shown that the purchaser participated in the fraud. Undoubtedly, the attachment or garnishment will be sustained where he did participate in the fraud.[14] Thus, a purchase of property under circumstances which must have suggested to the purchaser that the object of the vendor was to dispose of his property for value before it could be attached or seized under a judgment recently obtained is invalid as against the judgment debtor. For example, a bill of sale or deed is invalid as a fraud upon creditors when taken at a time when an attachment has been levied on the vendor's stock and his career as a merchant is practically closed, and the vendee knows that there are other creditors and the consideration consists of legal services, most of which has been earned in the litigation accruing out of the transaction.[15] So, a transfer of property easily separable from a much larger quantity than is necessary to pay the debt in payment of which it is given will support an attachment of the property transferred when the creditor was privy to the fraudulent design.[16] But a conveyance at a time when the writ of attachment against the property of the grantor was in the hands of the sheriff, of the issuing of which the grantee had no knowledge and which was never levied, is not rendered fraudulent by such attachment proceeding.[17] Likewise, an innocent purchaser for value from a fraudulent grantee who purchased subsequent to an attachment of all the original grantor's interest in real estate, which such original grantor had conveyed to the fraudulent grantee by deed recorded before the attachment, is not put upon notice and inquiry as to such previous transaction. Similarly, the mere knowledge of a purchaser of the fact that the sheriff was seeking to subject the property purchased to the satisfaction of execution in his hands would not of itself invalidate the purchase. But if he purchased with a view to defeat the remedy of creditors in relation to the goods purchased, it would be invalid, even though he gave a fair price.[18]

An assignment for the benefit of creditors, with fraudulent intent on the part of the assignor, but without such intent on the part of the trustee, constitutes ground for attachment of the assigned property.[19]

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[10] Annotation: 5 B. R. C. 450.

[11] See Vol. 4, p. 694, §§ 222; p. 700, § 230.

[12] Ludlow Sav. Bank & T. Co. v. Knight, 92 Vt. 171, 102 A. 51, 2 A.L.R. 1433.

Annotation: 30 L.R.A. 465; 5 Ann. Cas. 618.

To make a conveyance for a valuable consideration fraudulent as against creditors, there must be a fraudulent intent on the part of both the grantor and grantee. Ludlow Sav. Bank & T. Co. v. Knight, 92 Vt. 171, 102 A. 51, 2 A.L.R. 1433.

[13] Annotation: 30 L.R.A. 465; 5 Ann. Cas. 618.

[14] Ludlow Sav. Bank & T. Co. v. Knight, 92 Vt. 171, 102 A. 51, 2 A.L.R. 1433.

Annotation: 30 L.R.A. 465; 5 Ann. Cas. 618.

[15] Annotation: 32 L.R.A. 61.

[16] Annotation: 30 L.R.A. 465.

[17] Lowry v. Howard, 35 Ind. 170, 9 Am. Rep. 676.

[18] Annotation: 32 L.R.A. 61.

§ 861. Priority as to Equitable Assignment.—An equitable assignment is as effective as a legal assignment in defeating a subsequent attachment or garnishment.[20] For example, it has been held that if the principal debtor gives an order to another for the money due, the assent of the garnishee is not necessary to the operation of such order as an equitable transfer of the fund and, consequently, as a defense in garnishment proceedings.[1] An order by a creditor upon his debtor, where it is for the full amount of the demand and for a valuable consideration, may constitute an equitable assignment sufficient to have priority over a subsequent attachment or garnishment, although it is not available as a bill of exchange for want of a written acceptance.[2] And there is authority to the effect that an order given on a debtor for the payment to the person in whose favor the order is drawn of a debt then existing, or in potential existence, though not accepted, takes precedence over a subsequent garnishment of the same debt.[3]

§ 862. Priority as to Negotiable Document of Title Such as Warehouse Receipt.[4]—Priority between an attachment or garnishment of bailed property and a warehouse receipt or other negotiable document of title issued for the same depends upon whether or not the attachment or garnishment preceded the issuance of the negotiable document.[5]

§ 863. Priority as to Option to Purchase.—While it may be that for some purposes an equitable conversion effected by an election to exercise an option to buy will relate back to the date of the contract—a question, it may be observed, on which the authorities are in conflict—yet it cannot operate to dissolve an attachment levied on land prior to such election and while the grantor retains the ownership.[6] But the view has been taken that a contract granting an option to purchase, when duly recorded, is sufficient to put creditors of the grantor on inquiry, that they are bound to inquire whether the election has been made, and that upon giving notice of his election to purchase, the holder of the option has an equitable interest in the land which relates back to the date of the contract.[7]

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[19] Annotation: 30 L.R.A. 465.

[20] Canterbury v. Marengo Abstract Co. 166 Ala. 231, 52 So. 388, 139 Am. St. Rep. 30; Wheatley v. Strobe, 12 Cal. 92, 73 Am. Dec. 522; Walton v. Horkan, 112 Ga. 814, 38 S. E. 105, 81 Am. St. Rep. 77; Harlow v. Bartlett, 96 Me. 294, 52 A. 638, 90 Am. St. Rep. 346; Merchants' & M. Nat. Bank v. Barnes, 18 Mont. 335, 45 P. 218, 47 L.R.A. 737, 56 Am. St. Rep. 586; Nesmith v. Drum, 8 Watts & S. (Pa.) 9, 42 Am. Dec. 260; Burditt Bros. v. Porter, 63 Vt. 296, 21 A. 955, 25 Am. St. Rep. 763; Campbell v. Hutchinson Lumber Co. 106 W. Va. 142, 145 S. E. 160, citing R. C. L.; Dillman v. Carlin, 105 Wis. 14, 80 N. W. 932, 76 Am. St. Rep. 902.

Annotation: 50 A.L.R. 1321; 76 Am. St. Rep. 904; 94 Am. St. Rep. 28.

Rights under garnishment are subordinate to a good, pre-existing equitable assignment, although the latter is not perfect at law. Canterbury v. Marengo Abstract Co. 166 Ala. 231, 52 So. 388, 139 Am. St. Rep. 30; Campbell v. Hutchinson Lumber Co. 106 W. Va. 142, 145 S. E. 160, citing R. C. L.

[1] Merchants' & M. Nat. Bank v. Barnes, 18 Mont. 335, 45 P. 218, 47 L.R.A. 737, 56 Am. St. Rep. 586.

Where one gives an order to his attorney to pay to a third party the amount of a claim placed in his hands for collection, such amount will not subsequently be liable to attachment for the debt of the drawer, even though the order is not accepted by the drawee, as an equitable assignment made on valuable, or even good, consideration will always be executed by a chancellor. Nesmith v. Drum, 8 Watts & S. (Pa.) 9, 42 Am. Dec. 260.

As to rule under Negotiable Instrument Act, see infra, § 867.

[2] Wheatley v. Strobe, 12 Cal. 92, 73 Am. Dec. 522.

[3] Merchants' & M. Nat. Bank v. Barnes, 18 Mont. 335, 45 P. 218, 47 L.R.A. 737, 56 Am. St. Rep. 586; Burditt Bros. v. Porter, 63 Vt. 296, 21 A. 955, 25 Am. St. Rep. 763.

[4] Generally as to priority between rights on negotiable instruments and attachment or garnishment of same, see infra, § 868.

[5] In Union Trust Co. v. Wilson, 198 U. S. 530, 49 L. ed. 1154, 25 S. Ct. 766, the court held that the storing of goods with a warehouse company, whereby the bailor had full control of the property, with full and exclusive access to the place of its custody, constituted the bailee a public warehouse company, and that the indorsement of a receipt, issued by the warehouseman, to a third person as security for loans made to the bailor was a valid pledge of the property as good as against subsequent attachment creditors of the owner.

The issuance of a negotiable warehouse receipt after the property has been attached cannot affect the lien of the attachment. International Bedding Co. v. Terminal Warehouse Co. 146 Md. 479, 126 A. 902, 40 A.L.R. 960.

b. Priority as to Assignment of Intangibles and Choses in Action

§ 864. Generally.—The general rule is that priority between an attachment or garnishment and an assignment of a chose in action depends upon priority in time.[8] Accordingly, a prior assignee in good faith and for value of an equity of redemption has priority over a subsequent attachment or garnishment of the same.[9]

An assignee of property which has been garnished in the hands of a bailee is estopped after judgment to assert his claim against the garnishee, where he appeared and testified in the garnishment proceedings and had asked for more time to interplead, while the assignor was aware of the proceedings for three years before he made the assignment, although the assignee was not in fact made a party to it.[10]

§ 865. Wages.—The general rule, like that relating to the proceeds of general contracts, is that in the absence of a controlling statute to the contrary, an assignment of wages or salary earned or to be earned under an existing contract may be made, and that such an assignment, if for a valuable consideration, and with the assent of the employer, is valid as against, and entitled to priority over, a subsequent attachment or garnishment by a creditor of the assignor, the theory being that a creditor can be placed in no better position than the defendant by reason of garnishment proceedings, and that property validly assigned no longer belongs to the assignor, wherefore the garnishee can answer that he has nothing of the defendant's in his possession or, as it is sometimes stated, is not indebted to the defendant. The application of this theory will of itself preclude the garnishing of previously assigned wages, where such wages are, by the terms of the contract, payable in advance.[11]

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[6] Sheehy v. Scott, 128 Iowa, 551, 104 N. W. 1139, 4 L.R.A.(N.S.) 365.

Annotation: 50 A.L.R. 1321.

[7] Annotation: 50 A.L.R. 1321.

[8] Van Ness v. Hyatt, 13 Pet. (U. S.) 294, 10 L. ed. 168; Vanbuskirk v. Hartford F. Ins. Co. 14 Conn. 141, 36 Am. Dec. 473; Walter v. Whitlock, 9 Fla. 86, 76 Am. Dec. 607; Walton v. Horkan, 112 Ga. 814, 38 S. E. 105, 81 Am. St. Rep. 77; Woodward v. Brooks, 128 Ill. 222, 20 N. E. 685, 3 L.R.A. 702, 15 Am. St. Rep. 104; Smith v. Blatchford, 2 Ind. 184, 52 Am. Dec. 504; Walters v. Washington Ins. Co. 1 Iowa, 404, 63 Am. Dec. 451; Hall v. Kansas City Terra Cotta Co. 97 Kan. 103, 154 P. 210, L.R.A.1916D, 361, Ann. Cas. 1918D, 605; McAllister v. Brooks, 22 Me. 80, 38 Am. Dec. 282; McDowell, P. & Co. v. Hopfield, 148 Md. 84, 128 A. 742, 52 A.L.R. 105; Martin v. Potter, 11 Gray (Mass.) 37, 71 Am. Dec. 689; Schoolfield v. Hirsh, 71 Miss. 55, 14 So. 528, 42 Am. St. Rep. 450; Oldham v. Ledbetter, 1 How. (Miss.) 43, 26 Am. Dec. 690; Muir v. Schenck, 3 Hill (N. Y.) 228, 38 Am. Dec. 633; Market Nat. Bank v. Raspberry, 34 Okla. 243, 124 P. 758, L.R.A.1916E, 79; Phillips's Estate, 205 Pa. 525, 55 A. 216, 97 Am. St. Rep. 750; Noble v. Thompson Oil Co. 79 Pa. 354, 21 Am. Rep. 66; Nesmith v. Drum, 8 Watts & S. (Pa.) 9, 42 Am. Dec. 260; Dillingham v. Traders' Ins. Co. 120 Tenn. 302, 108 S. W. 1148, 16 L.R.A.(N.S.) 220; Clodfelter v. Cox, 1 Sneed (Tenn.) 330, 60 Am. Dec. 157; Wolcott v. Mongeon, 88 Vt. 361, 92 A. 457; Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 570, 48 Am. Rep. 821.

Annotation: 52 A.L.R. 109; L.R.A.1916D, 367; L.R.A.1916E, 81.

[9] Van Ness v. Hyatt, 13 Pet. (U. S.) 294, 10 L. ed. 168.

[10] Henderson v. Hooper Sugar Co. 65 Utah, 241, 236 P. 239, 45 A.L.R. 637.

[11] Roesch v. W. B. Worthen Co. 95 Ark. 482, 130 S. W. 551, 31 L.R.A.(N.S.) 374.

Annotation: L.R.A.1916D, 367.

Failure of the holder of a note, to secure which the maker has assigned fees to be earned by him as a public officer, to credit the fees as they accrue will not prevent his holding them against a garnishee, if they are in the possession of the assignee. Roesch v. W. B. Worthen Co. 95 Ark. 482, 130 S. W. 551, 31 L.R.A.(N.S.) 374.

See also Vol. 4, p. 756, § 322.

§ 866. Judgments.—The assignment of a judgment is valid and effective to vest the title to it in the assignee so as to defeat a subsequent attachment or garnishment of the judgment debtor by a creditor of the assignor having no notice of the assignment before service of the garnishment.[12] Some cases take the extreme view that notice of an assignment of a judgment prior to an attachment or garnishment of the same is necessary to give the assignment priority in law over the attachment or garnishment.[13] Other cases take the opposite extreme view that an assignment has priority in law over a subsequent attachment or garnishment of the assigned judgment irrespective of any notice to the judgment debtor of the assignment.[14] However, the majority rule undoubtedly is that in order to preserve the priority of an assignment of a judgment over a subsequent garnishment of the same, notice of the assignment must be given to the judgment debtor either before or during the garnishment proceedings, the courts differing with respect to the time at which it must be given to have such effect.[15] Some cases hold that it is sufficient if given in time for the garnishee to disclose it in his answer in the garnishment proceedings.[16] Still others hold that it is in time if given before judgment or even before satisfaction, if the garnishee can still take steps to protect the interest of the assignee.[17]

§ 867. Funds on Deposit.—It is clear that an attachment or garnishment of funds on deposit has priority over a check or negotiable instrument subsequently given or accepted against the same.[18] Indeed, an assignment of a deposit in a savings bank made after the garnishment thereof gives the assignee no right to the dividends on such deposit accruing after service of the writ.[19] Whether or not an attachment or garnishment of a fund on deposit has priority over a check or negotiable instrument previously given or accepted against the same depends upon whether the giving or acceptance of the negotiable paper constitutes an assignment.[20] The weight of authority is to the effect that the garnishment of an ordinary deposit account after the giving of a check in the usual course of business, but before its presentation for payment, creates a lien upon the deposit superior to the rights of the payee of the check, under the rule that the giving of such a check does not amount to an equitable assignment of the funds drawn against.[21] This is the rule adopted by the

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[12] Canterbury v. Marengo Abstract Co. 166 Ala. 231, 52 So. 388, 139 Am. St. Rep. 30; Schoolfield v. Hirsh, 71 Miss. 55, 14 So. 528, 42 Am. St. Rep. 450; Scott v. Rohman, 43 Neb. 618, 62 N. W. 46, 47 Am. St. Rep. 767.

[13] Clodfelter v. Cox, 1 Sneed (Tenn.) 330, 60 Am. Dec. 157 (not necessary to result).

Annotation: 32 A.L.R. 1027; 52 A.L.R. 122.

[14] Annotation: 32 A.L.R. 1024; 52 A.L.R. 109.

See also Brown v. Ayres, 33 Cal. 525, 91 Am. Dec. 655.

[15] Buckeye Ref. Co. v. Kelly, 163 Cal. 8, 124 P. 536, Ann. Cas. 1913E, 840; Houtz v. Daniels, 36 Idaho, 544, 211 P. 1088, 32 A.L.R. 1016.

See also Dodd v. Brott, 1 Minn. 270, Gil. 205, 66 Am. Dec. 541; Schoolfield v. Hirsh, 71 Miss. 55, 14 So. 528, 42 Am. St. Rep. 450.

Annotation: 32 A.L.R. 1025; 52 A.L.R. 110.

[16] Schoolfield v. Hirsh, 71 Miss. 55, 14 So. 528, 42 Am. St. Rep. 450.

Annotation: 32 A.L.R. 1027; 52 A.L.R. 115.

In Schoolfield v. Hirsh, 71 Miss. 55, 14 So. 528, 42 Am. St. Rep. 450, it was held that the assignment of a judgment was valid and effective to vest the title to it in the assignee, so as to defeat a garnishment of the judgment debtor by a judgment creditor of the assignor, where no notice was given to the garnishee of the assignment before service of the garnishment, but he had notice before he had answered in garnishment.

[17] Annotation: 52 A.L.R. 117.

[18] Loewe v. Savings Bank (C. C. A. 2d) 236 F. 444, L.R.A.1917B, 938, affirmed in 242 U. S. 357, 61 L. ed. 360. 37 S. Ct. 172.

[19] Ibid.

[20] See Vol. 4, p. 720, § 258.

[21] Donohoe-Kelly Bkg. Co. v. Southern P. Co. 138 Cal. 183, 71 P. 93, 94 Am. St. Rep. 28; Kaesemeyer v. Smith, 22 Idaho, 1, 123 P. 943, 43 L.R.A.(N.S.) 100; Love v. Ardmore Stock Exch. 5 Ind. Terr. 202, 82 S. W. 721, 67 L.R.A. 617, 5 Ann. Cas. 183; Clark

Uniform Negotiable Instruments Act.[1] But where the rule has been adopted that checks constitute assignments pro tanto of the funds drawn against, it is generally held that such checks and drafts are entitled to priority of payment as against the garnishing creditor, although neither accepted nor paid before the serving of the garnishment notice.[2]

§ 868. Negotiable Paper.—It is well settled that an attachment or garnishment is unavailing against a bona fide holder for value of negotiable paper, who obtains it before maturity and without notice.[3] The reason for this is the inapplicability of the doctrine of lis pendens to negotiable commercial paper before maturity.[4] The general rule that a negotiable bill or note is be-

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v. Toronto Bank, 72 Kan. 1, 82 P. 582, 2 L.R.A.(N.S.) 83, 115 Am. St. Rep. 173; Bullard v. Randall, 1 Gray (Mass.) 605, 61 Am. Dec. 433; Wileman v. King, 120 Miss. 392, 82 So. 265, 5 A.L.R. 584; Commercial Bank v. Chilberg, 14 Wash. 247, 44 P. 264, 53 Am. St. Rep. 873.

Annotation: 5 A.L.R. 1668; 94 A.L.R. 1391; 43 L.R.A.(N.S.) 101; 94 Am. St. Rep. 28; 5 Ann. Cas. 190.

Mere notice to the bank that a party holds a check, without presentment and demand, has been held not to work an assignment so as to give priority to the check as against a garnishment of the bank account. Bullard v. Randall, 1 Gray (Mass.) 605, 61 Am. Dec. 433.

An oral acceptance by an officer of the bank was held insufficient to work an assignment having priority over the attachment. Annotation: 43 L.R.A.(N.S.) 101.

See also Vol. 4, p. 720, § 258.

[1] **A check, of itself, does not operate** as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check. Uniform Negotiable Instruments Act, § 189.

[2] Farrington v. F. E. Fleming Commission Co. 94 Neb. 108, 142 N. W. 297, 47 L.R.A.(N.S.) 742; Dillman v. Carlin, 105 Wis. 14, 80 N. W. 932, 76 Am. St. Rep. 902.

Annotation: 94 A.L.R. 1391; 43 L.R.A. (N.S.) 102; 76 Am. St. Rep. 904.

As to priority between an attachment and an order, where the order is regarded as an equitable assignment, although it is insufficient as a bill of exchange for want of acceptance, see supra, § 861.

[3] Generally, as to attachment or garnishment of negotiable paper, see Vol. 4, p. 721, §§ 259 et seq.

Questions of priority with respect to the attachment or garnishment of particular negotiable or commercial paper such as paper payable on demand or sight, certificates of deposit, drafts, bills of exchange, etc., have been discussed in connection with the sections of this article dealing with the attachment and garnishment of such paper generally. See Vol. 4, p. 735, §§ 284 et seq.

[4] Winston v. Westfeldt, 22 Ala. 760, 58 Am. Dec. 278; Mims v. West, 38 Ga. 18, 95 Am. Dec. 379; Oldham v. Ledbetter, 1 How. (Miss.) 43, 26 Am. Dec. 690; Rice v. Jones, 103 N. C. 226, 9 S. E. 571, 14 Am. St. Rep. 801; Howe v. Hartness, 11 Ohio St. 449, 78 Am. Dec. 312; Day v. Zimmerman, 68 Pa. 72, 8 Am. Rep. 157; Ludlow v. Bingham, 4 Dall. (Pa.) 47, 1 L. ed. 736; Ayott v. Smith, 40 Vt. 532, 94 Am. Dec. 429.

Annotation: L.R.A.1918C, 746; 14 Am. St. Rep. 809; 15 Ann. Cas. 980.

An attachment of the amount payable upon a negotiable promissory note indorsed in blank and in commercial form by service upon the maker while the defendant had possession, such note being afterwards transferred, before it matured, to a third person, without notice, for a full consideration, cannot stand. Ludlow v. Bingham, 4 Dall. (Pa.) 47, 1 L. ed. 736.

An attachment of a negotiable promissory note in the hands of the maker before its maturity, at the suit of a creditor of the payee, is worthless against a holder who acquired the paper in due course of business, in good faith, either before or after the attachment. Day v. Zimmerman, 68 Pa. 72, 8 Am. Rep. 157.

The general rule that the pendency of a litigation respecting real property is notice to all persons dealing with its subject, whether applicable or not to personal property in general, does not apply to transfers of negotiable paper before maturity. Winston v. Westfeldt, 22 Ala. 760, 58 Am. Dec. 278.

The Supreme Court of the United States has held that the rule requiring everyone to take notice of a pending litigation over the title to property he is about to buy from one of the litigants does not apply to commercial paper purchased before its maturity. Warren County v. Marcy, 97 U. S. 107, 24 L. ed. 981.

The reason for excepting negotiable paper from the operation of the lis pendens rule is to protect the commercial community by removing all obstacles to the free circulation of such paper, since if such paper, when regular upon its face, were to be subject to the possibility of a suit being pending between the original parties to it, its negotiability would be seriously affected, and innumerable commercial transactions would be checked. Warren County v. Marcy, 97 U. S. 107, 24 L. ed. 981.

It has never been questioned by any authority worthy of respect, where the law merchant prevails unaffected by legislation, that negotiable commercial paper, after it has passed, before maturity, from a defendant to another holder in good faith for value, cannot be subjected to attachment or garnishment. It has gone beyond the reach of these processes. Annotation: L.R.A.1918C, 731.

However, under a statute providing for attachment of a negotiable promissory note, made and payable in the state, or the parties to which, at the time of making yond the reach of an attachment before it matures is subject to the exception that a voluntary transfer of it, or one fraudulently made intentionally to protect the payee from the claims of his creditors, leaves it open to attachment or garnishment while it is in the hands of the indorsee, because he is not a bona fide holder.[5] As a matter of procedure, it has been held that a transferee of a note, who receives notice of garnishment proceedings but fails to appear and assert his rights, is precluded from setting up his rights against the garnishee.[6] The lien of a pledgee of commercial paper pledged in good faith to secure an actual indebtedness takes precedence of the lien of a subsequent attachment; his right to the pledges and the money to be obtained by their means is paramount to the rights of other creditors of the pledgeor until the debt is paid, and is unaffected by garnishment.[7]

§ 869. **—Necessity of Notice of Transfer to Garnishee to Protect Holder against Garnishment.**—In the absence of a positive statute requiring it, no notice to the maker of a negotiable instrument of its transfer before its maturity is ever necessary to guard an indorsee against a later attachment of the paper as evidence of the maker's debt to a prior holder. One who acquires a negotiable promissory note in good faith, for value, and before maturity, is neither bound to anticipate subsequent attachment against a prior holder, nor required to give the maker any notice of the transfer to protect himself against a subsequent garnishment.[8] In other words, the rule that the assignee of a debt is entitled to its payment in preference to third persons who may have garnished the debtor only in case he has given previous notice to the debtor of the assignment of the debt[9] does not apply to debts due by negotiable commercial paper indorsed in blank and passing before maturity from holder to holder by mere delivery.[10]

§ 870. **—Statutes Requiring Notice.**—In the past there have been enacted statutes requiring indorsees of negotiable paper to give notice of their ownership to makers to protect themselves against attachments and garnishments of payees and indorsers. Such a statute has provided that all negotiable paper, whether unmatured or past due, may be attached by, and should be subject to, trustee process unless and until it is negotiated and notice of the negotiation is given to the maker or indorser before he is served with process.[11]

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the same, resided in the state, it was held that the purchaser before maturity of such a note took it subject to a previous attachment. Cox v. Severance, 70 N. H. 86, 46 A. 739, 85 Am. St. Rep. 602.

In determining what constitutes a transfer, in this connection, it has been held that a delivery of the instrument by the debtor to an agent for collection, with instructions to pay certain debts with the proceeds, does not pass the legal title to the note to the creditors whose debts are to be paid, so as to defeat garnishment proceedings against the debtor. Clark v. Cilley, 36 Ala. 652, 76 Am. Dec. 343.

[5] Annotation: L.R.A.1918C, 748.

An attaching creditor is entitled to have the question of the indorsee's good faith litigated. Annotation: L.R.A.1918C, 748.

[6] Smoot v. Eslava, 23 Ala. 659, 58 Am. Dec. 310.

[7] Hall v. Page, 4 Ga. 428, 48 Am. Dec. 235.

As to rule that pledged commercial paper is not attachable or garnishable except as to surplus of proceeds over and above what is due on the pledge, see Vol. 4, p. 737, § 289.

[8] Sheets v. Culver, 14 La. 449, 33 Am. Dec. 593.

Annotation: L.R.A.1918C, 743.

[9] See infra, §§ 874 et seq.

[10] Annotation: L.R.A.1918C, 746.

[11] Ayott v. Smith, 40 Vt. 532, 94 Am. Dec. 429; Emerson v. Patridge, 27 Vt. 8, 62 Am. Dec. 617.

Annotation: L.R.A.1918C, 745; 62 Am. Dec. 617.

The Vermont statute subjected to the trustee process, as debts due the payees, all promissory notes, without exception, regardless of time or place of payment or convenience of the parties, until notice had been given to the makers that they had been transferred to other holders; it was held that under its operation, a bank which, in the usual course of business, had discounted a negotiable promissory note payable at its own banking house in the future, and had neglected to give notice to the maker of the change of ownership, held

Under such a statute a notice of transfer given to one of two makers of a joint and several negotiable promissory note has been held sufficient to give the indorsee a prior right to recover the sum due upon it over a creditor of the payee claiming under a subsequent attachment in virtue of trustee process served upon the other maker.[12]

§ 871. **Mature and Non-negotiable Paper.**—It has been decided that a bona fide indorsee for value of an overdue negotiable promissory note takes a good title to it and gains a right to recover the amount due upon it from the maker and indorser superior to an attachment or garnishment which was not served until after he had become the owner and holder of the paper.[13] Thus, the maker of a negotiable promissory note which has matured cannot be charged as garnishee of the payee unless it is shown affirmatively to have belonged to such payee when the writ was served.[14] This follows from the rule that a garnishment does not bind a garnishee who, at the time of the service of the writ upon him, is not indebted to the defendant.[15]

§ 872. **—Necessity of Notice to Maker to Protect Indorsee against Garnishment.**—With respect to the necessity for the holder of negotiable commercial paper, who acquires it after it has become payable and is dishonored, to notify the maker of its transfer in order to be protected against a subsequent attachment or garnishment, the courts are far from agreement. It is the general rule that negotiable commercial paper acquired after it is past due is subject to the same defenses as if it were not negotiable,[16] and it is certainly true that the maker of a promissory note payable to a defendant in attachment cannot be charged as trustee if it was transferred to another person before the service of the writ, and proper notice of such transfer was given to the maker, whether the note was or was not negotiable.[17] That it is necessary for the purchaser of commercial paper which has lost its negotiability in general by becoming overdue to notify the maker that he has acquired it in order to forestall an attachment or garnishment is a proposition that has been both denied and affirmed by the courts,[18] as it has been with respect to assignments of choses in action generally.[19]

§ 873. **Corporate Stock.**—It is generally held that in the absence of controlling statutes, a purchaser of shares of stock in a corporation for a valuable consideration is, in the absence of fraud, protected against a subsequent at-

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the paper subject to a trustee process served on the maker as the payee's debtor. Under that statute, too, it was held necessary that every transfer of a negotiable commercial instrument to a new holder should in turn be brought to the knowledge of the maker for the holder to be safe against attachments in actions against prior holders along the line. The statute afterwards was amended so as to exempt domestic banks which had discounted commercial paper from the necessity of notifying the makers in order to protect themselves from subsequent attachments by trustee processes, but the amendment was held not to extend to or cover negotiable promissory notes turned over to the banks as collateral securities for other discounts. Annotation: L.R.A.1918C, 745.

Under this statute it has been held that negotiable paper transferred to a bank without the state may be garnished before notice of transfer, and such discrimination is not unconstitutional. Hawley v. Hurd, 72 Vt. 122, 47 A. 401, 52 L.R.A. 195, 82 Am. St. Rep. 922.

[12] Ayott v. Smith, 40 Vt. 532, 94 Am. Dec. 429.

[13] Bassett v. Garthwaite, 22 Tex. 230, 73 Am. Dec. 257.

Annotation: L.R.A.1918C, 743.

[14] Bassett v. Garthwaite, 22 Tex. 230, 73 Am. Dec. 257.

[15] See Vol. 4, p. 650, § 156; p. 652, § 161.

[16] See Bills and Notes [Also 3 R. C. L. p. 1045, §§ 250 et seq.]

[17] Annotation: L.R.A.1918C, 744.

[18] Annotation: L.R.A.1918C, 744.

[19] Walters v. Washington Ins. Co. 1 Iowa, 464, 63 Am. Dec. 451 (holding notice must be given to garnishee in time for him to set it up in his answer).

Generally, as to when notice of assignment to debtor must be given to protect assignment against subsequent attachment or garnishment, see infra, §§ 876 et seq.

tachment or execution, issued against the vendor, although he has failed to have the transfer entered on the books of the corporation.[20] Thus, an attachment by a creditor of a stockholder of stock which has been pledged and transferred by indorsement and delivery as security for the payment of a debt, but the transfer of which was not entered on the books of the corporation, is valid only against the interest of the assignor therein after the debt had been paid.[1] Especially is this true where the attaching creditor has notice that the stock has been sold.[2] The trend of decisions is towards the view that notwithstanding statutes or by-laws requiring the registration of transfers of stock, an unregistered transferee acquires a good title as against an attaching or execution creditor of the transferrer.[3] However, in several states, under statutes which do not declare such transfers invalid between the parties, but merely declare that corporate stock is transferable only on the books of the corporation, it has been ruled that the mode must be followed in order to pass the title, and that a levy will prevail over a transfer not so made.[4] In a few instances it has been held to be a material question whether the attaching creditor has notice of the unregistered transfer.[5]

The courts are in substantial agreement in support of the holding that the true owner of stock placed in the name of another upon the books of the corporation has priority over the attachment or execution creditors of the latter, unless estopped to claim title by something more than the mere fact of permitting the shares to remain so registered. This, of course, assumes a statute as ordinarily worded. It is possible to legislate so as to change this rule.[6]

c. PRIORITY AS AFFECTED BY LACK OF NOTICE TO DEBTOR OF ASSIGNMENT

§ 874. Generally.—The effect of notice of assignment of a judgment or negotiable instrument on priority between the assignment and a subsequent attachment or garnishment has been noted in preceding sections.[7] Undoubtedly, where notice of a valid assignment is given the garnishee before a garnishment is served upon him, the assignment is complete and entitled to priority, and the garnishee admits indebtedness to the assignor at his peril.[8]

§ 875. Necessity of Notice.—A conflict of authority exists upon the necessity of notice to a debtor of an assignment of the debt in order to give the assignment priority over a subsequent attachment or garnishment of the debt in an action against the assignor.[9] Some cases seem to take the broad general view that notice to the debtor is not essential for this purpose, or that the time of notice is immaterial.[10] According to this view, the function of notice would seem merely to be to protect the garnishee and to prevent him from paying the funds to those not entitled thereto.[11] The majority rule, however, is that such notice must be given to the debtor either before or during the garnishment proceedings, the cases differing as to the exact time that the notice must be given, in order to preserve the priority of the assignment over such a subsequent attachment or garnishment.[12] Of course, no notice to a maker or drawee of a negotiable instrument is necessary to protect an indorsee in good faith and for value against either a subsequent attachment or garnishment or a previous attachment or garnishment of which he has no notice.[13] However, mature and non-negotiable papers are generally treated in the same category as other choses in action in this respect.[14]

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[20] National Bank v. Western P. R. Co. 157 Cal. 573, 108 P. 676, 27 L.R.A.(N.S.) 987, 21 Ann. Cas. 1391; Mapleton Bank v. Standrod, 8 Idaho, 740, 71 P. 119, 67 L.R.A. 656; Everitt v. Farmers & M. Bank, 82 Neb. 191, 117 N. W. 401, 118 N. W. 869, 20 L.R.A. (N.S.) 996.

Annotation: 67 L.R.A. 665; 21 Ann. Cas. 1395; Ann. Cas. 1917A, 428.

[1] Mapleton Bank v. Standrod, 8 Idaho, 740, 71 P. 119, 67 L.R.A. 656.

[2] Nicollet Nat. Bank v. City Bank, 38 Minn. 85, 35 N. W. 577, 8 Am. St. Rep. 643.

[3] Black v. Zacharie, 3 How. (U. S.) 483, 11 L. ed. 690; Bleakley v. Candler, 169 N. C. 16, 84 S. E. 1039, Ann. Cas. 1917A, 425.

Annotation: 67 L.R.A. 656; 21 Ann. Cas. 1395 (discussing statute and rule in different jurisdictions); Ann. Cas. 1917A, 428.

As to the rule that an attachment or garnishment has the effect of an assignment but not of a bona fide assignment for value, see supra, § 820.

[4] National Bank v. Western P. R. Co. 157 Cal. 573, 108 P. 676, 27 L.R.A.(N.S.) 987, 21 Ann. Cas. 1391; Young v. South Tredegar Iron Co. 85 Tenn. 189, 2 S. W. 202, 4 Am. St. Rep. 752.

[5] Annotation: 21 Ann. Cas. 1395.

[6] Gray v. Graham, 87 Conn. 601, 89 A. 262, 49 L.R.A.(N.S.) 1159.

Annotation: 49 L.R.A.(N.S.) 1159.

One who places corporate stock in the name of another on the books of the corporation to qualify him as a director, retaining possession of the certificate himself, has priority over an attaching creditor of the latter who did not extend credit on the faith of the stock. Gray v. Graham, 87 Conn. 601, 89 A. 262, 49 L.R.A.(N.S.) 1159.

One attaching stock which is placed in the name of a person on the books of the corporation to qualify him to act as a director, for the debt of the latter, cannot contest the title of the true owner to the stock, even where the statute requires directors to be bona fide stockholders, and the owner of the stock has aided in a violation of the statute. Gray v. Graham, 87 Conn. 601, 89 A. 262, 49 L.R.A.(N.S.) 1159.

Annotation: 49 L.R.A.(N.S.) 1160.

[7] See supra, §§ 866, 869.

[8] Burditt Bros. v. Porter, 63 Vt. 296, 21 A. 955, 25 Am. Dec. 763.

Annotation: 52 A.L.R. 110; L.R.A.1916E, 82.

§ 876. —At Time of Garnishment.—The decisions adhering to the general doctrine that notice of an assignment of a chose in action must at some time be given to the debtor in order to preserve the priority of the assignment over a subsequent attachment or garnishment of the chose, are not readily classifiable as to the exact time before or during the garnishment proceedings that such notice must be given.[15] Unquestionably, notice to the garnishee of the assignment prior to the garnishment is sufficient to protect the assignment.[16] However, the general rule supported by the weight of authority is that such notice to the debtor prior to the service of process on him as garnishee is not essential to complete the assignment of the chose in action as regards priority between the assignee and a creditor of the assignor who subsequently attempts to garnish the debt, but that the assignee may be entitled to priority, notwithstanding at the time of the garnishment the debtor had no notice of the assignment.[17] Thus, where the assignee intervenes in the garnishment proceedings and claims under a prior assignment, it has been held that his claim is entitled to priority over the garnishment, although the garnishee had no notice of the assignment prior to, or at the time of, the levy of garnishment.[18] Moreover, where the statute expressly provides that a claimant by prior right may intervene in a garnishment proceeding, lack of notice to the garnishee will not defeat the priority of the assignment.[19] It has been said that the rule is founded upon the idea that the assignment of a chose in action gives to the assignee an equitable interest which a court of equity will protect.[20]

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[9] Annotation: 32 A.L.R. 1024; 52 A.L.R. 109; L.R.A.1916E, 82.

See ASSIGNMENTS, Vol. 4, p. 225,

[10] Walton v. Horkan, 112 Ga. 814, 38 S. E. 105, 81 Am. St. Rep. 77 (holding generally, that even in the absence of notice, to the debtor of the assignment, the garnishing creditor will be postponed to the assignee, when the garnishment is served subsequent to the making of the assignment); Schoolfield v. Hirsh, 71 Miss. 55, 14 So. 528, 42 Am. St. Rep. 450; Market Nat. Bank v. Raspberry, 34 Okla. 243, 124 P. 758, L.R.A.1916E, 79 (holding that a plaintiff who causes a writ of attachment to be served upon the debtor of the defendant is not a purchaser for value, and therefore cannot take the debt as against a prior assignee thereof for value, who has not given notice to the debtor of his assignment).

Annotation: 32 A.L.R. 1024; 52 A.L.R. 109; L.R.A.1916E, 82.

A valid assignment unquestionably passes the title of the assignor without notice to the debtor; after the assignment the assignor has no interest to be reached by his creditor in any proceeding; as between rival claimants of what is in the hands of a garnishee, notice to the garnishee is not a matter for inquiry, their rights not depending on notice; and except as affected by the registry laws, a creditor can subject to legal process only the interest of his debtor, and his debtor has no interest in a chose in action which he has assigned before seizure by legal process. Schoolfield v. Hirsh, 71 Miss. 55, 14 So. 528, 42 Am. St. Rep. 450; Market Nat. Bank v. Raspberry, 34 Okla. 243, 124 P. 758, L.R.A.1916E, 79.

[11] Generally, as to necessity of notice of assignment to make garnishee liable to assignor, see supra, § 690.

[12] Annotation: 32 A.L.R. 1025; 52 A.L.R. 109; L.R.A.1916E, 82.

[13] See supra, § 869.

[14] See supra, § 872.

[15] Annotation: 32 A.L.R. 1025; 52 A.L.R. 109.

[16] See supra, § 874.

[17] Walters v. Whitlock, 9 Fla. 86, 76 Am. Dec. 607; Walton v. Horkan, 112 Ga. 814, 38 S. E. 105, 81 Am. St. Rep. 77; Woodward v. Brooks, 128 Ill. 222, 20 N. E. 685, 3 L.R.A. 702, 15 Am. St. Rep. 104; Smith v. Blatchford, 2 Ind. 184, 52 Am. Dec. 504; Walters v. Washington Ins. Co. 1 Iowa, 404, 63 Am. Dec. 451 (dictum); Hall v. Kansas City Terra Cotta Co. 97 Kan. 103, 154 P. 210, L.R.A.1916D, 361, Ann. Cas. 1918D, 605; McAllister v. Brooks, 22 Me. 80, 38 Am. Dec. 282; McDowell, P. & Co. v. Hopfield, 148

In a few states the courts apply what may be regarded as the minority rule —that is, that notice of an assignment prior to the service of a writ of garnishment by a bona fide creditor of the assignor is indispensable to the priority of the assignment over the garnishment.[1]

§ 877. —In Time for Garnishee to Disclose Assignment in Answer.—It seems well settled, according to the majority view, that where the garnishee receives notice of a prior assignment in time to set the same up in his answer or disclose it in the garnishment proceedings, the assignment is entitled to priority over the garnishment, even though notice of the assignment was not given until after the service of garnishment.[2] It has been said that if the right of the defendant has been transferred before the attachment issues, there is nothing for the plaintiff in the attachment to acquire; and if the garnishee has notice

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Md. 84, 128 A. 742, 52 A.L.R. 105; Martin v. Potter, 11 Gray, 37, 71 Am. Dec. 689; Schoolfield v. Hirsh, 71 Miss. 55, 14 So. 528, 42 Am. St. Rep. 450 (assignment of judgment); Oldham v. Ledbetter, 1 How. (Miss.) 43, 26 Am. Dec. 690; Muir v. Schenck, 3 Hill (N. Y.) 228, 38 Am. Dec. 633 (recognizing rule); Market Nat. Bank v. Raspberry, 34 Okla. 243, 124 P. 758, L.R.A. 1916E, 79; Phillips's Estate, 205 Pa. 525, 55 A. 216, 97 Am. St. Rep. 750; Noble v. Thompson Oil Co. 79 Pa. 354, 21 Am. Rep. 66; Nesmith v. Drum, 8 Watts & S. (Pa.) 9, 42 Am. Dec. 260.

Annotation: 52 A.L.R. 110.

[18] Market Nat. Bank v. Raspberry, 34 Okla. 243, 124 P. 758, L.R.A.1916E, 79; Nesmith v. Drum, 8 Watts & S. (Pa.) 9, 42 Am. Dec. 260.

[19] Annotation: 52 A.L.R. 117.

[20] Schumann v. Bank of California, N. A. 114 Or. 336, 233 P. 860, 37 A.L.R. 1531.

Annotation: 52 A.L.R. 112.

[1] Vanbuskirk v. Hartford F. Ins. Co. 14 Conn. 141, 36 Am. Dec. 473 (notice not given until long after the attachment); Clodfelter v. Cox, 1 Sneed (Tenn.) 330, 60 Am. Dec. 157 (holding, after admitting that the weight of American authority was to the contrary, that the one who first gave notice was entitled to priority, and therefore that an attachment by a creditor in the period intervening between the attachment and the notice thereof to the garnishee would have preference over the assignment); Dillingham v. Traders' Ins. Co. 120 Tenn. 302, 108 S. W. 1148, 16 L.R.A.(N.S.) 220 (same); Wolcott v. Mongeon, 88 Vt. 361, 92 A. 457; Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 570, 48 Am. Rep. 821.

Annotation: 52 A.L.R. 122.

The courts which apply the minority rule have in various instances done so on the theory that notice to the debtor is essential to the completion of the assignment, and that until such notice is given, he remains the debtor of the assignor, and therefore cannot be the debtor of the assignee, so as to entitle the latter to claim priority over a garnishing creditor who acquires the rights of the assignor; in other words, that until notice of the assignment is given to the debtor, he remains the debtor of the assignor, in consequence of which if garnishment is served prior to notice of the assignment, those rights still remain in the assignor which the garnishing creditor acquires by his proceeding, even though the assignment itself antedates the service of the garnishment. Dillingham v. Traders' Ins. Co. 120 Tenn. 302, 108 S. W. 1148, 16 L.R.A.(N.S.) 220; Clodfelter v. Cox, 1 Sneed (Tenn.) 330, 60 Am. Dec. 157. Annotation: 52 A.L.R. 122.

[2] Fenton v. Edwards, 126 Cal. 43, 58 P. 320, 46 L.R.A. 832, 77 Am. St. Rep. 141; Walter v. Whitlock, 9 Fla. 86, 76 Am. Dec. 607; Smith v. Blatchford, 2 Ind. 184, 52 Am. Dec. 504; Walters v. Washington Ins. Co. 1 Iowa, 404, 63 Am. Dec. 451; Hall v. Kansas City Terra Cotta Co. 97 Kan. 103, 154 P. 210, L.R.A.1916D, 361, Ann. Cas. 1918D, 605; Schoolfield v. Hirsh, 71 Miss. 55, 14 So. 528, 42 Am. St. Rep. 450; Muir v. Schenck, 3 Hill (N. Y.) 228, 38 Am. Dec. 633.

Annotation: 32 A.L.R. 1024; 52 A.L.R. 115; L.R.A.1916E, 84.

The general rule is that a creditor of a contractor cannot garnishee any proceeds of the contractor in the hands of the contractee which the contractor has previously assigned in good faith, for a valuable consideration, and with notice to, or the assent of, the garnishee, to a third person. Hall v. Kansas City Terra Cotta Co. 97 Kan. 103, 154 P. 210, L.R.A.1916D, 361, Ann. Cas. 1918D, 605.

of the transfer before he makes his answer, the demand, by the garnishment of the debt, does not impair his obligation to pay it to the assignee.[3]

§ 878. **—Before Judgment.**—In a number of jurisdictions notice to the garnishee at any time before final judgment against him entitles the assignee to recover and will defeat the garnishee if set up as a defense, in consequence of which the garnishee fails to set up the assignment at his peril.[4] Also, it is provided by statute in some states that where it appears in a garnishment proceeding that a prior assignment has been made, the assignee should be notified to appear for the purpose of having his rights litigated; and it would seem to follow that notice at any time before final judgment, if brought to the attention of the court, would be sufficient under these statutes to entitle the prior assignment to priority.[5]

§ 879. **—After Judgment, but before Execution.**—On the question whether notice to the garnishee after judgment against him in the garnishment proceedings but before satisfaction of the judgment is sufficient to protect the assignor and entitle him to priority over the subsequent garnishing creditor, the authorities are divided. On the one hand, it has been held that notice is insufficient if not given to the garnishee until after final judgment in the garnishment proceedings has been obtained against him, and that under these circumstances, in the absence of a qualifying statute, the prior assignee, because of his own neglect, has no rights against the garnishee;[6] at least, where, by statute, the rights of the debtor (garnishee) against the assignor before notice of the assignment are preserved against the assignee, a judgment in garnishment obtained before notice to the garnishee of a prior assignment takes priority over such assignment and relieves the garnishee from liability to the assignee.[7] On the other hand, various cases sustain the sufficiency of the notice to the garnishee even after judgment has been rendered against him and uphold the prior rights of the assignee as against the subsequent garnishment where the judgment has not been satisfied before notice is received;[8] at least, it seems that where, by statute, the garnishee, up to the time of satisfaction of the judgment in garnishment, still has an opportunity to be heard against its enforcement—as where, for example, he is entitled to show cause against the issuance of an execution—notice of a prior assignment at any time during the period in which the garnishee has the privilege of being heard is sufficient to entitle the assignment to priority over a judgment in garnishment, it being the duty of the garnishee in such a case to set up the prior assignment as a cause against the issuing of execution on the judgment in garnishment.[9] Under a statutory provision that a garnishee shall not be made liable on a debt evidenced by negotiable or assignable paper unless such paper is delivered or the garnishee completely exonerated or indemnified from all liability thereon after he may have satisfied the judgment, it has been held that an assignment antedating a garnishment is entitled to priority, even though no notice of the assignment is given the garnishee prior to satisfaction by him of the judgment in garnishment, it being declared that he is bound to protect himself under the statute against his absolute liability to the prior assignee.[10] It has been held, also, that the rights of an assignee to payment are not affected by payment of the debt to a subsequent garnishing creditor, even though the garnishee had no notice of the prior assignment at the time he made the payment, where such payment is voluntary and the statute prescribes certain facts which must exist to entitle a person voluntarily to pay the debt of another to whom he is indebted, among which are a judgment and execution thereon and an instant indebtedness upon the part of the person making the payment to him against whom the judgment runs.[11]

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[3] Annotation: 52 A.L.R. 115.

[4] Woodward v. Brooks, 128 Ill. 222, 20 N. E. 685, 3 L.R.A. 702, 15 Am. St. Rep. 104; Smith v. Blatchford, 2 Ind. 184, 52 Am. Dec. 504; Walters v. Washington Ins. Co. 1 Iowa, 404, 63 Am. Dec. 451 (dictum).
Annotation: 52 A.L.R. 114.

[5] Annotation: 52 A.L.R. 115.

[6] McCoid v. Beatty, 12 Iowa, 299; Walters v. Washington Ins. Co. 1 Iowa, 404, 63 Am. Dec. 451; Richards v. Griggs, 16 Mo. 416, 57 Am. Dec. 240.

[7] Annotation: 52 A.L.R. 118.

[8] McDowell, P. & Co. v. Hopfield, 148 Md. 84, 128 A. 742, 52 A.L.R. 105; Oldham v. Ledbetter, 1 How. (Miss.) 43, 26 Am. Dec. 690.
Annotation: 52 A.L.R. 118.

An assignee who purchases a chose in action for value has a right superior to that of one who dealt with the assignor on the basis of his general credit and merely obtained judgment against his debtor in a garnishment proceeding before notice of the assignment was given, where the assignee and garnishee applied to have the judgment stricken out within the term at which it was entered. McDowell, P. & Co. v. Hopfield, 148 Md. 84, 128 A. 742, 52 A.L.R. 105.

[9] McDowell, P. & Co. v. Hopfield, 148 Md. 84, 128 A. 742, 52 A.L.R. 105; Oldham v. Ledbetter, 1 How. (Miss.) 43, 26 Am. Dec. 690.
Annotation: 52 A.L.R. 118.

4. Priority as to Assignment for Benefit of Creditors

§ 880. Generally.—The general rule is that as against a valid assignment for the benefit of creditors, a subsequent attaching creditor cannot claim any priority.[12] Where an assignment is invalid when made, but is subsequently validated, the lien of an intervening attachment is superior to the rights of the assignee,[13] and it seems that in the case of an attachment and an assignment made on the same day, in the absence of proof of the exact time when each was made, the lien of the attachment will be prior.[14] If the attachment

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McDowell, P. & Co. v. Hopfield, 148 Md. 84, 128 A. 742, 52 A.L.R. 105, sustains the superior right of a prior assignee as against a subsequent attaching creditor who had secured judgment against the garnishee before notice was given to the latter of the assignment, where no part of the judgment had been paid, or execution issued thereon, and the assignee and garnishee had applied within the term to have the judgment stricken out. It will be observed that while the court holds that under the particular circumstances, the equities of the case were with the assignee, the decision does not appear necessarily to be based on this ground, and that the court regarded the better rule as that favoring the prior assignee over the subsequent attaching creditor who had secured judgment in the garnishment proceedings, which judgment was unsatisfied, and took the view that the priority of the assignee's rights did not depend on the giving of notice to the debtor in time to permit him to disclose the assignment in his answer to the garnishee process.

On the theory that the garnishee is regarded as a trustee and as such must take appropriate legal steps to protect the rights of the parties, it has been held that notice of a prior assignment received after judgment, but before satisfaction thereof, entitles the assignee to priority, since in such a case the garnishee is bound to protect the assignee by filing a bill in interpleader. Oldham v. Ledbetter, 1 How. (Miss.) 43, 26 Am. Dec. 690, holding that where the garnishee satisfied a demand in garnishment after receiving notice of a prior assignment, he did so in his own wrong, and that the judgment constituted no defense as against the assignee.

[10] Annotation: 52 A.L.R. 121.

[11] Brown v. Ayres, 33 Cal. 525, 91 Am. Dec. 655, wherein judgment was assigned and the amount thereof voluntarily paid to garnishing creditors before notice of the assignment.

Annotation: 32 A.L.R. 1024; 52 A.L.R. 121.

[12] Crapo v. Kelly, 16 Wall. (U. S.) 610, 21 L. ed. 430; McGoon v. Scales, 9 Wall. (U. S.) 23, 19 L. ed. 545; Beach v. Viles, 2 Pet. (U. S.) 675, 7 L. ed. 559; Spring v. South Carolina Ins. Co. 8 Wheat. (U. S.) 268, 5 L. ed. 614; Smead v. Chandler, 71 Ark. 505, 76 S. W. 1066, 65 L.R.A. 353; Hamilton-Brown Shoe Co. v. Mercer, 84 Iowa, 537, 51 N. W. 415, 35 Am. St. Rep. 831; Gillespie v. Keating, 180 Pa. 150, 36 A. 641, 57 Am. St. Rep. 622.

Annotation: 17 L.R.A. 88; 26 L.R.A. 593.

As to the rule that property in the possession of an assignee for the benefit of creditors is in custodia legis and therefore not attachable, garnishable, or liable to execution generally, see Vol. 4, p. 806, § 405.

See also Assignments for Benefit of Creditors, Vol. 4, p. 335.

[13] Wood v. McCain, 7 Ala. 800, 42 Am. Dec. 612; Coleman v. Darling, 66 Wis. 155, 28 N. W. 367, 57 Am. Rep. 253.

[14] Boyer's Estate, 51 Pa. 432, 91 Am. Dec. 129.

or garnishment precedes the consummation of the assignment, it will take priority over the assignment.[15]

It has been held, however, that when an action is commenced by attachment, which is followed by an assignment for the benefit of creditors, and afterwards an amendment to the complaint is made, substituting an entirely different and distinct cause of action, the attachment thereby becomes subsequent to the assignment and is therefore discharged.[16] The general rule may be modified in its application by the effect of a recording statute.[17] A deed of trust in favor of certain creditors, but not of all of them, does not become operative without the consent of the latter and before they have knowledge of it so as to take priority over an attachment which is levied after the acceptance of the trust by the trustee and his taking possession of the property.[18]

§ 881. Assignment for Benefit of Creditors in Another State.—If the assignment for the benefit of creditors has occurred outside the state in which the garnishment proceedings are instituted, the extraterritorial force of such assignment determines the priority between it and the garnishment.[19] Generally, a voluntary or common-law assignment made in the state of the assignor's domicil will be respected in other states, except in so far as it comes in conflict with the laws or public policy of the state in which it is sought to be enforced; consequently, it will pass the title to real or personal property of the assignor situated in the latter state as against subsequent attaching creditors.[20] Accordingly, it has been held that notice to a debtor of an assignment for the benefit of creditors made in another state by his creditor need not be given him before an attachment of the chose in action in order to make the assignment binding upon him, if he receives the notice pendente lite in time to avail himself of it in discharge of the suit against him.[1]

5. Priority as to Receivership

a. In General

§ 882. Generally.—The general rule is that priority between a receivership or involuntary trusteeship and an attachment or garnishment depends upon their priority in time. It has already been noted in this article that ordinarily, the appointment of a receiver gives such right of possession that a levy of an attachment thereafter will not be permitted to interfere therewith, at least without the permission of the court appointing the receiver.[2] On the other hand, an attachment or garnishment generally has priority over a subsequent receivership or involuntary trusteeship.[3] Accordingly, an attachment of real estate will ordinarily have priority over subsequent receivership proceedings in another court.[4] The view has been taken that where a levy of a writ of attachment is made after a suit for a receiver is filed but before he is appointed, the receiver's possession is subordinate to the lien of the levy.[5] On the other hand, a receivership has been held to have priority over an attachment or garnishment after the suit for the receivership is filed but before the receiver is appointed[6] or before the receiver has qualified.[7] But an attachment creditor who sits back during the pendency of legal proceedings and allows the receiver of the estate to insure the attached property for the benefit of the estate, and who meanwhile maintains a hostile attitude toward the receiver and the assignment under which he holds, cannot, after money is collected by the receiver on an insurance policy, claim a trust in his favor on account of his attachment on the burned building which might have satisfied his execution had it not burned.[8] A court having possession of a fund in attachment proceedings against an insolvent foreign corporation should, upon prayer of the proper authority, provide for the payment of taxes due by the corporation.[9]

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[15] Smead v. Chandler, 71 Ark. 505, 76 S. W. 1066, 65 L.R.A. 353.

Where the act of assignment requires ratification, and garnishment occurs prior to such ratification, the garnishment will be given priority. Coleman v. Darling, 66 Wis. 155, 28 N. W. 367, 57 Am. Rep. 253.

[16] Heidel v. Benedict, 61 Minn. 170, 63 N. W. 490, 31 L.R.A. 422, 52 Am. St. Rep. 592.

[17] Smead v. Chandler, 71 Ark. 505, 76 S. W. 1066, 65 L.R.A. 353.

[18] Alliance Mill. Co. v. Eaton, 86 Tex. 401, 25 S. W. 614, 24 L.R.A. 369.

Generally as to attachment or garnishment of interests under deed of trust to secure debts, see Vol. 4, p. 791, § 377.

[19] Paine v. Lester, 44 Conn. 196, 26 Am. Rep. 442, refusing to give effect to assignment under foreign statute.

Annotation: 17 L.R.A. 88.

In Pierce v. O'Brien, 129 Mass. 314, 37 Am. Rep. 360, the court held an assignment invalid against a subsequent attachment by a creditor not assenting to the assignment. The ground of the decision was that independently of insolvent laws or assignments for the benefit of creditors authorized by statute, a voluntary assignment by a resident debtor in trust for the payment of debts and without adequate consideration is invalid against an attachment, except so far as assented to by creditors for whose benefit it is made. On grounds of public policy, and in the absence of any county requiring it to give force to a foreign law conflicting with its own, the court applied the same rule to an assignment by a nonresident debtor and an attachment by a creditor resident of the forum.

[20] See Assignments for Benefit of Creditors, Vol. 4, p. 335.

[1] Fenton v. Edwards, 126 Cal. 43, 58 P. 320, 46 L.R.A. 832, 77 Am. St. Rep. 141.

[2] See Vol. 4, p. 808, § 407.

Service of a writ of garnishment upon a bank in which the judgment debtor has a general deposit creates no such lien or equity having the effect of a lien on the assets of the bank as will entitle the garnishing creditor to a preference upon the bank's becoming insolvent before the rendition of the judgment in the garnishment proceeding.[10]

§ 883. With Respect to Federal and State Courts.—The general rule stated in the preceding section that priority between a receivership and an attachment or garnishment depends upon their priority in time is applicable generally to a receivership and attachment or garnishment where one is in a Federal court and the other in a state court.[11]

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[3] Ward v. Connecticut Pipe Mfg. Co. 71 Conn. 345, 41 A. 1057, 42 L.R.A. 706, 71 Am. St. Rep. 207; Southern Bldg. & L. Asso. v. Price, 88 Md. 155, 41 A. 53, 42 L.R.A. 206; Farmers Bank v. Beaston, 7 Gill & J. (Md.) 421, 28 Am. Dec. 226, affirmed in 12 Pet. (U. S.) 102, 9 L. ed. 1017; Buswell v. Supreme Sitting, O. I. H. 161 Mass. 224, 36 N. E. 1065, 23 L.R.A. 846; Hibernia Nat. Bank v. Lacombe, 84 N. Y. 367, 38 Am. Rep. 518.
Annotation: 8 A.L.R. 459; 98 A.L.R. 351; 20 L.R.A. 392; 3 L.R.A.(N.S) 1073.

In Buswell v. Supreme Sitting, O. I. H. 161 Mass. 224, 36 N. E. 1065, 23 L.R.A. 846, it was held that the appointment of a receiver for an insolvent corporation did not affect attachment liens existing against the property of the corporation before the appointment.

The appointment of a receiver for a beneficiary association does not dissolve valid attachments of the property of the corporation levied before the filing of the bill of complaint under which the receiver was appointed, and where the funds attached have been paid over to the receiver upon order of the court, without prejudice to the rights of the attaching parties, the receiver takes the property subject to all valid attachments, and the claims of the attaching plaintiffs, when proved, are to be treated as preferred. Annotation: 8 A.L.R. 459.

Generally as to the effect of the appointment of a receiver on existing liens, see RECEIVERS [Also 23 R. C. L. p. 56, § 60].

[4] Beardslee v. Ingraham, 183 N. Y. 411, 76 N. E. 476, 3 L.R.A.(N.S.) 1073.
Annotation: 3 L.R.A.(N.S.) 1073.

It has been held, however, that the attachment of real property will not preclude a receiver subsequently appointed by another court from taking possession, the grounds assigned for this holding being that since the possession of the occupant is not disturbed by the levy of the attachment, it is impossible for constructive possession to be in the officer making the levy. Annotation: 3 L.R.A.(N.S.) 1073, 1074.

[5] Annotation: 20 L.R.A. 392.

[6] Riesner v. Gulf, C. & S. F. R. Co. 89 Tex. 656, 36 S. W. 53, 33 L.R.A. 171, 59 Am. St. Rep. 84.

[7] Texas Trunk R. Co. v. Lewis, 81 Tex. 1, 16 S. W. 647, 26 Am. St. Rep. 776.

[8] McLaughlin v. Park City Bank, 22 Utah, 473, 63 P. 589, 54 L.R.A. 343.

[9] Taylor v. Sutherlin-Meade Tobacco Co. 107 Va. 787, 60 S. E. 132, 14 L.R.A.(N.S.) 1135.

[10] Ellery v. Cumming, 40 Ariz. 512, 14 P. (2d) 709, 83 A.L.R. 1081.
Annotation: 83 A.L.R. 1085.

[11] Ke-Sun Oil Co. v. Hamilton (C. C. A. 9th) 61 F. (2d) 215, 85 A.L.R. 204; Irwin v.

§ 834. **Priority as to Bankruptcy Proceedings.**—The Federal Bankruptcy Act [12] invalidates liens obtained within four months prior to bankruptcy of the owner of property subjected to the lien. It further provides that nothing contained in the above-stated provision may have the effect of destroying or impairing the title obtained by levy, judgment, attachment, or other lien, of a bona fide purchaser for value who has acquired the same without notice or reasonable cause for inquiry.[13]

An attachment or garnishment lien acquired more than four months before the filing of the petition in bankruptcy is not invalidated by the subsequent bankruptcy proceedings and adjudication.[14] While an attachment or garnishment within the four-month period is ineffectual as a lien, gives the attaching or garnishing creditor no superior rights to other creditors,[15] and may properly be dismissed on the motion of the garnishee,[16] its effect is not obliterated so far as a surety on the attachment bond is concerned,[17] or so far as it is binding on property the title of which does not pass to the trustee in bankruptcy.[18] Of course, an attachment or garnishment subsequent to the petition in bankruptcy is of no effect and constitutes no lien that will prevail against the bankruptcy.[19] In the computation of the four-month period to determine whether an attachment lien is dissolved, the maxim that in law there is no fraction of a day does not apply.[20] Notwithstanding an attachment in an action against the debtor in a state court was levied within four months before the petition in bankruptcy was filed, a sale of the property as perishable, by order of the state court and as authorized by the state law, gives the purchaser a good title, where the court and the purchaser were ignorant of the institution or pendency of the bankruptcy proceedings and the trustee in bankruptcy has not intervened in the suit.[21]

b. WITH RESPECT TO FOREIGN RECEIVERSHIP

§ 885. **Where Receivership Is Subsequent to Attachment or Garnishment.**—The general rule that an attachment or garnishment has priority over subsequent receiverships or involuntary trusteeship proceedings [1] applies, of course, to an attachment or garnishment and a subsequent foreign receiver-

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McKechnie, 58 Minn. 145, 59 N. W. 987, 26 L.R.A. 218, 49 Am. St. Rep. 495; Riesner v. Gulf, C. & S. F. R. Co. 89 Tex. 656, 36 S. W. 53, 33 L.R.A. 171, 59 Am. St. Rep. 84.

Annotation: 85 A.L.R. 211; 26 L.R.A. 218.

[12] § 67 f.

[13] See BANKRUPTCY [Also 3 R. C. L. pp. 290, 296, §§ 115, 121].

[14] Metcalf Bros. v. Barker, 187 U. S. 165, 47 L. ed. 122, 23 S. Ct. 67; Light v. Hunt, 17 Ga. App. 491, 87 S. E. 763, citing R. C. L.; Marx v. Hart, 166 Mo. 503, 66 S. W. 260, 89 Am. St. Rep. 715.

Annotation: 18 Ann. Cas. 382.

"In our opinion the conclusion to be drawn from this language [§ 67f] is that it is the lien created by a levy, or a judgment, or an attachment, or otherwise, that is invalidated, and that where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized. When it is obtained within four months the property is discharged therefrom, but not otherwise." Metcalf Bros. v. Barker, 187 U. S. 165, 47 L. ed. 122, 23 S. Ct. 67.

[15] Hobbs v. Thompson, 160 Ala. 360, 49 So. 787, 18 Ann. Cas. 381; Hanson v. Shank, 159 Minn. 278, 198 N. W. 804, citing R. C. L.; Cavanaugh v. Fenley, 94 Minn. 505, 103 N. W. 711, 110 Am. St. Rep. 382.

Annotation: 18 Ann. Cas. 383.

[16] Hobbs v. Thompson, 160 Ala. 360, 49 So. 787, 18 Ann. Cas. 381. But see Smith v. Davis, 131 Me. 9, 158 A. 359, 81 A.L.R. 78.

[17] Andrews v. Jones, 46 R. I. 141, 125 A. 356, 36 A.L.R. 447.

Annotation: 36 A.L.R. 449.

Contra, by express provisions in the Bankruptcy Act of 1841: Franklin Bank v. Bachelder, 23 Me. 60, 39 Am. Dec. 601.

[18] Smith v. Davis, 131 Me. 9, 158 A. 359, 81 A.L.R. 78.

Annotation: 81 A.L.R. 85.

[19] Acme Harvester Co. v. Beekman Lumber Co. 222 U. S. 300, 56 L. ed. 208, 32 S. Ct. 96.

[20] Westbrook Mfg. Co. v. Grant, 60 Me. 88, 11 Am. Rep. 181.

[21] Jones v. Springer, 226 U. S. 148, 57 L. ed. 161, 33 S. Ct. 64, wherein the claim of the trustee in bankruptcy was transferred to the proceeds of the sale.

[1] See supra, § 882.

ship or involuntary trusteeship.[2] Accordingly, funds which have been garnished will not be directed to be turned over to an ancillary receiver until the rights of the plaintiffs in the garnishment proceedings have been disposed of.[3]

§ 886. Where Attachment or Garnishment Is Subsequent to Receivership.—On the theory either of the analogy between the receiver's position and that of an assignee under an involuntary assignment or of the limited character of the receiver's authority, rights, and powers, it has become a rule, quite generally established, subject to certain exceptions, as to ordinary chancery receivers, and, by considerable authority, as to receivers or liquidators with title, that the local property in a state of a foreign corporation for which such receiver or liquidator has been appointed in another state is subject to attachment or garnishment, or to sequestration by the appointment of a local receiver, by the creditors of the corporation, which, though levied subsequently to the institution of the receivership proceedings or the appointment of the receiver or liquidator in another state, will take precedence over the rights or title of the receiver or the liquidator.[4]

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[2] Southern Bldg. & L. Asso. v. Price, 88 Md. 155, 41 A. 53, 42 L.R.A. 206; Baldwin v. Hosmer, 101 Mich. 119, 59 N. W. 432, 25 L.R.A. 739.

[3] Baldwin v. Hosmer, 101 Mich. 119, 59 N. W. 432, 25 L.R.A. 739.

[4] Clark v. Williard, 294 U. S. 211, 79 L. ed. 865, 55 S. Ct. 356, 98 A.L.R. 347; Choctaw Coal & Min. Co. v. Williams-Echols Dry Goods Co. 75 Ark. 365, 87 S. W. 632, 5 Ann. Cas. 569; Humphreys v. Hopkins, 81 Cal. 551, 22 P. 892, 6 L.R.A. 792, 15 Am. St. Rep. 76; Gray v. Covert, 25 Ind. App. 561, 58 N. E. 731, 81 Am. St. Rep. 117 (receiver with title under statute); Linville v. Hadden, 88 Md. 594, 41 A. 1097, 43 L.R.A. 222; Folger v. Columbian Ins. Co. 99 Mass. 267, 96 Am. Dec. 747 (affirmed in 20 Wall. (U. S.) 1, 22 L. ed. 307); Barth v. Backus, 140 N. Y. 230, 35 N. E. 425, 23 L.R.A. 47, 37 Am. St. Rep. 545; Hibernia Nat. Bank v. Lacombe, 84 N. Y. 367, 38 Am. Rep. 518; Commercial Nat. Bank v. Motherwell Iron & Steel Co. 95 Tenn. 172, 31 S. W. 1002, 29 L.R.A. 164 (receiver appointed under statute for dissolution of corporation).

Annotation: 98 A.L.R. 353; 23 L.R.A. 35.

Cases reaching a contrary decision under exceptions to the general rule are considered in connection with a discussion of the legal theories under which they were decided in an annotation in 98 A.L.R. 351. See also the following cases: Relfe v. Rundle (Life Asso. of America v. Rundle) 103 U. S. 222, 26 L. ed. 337 (statutory liquidator with title; appointment of local receiver by local policyholders); Gilman v. Ketcham (Gilman v. Hudson River Boot & Shoe Mfg. Co.) 84 Wis. 60, 54 N. W. 395, 23 L.R.A. 52, 36 Am. St. Rep. 899 (receiver with title under statute; attachment by resident of state where receiver appointed).

In Disconto Gesellschaft v. Umbreit, 127 Wis. 651, 106 N. W. 821, 15 L.R.A.(N.S.) 1045, 115 Am. St. Rep. 1063 (affirmed in 208 U. S. 570, 52 L. ed. 625, 28 S. Ct. 337), it was held that a court will not assist a nonresident alien suing a nonresident alien to redress a wrong committed without the state, to impound the defendant's assets within the state by garnishment to the prejudice of his resident creditor who has obtained a judgment and a provisional lien against the assets, although the claim of the alien first accrued and his action was first brought, especially where the foreign creditor is acting merely as agent for a foreign trustee in bankruptcy who would have no standing in court.

On the theory that the authority and power of an ordinary chancery receiver, who does not ordinarily take title to the property by virtue of his appointment, but merely acts as an agent of the court appointing him, do not extend beyond the limits of the territorial jurisdiction of the court, the courts are quite generally agreed, subject to certain exceptions, that the local property of an insolvent foreign corporation for which such a receiver has been appointed is subject to attachment or garnishment, and that such attachment or garnishment, although subsequent in point of time to the appointment of the receiver, takes precedence of his claims; in some cases the same result is reached on the theory that the receiver's position is analogous to that of an assignee under an involuntary assignment, as to which the rule is that the assignee's title is subordinate to the lien of attachment in another state. Choctaw Coal & Min. Co. v. Williams-Echols Dry Goods Co. 75 Ark. 365, 87 S. W. 632, 5 Ann. Cas. 569; Humphreys v. Hopkins, 81 Cal. 551, 22 P. 892, 6 L.R.A. 792, 15 Am. St. Rep. 76; Hibernia Nat. Bank v. Lacombe, 84 N. Y. 367, 38 Am. Rep. 518.

Annotation: 98 A.L.R. 356.

In Choctaw Coal & Min. Co. v. Williams-Echols Dry Goods Co. 75 Ark. 365, 87 S. W. 632, 5 Ann. Cas. 569, it was held that a receiver of an insolvent foreign corporation, appointed by a Federal court sitting in Indian Territory in a proceeding to foreclose a deed of trust executed by such corporation, was not entitled to recover funds owing to the corporation by an Arkansas bank which was garnished by the creditors of the corporation subsequent to his appointment.

In Hibernia Nat. Bank v. Lacombe, 84 N. Y. 367, 38 Am. Rep. 518, it was held that commissioners appointed by a court in Louisiana for a Louisiana insolvent bank could not prevail over a creditor attaching in New York debts owing to the insolvent

§ 887. Receivership or Liquidation with Title under Statute, Decree, or Assignment.—While not as uniform and consistent in their holdings as those cases involving ordinary chancery receivers without title, frequent deviations from the general rule being noticeable, predicated on the title of the receiver or liquidator or the statutory source thereof which forms a part of the charter of the corporation, or on the peculiar relation of the attaching creditor to the corporation, there are numerous authorities which seem to apply the general rule that property of an insolvent corporation is subject to attachment or garnishment in another state, even in cases where the receiver or the liquidator was not a mere chancery receiver without title, but a receiver or liquidator clothed with title under the decree or statute of the foreign state.[5] In a number of cases, however, the opposite conclusion has been reached where the receiver was a statutory liquidator of the insolvent corporation, under a statute providing for the dissolution or liquidation of such corporations, which might be regarded as a part of the corporation's charter, the theory being that the corporation carries its charter with it into every state into which it may be admitted to do business, and that creditors or other persons dealing with it are subject to its provisions, and may not, therefore, attach its local property as against one who, under the foreign law as constituting a part of the corporate charter, has previously acquired the title thereto for purposes of liquidation.[6] Sometimes the decision disallowing the attachment in cases involving statutory receivers or liquidators with title has been based on the ground that the attaching creditor was a resident of the state in which the appointment was made, and was therefore bound by its law in attaching the property of the corporation in another state.[7] Even in cases where the receiver or the liquidator succeeds to the title of the corporation's property generally, real property located outside the jurisdiction from which his appointment is derived does not pass to him so as to prevent its being attached in the state of its situs, because that state has exclusive control and power

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bank, although such creditor was a nonresident of New York and a resident of Louisiana. The decision is based on the grounds that neither the law of Louisiana nor the adjudication under which the commissioners were appointed could have any operation in New York, that an assignment by virtue of or under a foreign law does not operate upon a debt as against persons in the state, and that although the plaintiff was a foreign creditor, he was rightfully pursuing a remedy in New York courts under the New York statute.

Because of the exclusive power of local courts over real property within their jurisdiction, and the rule giving to the state in which such property is situated exclusive right and power to regulate and prescribe its disposition and transfer, for stronger reasons than in the case of local personal property, the local real property of an insolvent foreign corporation for which a receiver has been appointed in another state is subject to attachment. Annotation: 98 A.L.R. 361.

[5] Gray v. Covert, 25 Ind. App. 561, 58 N. E. 731, 81 Am. St. Rep. 117 (receiver with title under statute).

Annotation: 98 A.L.R. 362.

As against the contention of the receiver of an insolvent New Jersey corporation, appointed by a court in New Jersey, that under the New Jersey statute providing that upon the appointment of a receiver for a corporation, all of its property, wherever situated, shall vest in the receiver and the corporation shall be divested of the title thereto, he became vested with the title to corporate property in Indiana, and that, therefore, it could not thereafter be attached by a creditor in Indiana, it was held in Gray v. Covert, 25 Ind. App. 561, 58 N. E. 731, 81 Am. St. Rep. 117, that a receiver appointed for a foreign corporation in another state does not acquire such title to the property of the corporation situated in Indiana as to defeat an attachment subsequently issued by the courts of Indiana at the instance of a creditor. The court based its decision on the ground that a receiver, unlike an assignee under a voluntary general assignment for the benefit of creditors, does not acquire title, and that the statute of New Jersey referred to was limited in its operation to property in that state.

[6] Annotation: 98 A.L.R. 367.

[7] Gilman v. Ketcham (Gilman v. Hudson River Boot & Shoe Mfg. Co.) 84 Wis. 60, 54 N. W. 395, 23 L.R.A. 52, 36 Am. St. Rep. 899.

Annotation: 98 A.L.R. 369.

over its transfer and disposition, and may give precedence to attaching creditors as against the foreign receiver.[8]

§ 888. Assignees with Title.—The rule that the local property of a foreign insolvent corporation is subject to attachment or garnishment is also applied as against assignees with title acquired in foreign insolvency or bankruptcy proceedings.[9]

§ 889. Effect of Relationships and Circumstances.—In some cases, because of the relation of the attaching creditor to the corporation, an exception to the general rule that local property of an insolvent foreign corporation for which a receiver has been appointed in another state is subject to attachment or garnishment has been recognized, as where the creditor was a member or policyholder of the corporation, and the claim for which the property was attached arose out of or was connected with such relation. In such event, according to the view taken in a number of cases, the local property of the corporation is not subject to attachment, garnishment, or other sequestration for such claim, the theory being that such member or policyholder is bound by the liquidation of the corporation under the laws of the state of its incorporation which form a part of its charter. In most of these cases, however, it seems that the receiver was not a mere chancery receiver, but one with title under the statute or decree, or both.[10] But in a few cases involving attachments by beneficiaries under policies issued by mutual benefit insurance companies, the right to attachment was sustained, notwithstanding the appointment of a receiver for the company in another state.[11] Practically all of the cases passing upon the question whether the local property of an insolvent foreign corporation for which a receiver has been appointed in another state is subject to execution, attachment, or garnishment, tacitly assume that no constitutional inhibition is involved in its determination, and base their decision on principles of comity and on the rule that laws of a state have no extraterritorial operation and that the authority of the receiver is confined by the territorial jurisdiction of the court appointing him. This seems to involve the assumption that the full faith and credit provision of the Federal Constitution, as applied to judgments, does not require the states to give effect to the authority of the foreign receiver derived from the decrees of a court of a sister state, at least so far as it concerns local property which, under local laws, is attached or garnished by local or foreign creditors.[12] A state may, at the suit of a resident creditor, permit the attachment or garnishment of the local property of a corporation for which a foreign receiver has been appointed, without any violation of the privileges and immunities clause of the Federal Constitution, at least where no right of a nonresident to attach or garnish the property is involved.[13] Whether a state may, however, consistently with the privileges and immunities clause, deny to nonresidents the right to attach or garnish the local property of a foreign corporation for which a receiver has been appointed in another state, while conceding that right to its citizens, has been answered both affirmatively, at least with respect to nonresidents who are residents of the state where the receiver was appointed,[14] and negatively, at least with respect to persons also nonresidents of the state where the receiver was appointed.[15] It has been held that notice of the appointment of a receiver in another state, after he has obtained an attachment, does not put him to an election between his attachment and the right to share in the foreign receivership, but, after taking the benefit of the security obtained by the attachment, he may claim in the receivership for any balance that may remain unpaid.[1] The rule has been enunciated that where, upon the insolvency of a corporation, the law of its domicil assumes to take its property and assign it by judicial proceedings, without its consent, to trustees for distribution among its creditors, such an assignment will not be allowed by the courts of another state to prevail against any remedy which the laws of the latter state afford to its own citizens against property within its jurisdiction, provided the insolvent corporation remains in existence at the time such remedy is availed of by the local creditors.[2]

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[8] Annotation: 98 A.L.R. 369.

[9] Security Trust Co. v. Dodd, 173 U. S. 624, 43 L. ed. 835, 19 S. Ct. 545; Paine v. Lester, 44 Conn. 196, 26 Am. Rep. 442.

Annotation: 98 A.L.R. 366.

In Security Trust Co. v. Dodd, 173 U. S. 624, 43 L. ed. 835, 19 S. Ct. 545, it was held that an assignee of an insolvent Minnesota corporation, under an assignment executed by the corporation under the general Assignment Statute of Minnesota, took title to the corporation property in Massachusetts subservient to the lien of attachment levied thereon by creditors of the corporation residing in New York, because such an assignment was not operative to pass personal property situated in Massachusetts as against such creditors.

In Paine v. Lester, 44 Conn. 196, 26 Am. Rep. 442, it was held that the title of an assignee or trustee in insolvency of a Pennsylvania corporation to the property of the corporation in Connecticut depended for recognition in Connecticut solely upon principles of comity, which would not be given effect where the property was, under the laws of Connecticut, attached by a creditor of the corporation, though the attachment was subsequent to the assignment to the trustee, and was made by a creditor residing in a third state, since under the Federal Constitution, citizens of other states are entitled to the same privileges and immunities as citizens of the state. The court regarded the assignment as a statutory assignment made in insolvency proceedings, and not a voluntary common-law assignment, and held that it had no legal effect beyond the limits of the state in which it was made.

[10] Relfe v. Rundle (Life Asso. of America v. Rundle) 103 U. S. 222, 26 L. ed. 337 (not involving attachment, but the rights of a statutory liquidator and a receiver appointed in another state for the local assets of the company, and frequently cited as authority in attachment cases).

Annotation: 98 A.L.R. 369.

[11] Annotation: 98 A.L.R. 373.

§ 890. —Effect of Residence or Domicil of Creditor.—In many cases the decision sustaining the attachment, garnishment, or other sequestration of the local property of a foreign corporation, as against its foreign receiver, is expressly based on the ground that the rights of local attaching creditors must prevail.[3] In other cases the attachment or garnishment of the local property of such a corporation has been sustained irrespective of whether the attaching creditor was a resident or nonresident of the forum,[4] so long as he was not a resident of the state in which the receiver was appointed,[5] and sometimes even where he was a resident of such state.[6]

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[12] Annotation: 98 A.L.R. 374.

The question, however, whether full faith and credit are due to the title of a liquidator of an insolvent foreign corporation derived from the provisions of the statute of a sister state, was answered in the affirmative by the United States Supreme Court, in the reported Clark v. Williard, 294 U. S. 211, 79 L. ed. 865, 55 S. Ct. 356, 98 A.L.R. 347, by its holding that the full faith and credit provision of the Federal Constitution requires that a state in which property is located of a foreign corporation for which a statutory liquidator has, in the domiciliary state, been appointed for the purpose of liquidating its assets upon dissolution, recognize such liquidator as the successor in title to the property of the corporation. The necessary result of this decision would have been to render immune from attachment or garnishment local property of a foreign corporation the title to whose assets was under the statute of another state vested in a liquidator, had not the court qualified its decision by the further holding that its conclusion did not prevent such state, in effectuating its policy tolerating preferences and a race of diligence among the creditors of an insolvent corporation, from subordinating such title to the liens of attachments and executions levied upon such property by the creditors of the corporation subsequent to the appointment of the liquidator.

[13] Annotation: 98 A.L.R. 381.

[14] Annotation: 98 A.L.R. 381.
See Standard Pa. Prac. Vol. 10.

[15] Paine v. Lester, 44 Conn. 196, 26 Am. Rep. 442.
Annotation: 98 A.L.R. 381.
See Standard Pa. Prac. Vol. 10.

[1] Ward v. Connecticut Pipe Mfg. Co. 71 Conn. 345, 41 A. 1057, 42 L.R.A. 706, 71 Am. St. Rep. 207; Linville v. Hadden & Co. 88 Md. 594, 41 A. 1097, 43 L.R.A. 222.
Annotation: 98 A.L.R. 382.

The view has been taken that the rule that the property in Maryland of a Connecticut corporation for which a receiver was appointed in the latter state was subject to attachment by a creditor of the corporation, even though such creditor was a nonresident of Maryland, so long as he was not a resident of Connecticut, was not altered by the fact that the creditor proved his claim also in the receivership proceedings in the other state, where it appeared that the attachment preceded such proof, and that the claim filed with the receiver contained a reservation or condition that by filing it the creditor did not intend to abandon any rights that he might have gained by the attachment suit. Linville v. Hadden & Co. 88 Md. 594, 41 A. 1097, 43 L.R.A. 222.

[2] Folger v. Columbian Ins. Co. 99 Mass. 267, 96 Am. Dec. 747, affirmed in 20 Wall. (U. S.) 1, 22 L. ed. 307.
Annotation: 98 A.L.R. 386.

§ 891. **—Rule as Affected by Possession of Receiver Acquired before Attachment.**—While there is authority to the contrary,[7] the overwhelming weight of judicial decision supports the rule in terms, or in effect, that property of an insolvent foreign corporation which has been reduced to the possession of its foreign receiver is not subject to attachment, particularly where the possession is first acquired by the receiver in the state of his appointment. In some of the cases supporting this rule the receiver had acquired the title to the property; in others apparently he had not.[8] Thus, where property has once vested as the property of a receiver by the law of the state where the property was situated, the law of another state will not divest the receiver of his right to it if he takes it into such state in the performance of his duty. Comity in such cases prevails to exempt the property from attachment in a foreign jurisdiction, when taken there under authority from the foreign court.[9]

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[3] Choctaw Coal & Min. Co. v. Williams-Echols Dry Goods Co. 75 Ark. 365, 87 S. W. 632, 5 Ann. Cas. 569; Humphreys v. Hopkins, 81 Cal. 551, 22 P. 892, 6 L.R.A. 792, 15 Am. St. Rep. 76; Folger v. Columbian Ins. Co. 99 Mass. 267, 96 Am. Dec. 747, affirmed in 20 Wall. (U. S.) 1, 22 L. ed. 307.

Annotation: 98 A.L.R. 377.

[4] Security Trust Co. v. Dodd, 173 U. S. 624, 43 L. ed. 835, 19 S. Ct. 545; Linville v. Hadden & Co. 88 Md. 594, 41 A. 1097, 43 L.R.A. 222. See also Paine v. Lester, 44 Conn. 196, 26 Am. Rep. 442 (based on privileges and immunities clause of Federal Constitution).

Annotation: 98 A.L.R. 377.

[5] Linville v. Hadden & Co. 88 Md. 594, 41 A. 1097, 43 L.R.A. 222; Gilman v. Ketcham (Gilman v. Hudson River Boot & Shoe Mfg. Co.) 84 Wis. 60, 54 N. W. 395, 23 L.R.A. 52, 36 Am. St. Rep. 899.

Annotation: 98 A.L.R. 377.

A receiver of a foreign corporation appointed in another state in proceedings to dissolve the corporation has a right to a debt due the corporation as against an attempt at garnishment of the debt by a nonresident creditor of the corporation who is a citizen of the state in which the corporation existed and in which the receiver was appointed. Gilman v. Ketcham (Gilman v. Hudson River Boot & Shoe Mfg. Co.) 84 Wis. 60, 54 N. W. 395, 23 L.R.A. 52, 36 Am. St. Rep. 899.

[6] Barth v. Backus, 140 N. Y. 230, 35 N. E. 425, 23 L.R.A. 47, 37 Am. St. Rep. 545; Hibernia Nat. Bank v. Lacombe, 84 N. Y. 367, 38 Am. Rep. 518; Commercial Nat. Bank v. Motherwell Iron & Steel Co. 95 Tenn. 172, 31 S. W. 1002, 29 L.R.A. 164.

Annotation: 98 A.L.R. 377.

In Hibernia Nat. Bank v. Lacombe, 84 N. Y. 367, 385, 38 Am. Rep. 518, the court said: "The plaintiff, as we have seen, although a foreign creditor, is rightfully in our court pursuing a remedy given by our statutes. It may enforce that remedy to the same extent, in the same manner, and with the same priority as a citizen. Any other construction would make the permission of the statute a form without benefit; a formality, and not matter of substance; a mere delusion. Once properly in court and accepted as a suitor, neither the law, nor the court administering the law, will admit any distinction between the citizen of its own state and that of another. Before the law and in its tribunals there can be no preference of one over the other." In this case the attaching creditor was a resident of the state in which the commissioners for the liquidation of the defendant insolvent corporation were appointed.

In Commercial Nat. Bank v. Motherwell Iron & Steel Co. 95 Tenn. 172, 31 S. W. 1002, 29 L.R.A. 164, a receiver of an insolvent corporation appointed by a court in Ohio in proceedings instituted for its dissolution under the Ohio statute was not permitted, in Tennessee, to prevail over an Ohio creditor of the corporation who, having obtained in Ohio a judgment by confession against the corporation after the appointment of the receiver, sought to enforce the same in Tennessee by attachment of property of the corporation in that state.

[7] Humphreys v. Hopkins, 81 Cal. 551, 22 P. 892, 15 Am. St. Rep. 76, 6 L.R.A. 792.

Annotation: 98 A.L.R. 382.

The general rule that the property of an insolvent foreign corporation is subject to attachment was applied in Humphreys v. Hopkins, 81 Cal. 551, 22 P. 892, 6 L.R.A. 792, 15 Am. St. Rep. 76, as against a foreign receiver who, having reduced the property of the corporation to possession in the foreign jurisdiction, brought it into California, where its attachment by creditors of the insolvent company was sustained, it being held that the receiver could not hold the property against the claims of citizens of California who, in pursuance of the laws of that state, attached it. The court said that the order of the foreign court appointing the receiver did not vest the title to the property in him, and that principles of comity did not require California to recognize that order so as to award to him the property for the exclusive benefit of creditors residing in other states.

[8] Pond v. Cooke, 45 Conn. 126, 29 Am. Rep. 668; Chicago, M. & St. P. R. Co. v. Keokuk Northern Line Packet Co. 108 Ill. 317, 48 Am. Rep. 557; Robertson v. Staed, 135 Mo. 135, 36 S. W. 610, 33 L.R.A. 203, 58 Am. St. Rep. 569; Woodhull v. Farmers' Trust Co. 11 N. D. 157, 90 N. W. 795, 95 Am. St. Rep. 712.

Annotation: 98 A.L.R. 382.

6. Questions of Priority Arising out of Attachment or Garnishment of Decedents' Estates and Interests Therein

§ 892. Attachment or Garnishment and Claims of Widow and Others on Decedent's Estate.[10]—In view of the general rule that the lien of an attachment continues until judgment is rendered, so that the lien of an execution issued on the judgment relates back to the inception of the attachment lien unaffected by the death of the debtor or other intervening circumstances, it would seem that an attachment pending at the death of the debtor would give the creditor priority over the widow's claim of dower,[11] and would be entitled to preference over nonattaching creditors in the payment of claims against the estate.[12] However, a widow's right to preference in payment of her allowance for support is not subject to the lien of an attachment in suit against her husband levied in his lifetime and undetermined at his death.[13]

§ 893. Attachment or Garnishment and Right of Retainer.—The right of

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In Pond v. Cooke, 45 Conn. 126, 29 Am. Rep. 668, property purchased by the receiver of an insolvent New Jersey corporation with the funds of the estate and brought over to Connecticut, to be used in the construction of a bridge under a contract between the insolvent corporation and a municipality, was held not subject to attachment by a creditor of the corporation.

In Chicago, M. & St. P. R. Co. v. Keokuk Northern Line Packet Co. 108 Ill. 317, 48 Am. Rep. 557, a barge belonging to an insolvent Missouri corporation for which a receiver had been appointed in Missouri to take over its property was held not subject to attachment in Illinois by a creditor of the corporation, where it appeared that at the time of the appointment of the receiver the barge was in Missouri, and the receiver took possession thereof and leased it for a trip to Illinois where it was attached. The decision is based on the ground that the receiver, by taking possession of the barge, acquired a special property therein which he was entitled to protect everywhere. The court conceded that if the barge had been in Illinois from the beginning, and had never come into the possession of the receiver, an attachment thereof by creditors residing in Illinois would have prevailed as against the receiver of its owner.

In Robertson v. Staed, 135 Mo. 135, 36 S. W. 610, 33 L.R.A. 203, 58 Am. St. Rep. 569, it was held that a receiver of a New York railroad corporation appointed by a court in the Republic of Mexico, who, as receiver, having taken possession of a railroad car belonging to the corporation, brought it into Missouri, where it was attached by Illinois creditors of the corporation, could institute in Missouri a suit of replevin against such creditors to recover the car, because by such possession he acquired a special property therein. The court said: "Courts will protect the rights of domestic creditors, and will not permit property located in their jurisdiction to be carried away by a receiver of a foreign state or nation until all such creditors are satisfied. But we know of no principle upon which rights of domestic creditors can be created by reason of the property, in the lawful possession of the receiver, being brought within their jurisdiction. . . . Hence it is generally ruled that after a receiver has obtained possession of the property of the debtor within the jurisdiction of the court appointing him, such possession will be protected, into whatever jurisdiction the property may thereafter be taken by the receiver."

Apparently conceding that the rule would have been otherwise if the attachment had preceded the appointment of a receiver in another state, or the taking of possession of the property by such receiver, it was held, in Woodhull v. Farmers' Trust Co. 11 N. D. 157, 90 N. W. 795, 95 Am. St. Rep. 712, that where the receiver of the corporation which owned notes secured by mortgage on land in North Dakota took possession of such notes after his appointment in Iowa, and brought them over to North Dakota for the purpose of using them as evidence in a foreclosure suit in the latter state, they were not subject to attachment in that state.

[9] Somerset Coal Co. v. Diamond State Steel Co. 224 Pa. 217, 73 A. 442, 132 Am. St. Rep. 775. And see Gilman v. Ketchum (Gilman v. Hudson River Boot & Shoe Mfg. Co.) 84 Wis. 60, 54 N. W. 395, 23 L.R.A. 52, 36 Am. St. Rep. 899.

[10] Generally, as to the attachability of a decedent's estate, and the interests in, and claims on, the same, see Vol. 4, p. 811, §§ 410 et seq.

[11] Tetzloff v. May, 151 Iowa, 441, 131 N. W. 647, Ann. Cas. 1913A, 341.

Annotation: Ann. Cas. 1913A, 343.

[12] Tetzloff v. May, 151 Iowa, 441, 131 N. W. 647, Ann. Cas. 1913A, 341.

[13] Ibid.

retainer may be exercised as against an attaching creditor of a distributee, and will take precedence of an attachment in execution against the legatee's interest in an estate.[14] Nevertheless, the view has been taken that an heir's distributive share of the real estate of his ancestor is not burdened with the lien of a debt which he owes such ancestor, which will take priority over an attachment against the heir's interest in favor of a third person.[15]

7. Priority between Attaching Creditors of Partner and Partnership

§ 894. As to Property of Partner.—As a general rule, the lien of an attachment or garnishment, based on a partnership liability upon the property of an individual partner, is not postponed, but is prior to the liens of subsequent judgments, attachments, or executions based on the individual obligations of such partner.[16] The reason for the rule is that equity follows the law and enforces legal liens according to their priorities in the administration of partnership and individual assets. Thus, the equitable rule which prefers partnership creditors in partnership assets and individual creditors in individual assets is not applicable to affect an existing legal lien.[17] A different rule prevails in at least one state, where the right of a partnership creditor to preference in the application of firm assets is a legal right, and the creditor of an individual partner has a like preference in the application of the separate estate.[18] The attachment of one partner's interest by another in a suit between them for an accounting gives to the plaintiff a lien superior to any lien of a subsequent execution creditor.[19]

§ 895. As to Partnership Property.[20]—It is a general rule that the lien of an attachment or garnishment, or other lien generally, in an action on an individual obligation of an individual member of a partnership is, as to the partnership, real or personal assets, subject to the lien of a subsequent attachment or garnishment in an action on a partnership obligation.[1] The reason for the rule is that the lien of an attachment against an individual partner reaches only the debtor's right in the partnership property, which is only an interest in the assets and claims of the partnership subject to the claims of partnership creditors and a partnership accounting.[2] Under varying circumstances the application of this rule has been qualified.[3] There seems to be a conflict of authority as to whether the fact that the prior lien is against all the partners as individuals will affect adversely the priority ordinarily given to subsequent lien creditors of the partnership as to the partnership effects. Some cases hold or imply that the partnership creditors are not affected adversely thereby.[4] Other cases take the contrary view and hold that an at-

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[14] Annotation: 1 A.L.R. 1034, s. 30 A.L.R. 780, and 75 A.L.R. 886.

The lien given by a statute which provides that "when an estate is solvent and a person to whom a share of it descends is indebted to the intestate at the time of his death, such debt creates a lien on his share, having priority to any attachment of it; and such lien may be enforced by suit and attachment of the share within two years after administration is granted," is superior to an attachment made by a creditor of a distributee, though made before any attachment by the administrator. Annotation: 1 A.L.R. 1034, s. 30 A.L.R. 780, and 75 A.L.R. 886.

[15] Neel v. Campton, 201 Ky. 1, 255 S. W. 840, 30 A.L.R. 765.

[16] Allen v. Wells, 22 Pick. (Mass.) 450, 33 Am. Dec. 757 (a frequently cited case, holding that the separate property of each member of a firm is liable to attachment for debts due from the partnership, and that the lien thereof is not defeated by a subsequent attachment by the creditor of an individual partner); Meech v. Allen, 17 N. Y. 300, 72 Am. Dec. 465 (judgments); Cummings's Appeal, 25 Pa. 268, 64 Am. Dec. 695 (judgments); Bardwell v. Perry, 19 Vt. 292, 47 Am. Dec. 687; Savings & Loan Corp. v. Bear, 155 Va. 312, 154 S. E. 587, 75 A.L.R. 980 (judgments).

Annotation: 75 A.L.R. 999.

[17] Savings & Loan Corp. v. Bear, 155 Va. 312, 154 S. E. 587, 75 A.L.R. 980 (judgments).

Annotation: 75 A.L.R. 1000.

[18] Bowker v. Smith, 48 N. H. 111, 2 Am. Rep. 189 (judgments).

Annotation: 75 A.L.R. 1003.

[19] Thoms v. Southard, 2 Dana (Ky.) 475, 26 Am. Dec. 467.

[20] As to interest of partner in partnership subject to attachment or garnishment against partner, see Vol. 4, p. 764, § 335.

As to the power of partners acting jointly to waive their lien to have the partnership credits applied to the payment of partnership obligations, and as to the general question of identity or equality as between joint debts of all the partners as individuals and their liabilities as partners, see Partnership [Also 20 R. C. L. p. 790].

[1] Bullock v. Hubbard, 23 Cal. 495, 83 Am. Dec. 130; Conroy v. Woods, 13 Cal. 626, 73 Am. Dec. 605. See also Swan v. Gilbert, 175 Ill. 204, 51 N. E. 604, 67 Am. St. Rep. 208 (holding that an execution against an individual partner is subordinate to a later chattel mortgage or other claims of firm creditors as regards the firm property); Springfield F. & M. Ins. Co. v. Huntington Nat. Bank, 229 Ky. 674, 17 S. W. (2d) 726, 71 A.L.R. 70 (holding that a creditor of an individual partner garnishing the insurer of partnership property is not entitled to judgment for any amount whatever, where partnership debts exceed the entire pro-

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ceeds of the insurance); Page v. Thomas, 43 Ohio St. 38, 1 N. E. 79, 54 Am. Rep. 788 (judgments); Sterling v. Brightbill, 5 Watts, 229, 30 Am. Dec. 304 (implied as to judgments); Overholt's Appeal, 12 Pa. 222, 51 Am. Dec. 598 (implied where the land is held as partners, and not as tenants in common); Erwin's Appeal, 39 Pa. 535, 80 Am. Dec. 542 (holding that judgments against a firm for firm debts are payable out of the proceeds of firm property in preference to a prior judgment against an individual partner whose name did not appear in the deed); Meily v. Wood, 71 Pa. 488, 10 Am. Rep. 719 (implied by holding that a judgment against an individual partner is not a lien on the partnership land so as to preclude a partnership from disposing of the land and giving a title clear of such encumbrance); Richard v. Allen, 117 Pa. 199, 11 A. 552, 2 Am. St. Rep. 652 (executions); Savings & Loan Corp. v. Bear, 155 Va. 312, 151 S. E. 587, 75 A.L.R. 980 (judgments); Powers v. Large, 69 Wis. 621, 35 N. W. 53, 2 Am. St. Rep. 767 (implied).

Annotation: 75 A.L.R. 1005.

In Powers v. Large, 69 Wis. 621, 35 N. W. 53, 2 Am. St. Rep. 767, the court held that in a contest between a creditor of one of two or more partners and a creditor of the partnership, the latter was to be preferred if he showed that he had in any way obtained a lien upon the partnership property before the same had been appropriated to the payment of the debt of the judgment creditor of the individual partner, and that where it was shown that the firm creditors had attached the firm assets before the same had been sold on the execution in favor of the creditor of the individual partner, it was wholly immaterial that the creditor of the individual partner obtained his lien first.

[2] See Vol. 4, p. 764, § 335.

[3] Schmidlapp v. Currie, 55 Miss. 597, 30 Am. Rep. 530 (holding that a bona fide transfer of the firm assets of a solvent firm for an individual debt of one of its members, made with the consent of all partners, is superior to the right of firm creditors subsequently attaching); Himmelreich v. Shaffer, 182 Pa. 201, 37 A. 1007, 61 Am. St. Rep. 698 (holding that individual lien creditors have priority over firm creditors whose liens are later in date, where there is, in fact, no partnership); Willis v. Freeman, 35 Vt. 44, 82 Am. Dec. 619 (holding that the lien of an attaching individual creditor on the real estate of the firm while the firm is solvent cannot be divested by its subsequent insolvency). See also Reed v. Shepardson, 2 Vt. 120, 19 Am. Dec. 697.

In Scudder v. Delashmut, 7 Iowa, 39, 71 Am. Dec. 428, the court says: "It is true that, as a rule, the partnership creditors have a priority of right in the partnership property. But what is the meaning of the rule, and where is it applicable? Does it mean that the partnership creditor may step in, and take precedence of an individual creditor, at any time and under all circumstances? The answer must be that, to enable the court to apply the rule, the case must be such that the court may marshal the debts and effects, and thus ascertain the amount of the joint liabilities and of the joint property. In this manner the court finds whether the entire assets are wanting to pay the joint creditors. Before the joint creditor can take the property from the individual creditor, who has an attachment or other lien, it must be ascertained that the property is wanted for this purpose,—that is, that there are not more than sufficient means for the payment of the partnership creditors. Therefore, it will be perceived that the joint creditor cannot come in by his attachment alone, and oust the separate creditor from his prior attachment, or other lien. The former has not a lien which he may enforce in this manner, for himself alone, by his attachment."

[4] Forsyth v. Woods, 11 Wall. (U. S.) 484, 20 L. ed. 207; Richard v. Allen, 117 Pa. 199, 11 A. 552, 2 Am. St. Rep. 652 (if before sale).

Annotation: 75 A.L.R. 1010.

In Forsyth v. Woods, 11 Wall. (U. S.) 484, 20 L. ed. 207, the court indicated its opinion in the following language: "If a firm be composed of two persons associated for the conduct of a particular branch of business, it can hardly be maintained that the joint contract of the two partners, made in their individual names, respecting a matter that has no connection with the firm business, creates a liability of the firm as such. The partnership is a distinct thing from the partners themselves, and it would seem that debts of the firm are different in character from other joint debts of the partners. If it is not so, the rule that sets apart the property of a partnership exclusively, in the first instance, for the payment of its debts, may be of little value. That rule presumes that a partnership debt was incurred for the benefit of the partnership, and that its property consists, in whole or in part, of what has been obtained from its creditors. The reason of the rule fails when a debt or liability has not been incurred for the firm as such, even though all the persons who compose the firm may be parties to the contract."

tachment or garnishment against all the partners as individuals has priority over a subsequent attachment or garnishment against the partnership.[5] Generally, in the case of a dormant partnership, priority in point of time gives priority in law, even as against a subsequent lien on the firm property as such.[6] The view has been taken that where the record or legal title of land is in tenants in common, though purchased by funds of a partnership comprised of such individuals, an attachment on the land against them as individuals has priority over a subsequent attachment or other lien on the land by firm creditors.[7] However, there is authority to the contrary. Of course, if the record title shows that the land is partnership property, the general rule applies.[8] When joint creditors acquire a lien on the joint assets, no subsequent disposition of the property by the several partners or by their separate attachment creditors can defeat such lien; it is a lien on the assets themselves, the firm creditors' rights are paramount; no agreement as to the order of sale can give the separate creditors a preference over them.[9]

XII. BONDS, RECEIPTS, AND THEIR ENFORCEMENT

A. The Attachment or Garnishment Bond

1. In General

§ 896. Generally.—Local statutes and practice, almost without exception, require that before an attachment or garnishment shall issue, the plaintiff shall give a bond conditioned to pay the costs and damages which the defendant may sustain by reason of the wrongful suing out of the writ. Under these acts the filing of the bond is held to be a condition precedent to the issuance of the writ.[10] However, attachment statutes sometimes do not require bonds to sustain the issuance of an attachment, at least of attachments based on certain grounds or for certain purposes.[11] A statute authorizing the attachment of property of a nonresident without an undertaking is not unconstitutional.[12] An attachment may be issued without the bond required by statute where the United States is the plaintiff in an action in a state court.[13]

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[5] Smith v. Smith Bros. 87 Iowa, 93, 54 N. W. 73, 43 Am. St. Rep. 359; Davis v. Delaware & H. Canal Co. 109 N. Y. 47, 15 N. E. 873, 4 Am. St. Rep. 418; Saunders v. Reilly, 105 N. Y. 12, 12 N. E. 170, 59 Am. Rep. 472; Richard v. Allen, 117 Pa. 199, 11 A. 552, 2 Am. St. Rep. 652 (after sale under the prior levy); Doner v. Stauffer, 1 Penr. & W. (Pa.) 198, 21 Am. Dec. 370.

Annotation: 75 A.L.R. 1011.

In Smith v. Smith Bros. 87 Iowa, 93, 54 N. W. 73, 43 Am. St. Rep. 359, a mortgage executed by the members of a firm to secure payment of the debts of the several individual partners was held to be superior to the liens of subsequent attachments by firm creditors.

In Saunders v. Reilly, 105 N. Y. 12, 12 N. E. 170, 59 Am. Rep. 472, it was said that all the members of a firm might sell the partnership property, even if wholly insolvent, to a purchaser in good faith, and that while the firm property would not pass under successive sales upon execution issued against each one of the individual partners, there was no apparent reason to doubt that it would pass under a sale upon a joint execution against all the partners issued upon a judgment recovered for any joint debt whatever.

[6] How v. Kane, 2 Pinney (Wis.) 531, 54 Am. Dec. 152 (obiter).

Annotation: 75 A.L.R. 1015.

[7] Cundey v. Hall, 208 Pa. 335, 57 A. 761, 101 Am. St. Rep. 938; Stover v. Stover, 180 Pa. 425, 36 A. 921, 57 Am. St. Rep. 654; Lefevre's Appeal, 69 Pa. 122, 8 Am. Rep. 229; Ridgway's Appeal, 15 Pa. 177, 53 Am. Dec. 586.

Annotation: 75 A.L.R. 1013.

Notably in Pennsylvania is this rule followed. See cases cited above.

In a Massachusetts case it was held that real estate purchased by partners with partnership funds for partnership use and convenience, but conveyed to them in such a manner as to make them tenants in common, must be considered at law as the several property of the partners as tenants in common, and must be dealt with according to the legal title, and so an attachment by an individual creditor for the separate debt of one was prior to a subsequent attachment for a firm debt. Annotation: 75 A.L.R. 999.

The New Jersey court of chancery takes exception to the Pennsylvania cases cited above. Annotation: 75 A.L.R. 997.

[8] See Savings & Loan Corp. v. Bear, 155 Va. 312, 154 S. E. 587, 75 A.L.R. 980.

Annotation: 75 A.L.R. 1013.

Generally as to when real estate is considered partnership property, see Partnership [Also 20 R. C. L. p. 790].

[9] Coover's Appeal, 29 Pa. 9, 70 Am. Dec. 149 (execution creditors).

[10] Java Cocoanut Oil Co. v. Fidelity & D. Co. (C. C. A. 9th) 300 F. 302, 39 A.L.R. 523; Erwin v. Commercial & R. Bank, 3 La. Ann. 186, 48 Am. Dec. 447; Mullen v. Sanborn, 79 Md. 364, 29 A. 522, 25 L.R.A. 721, 47 Am. St. Rep. 421; Mundil v. Hutson, 33 N. M. 388, 268 P. 566, 59 A.L.R. 522; Vickery v. Crawford, 93 Tex. 373, 55 S. W. 560,

§ 897. Discretion of Court to Permit Filing of Bond for Amount Smaller than That Required by Statute.—It is not within the discretion of the court to permit the filing of an attachment bond for an amount smaller than that required by the statute.[14] However, although upon a proper motion an attachment will be dissolved for failure to file a bond in the necessary amount, the view has been taken that the attachment is not rendered void by the fact that a bond for less than the requisite amount has been filed;[15] and if the judge or other officer erroneously decides that a defective bond is sufficient, such erroneous decision does not go to the jurisdiction to allow the writ,[16] but the error may be cured by filing a sufficient bond nunc pro tunc.[17]

§ 898. Construction of Bonds in Attachment Proceedings.—The primary rights and obligations of the parties to a bond given in an attachment or garnishment suit must be determined in view of the provisions of the law in force when the same is executed[18] and with regard to the object sought to be accomplished by the statute prescribing its execution.[19] The bond will be construed and enforced with respect to the terms of the statute requiring it,

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49 L.R.A. 773, 77 Am. St. Rep. 891; Allith-Prouty Co. v. Wallace, 32 Wyo. 392, 233 P. 144, 234 P. 504, 39 A.L.R. 513.

Annotation: 79 Am. Dec. 172; 89 Am. Dec. 658.

In New York the defendant may, together or in the alternative, move for, in addition to the vacation or modification of the warrant, an increase in the amount of the undertaking given by the plaintiff to procure the warrant. 7 Carmody, N. Y. Prac. p. 597.

The property of a citizen cannot be taken from his possession under any writ without a proper proceeding against him, in which security is given for the costs and damages which may result. Vickery v. Crawford, 93 Tex. 373, 55 S. W. 560, 49 L.R.A. 773, 77 Am. St. Rep. 891.

Where an order is made for the payment of the claim of a garnishing creditor out of a fund paid into court by a garnishee, upon the creditors giving a bond with sufficient sureties to refund the amount if he should be found not entitled to it, the bond so given is substituted for the fund. Bowden v. Schatzell, 8 S. C. Eq. (Bailey) 360, 23 Am. Dec. 170.

[11] Central Loan & T. Co. v. Campbell Commission Co. 173 U. S. 84, 43 L. ed. 623, 19 S. Ct. 346; State v. Marshall, 100 Miss. 626, 56 So. 792, Ann. Cas. 1914A, 434; Marsh v. Steele, 9 Neb. 96, 1 N. W. 869, 31 Am. Rep. 406; Byrd v. Rector, 112 W. Va. 192, 163 S. E. 845, 81 A.L.R. 1213.

A plaintiff in an attachment suit is not required by the West Virginia Code, chap. 38, § 8, art. 7, to give bond in order that he may garnish assets of the defendant in the hands of a third party. Byrd v. Rector, 112 W. Va. 192, 163 S. E. 845, 81 A.L.R. 1213.

[12] Central Loan & T. Co. v. Campbell Commission Co. 173 U. S. 84, 43 L. ed. 623, 19 S. Ct. 346; Marsh v. Steele, 9 Neb. 96, 1 N. W. 869, 31 Am. Rep. 406. See also Ownbey v. Morgan, 256 U. S. 94, 65 L. ed. 837, 41 S. Ct. 433, 17 A.L.R. 873.

A territorial statute permitting attachment against a nonresident without a bond, while requiring the bond for attachment against a resident, does not constitute a denial to the nonresident of the equal protection of the laws or of due process. Central Loan & T. Co. v. Campbell Commission Co. 173 U. S. 84, 43 L. ed. 623, 19 S. Ct. 346.

[13] United States v. Murdock, 18 La. Ann. 305, 89 Am. Dec. 651.

[14] Fleitas v. Cockrem, 101 U. S. 301, 25 L. ed. 954; Griffith v. Milwaukee Harvester Co. 92 Iowa, 634, 61 N. W. 243, 54 Am. St. Rep. 573; Duxbury v. Dahle, 78 Minn. 427, 81 N. W. 198, 79 Am. St. Rep. 408.

The fact that the amount of an attachment bond is fixed by an order of a judge makes no difference in Louisiana as to the effect of the invalidity of an insufficient bond upon the subsequent proceedings. According to the Code of that state as construed by its courts, the bond given by the attaching creditor must be for a sum exceeding by one half that which he claims. Fleitas v. Cockrem, 101 U. S. 301, 25 L. ed. 954.

[15] Fleitas v. Cockrem, 101 U. S. 301, 25 L. ed. 954; Griffith v. Milwaukee Harvester Co. 92 Iowa, 634, 61 N. W. 243, 54 Am. St. Rep. 573.

[16] Duxbury v. Dahle, 78 Minn. 427, 81 N. W. 198, 79 Am. St. Rep. 408.

[17] See infra, § 900.

[18] Jayne v. Platt, 47 Ohio St. 262, 24 N. E. 262, 21 Am. St. Rep. 810; Bedard v. Mahoney, 30 R. I. 469, 76 A. 113, 136 Am. St. Rep. 965.

[19] Jayne v. Platt, 47 Ohio St. 262, 24 N. E. 262, 21 Am. St. Rep. 810,

which will be read into it,[20] especially in any case where the construction to be given a bond is doubtful. However, the view has been taken that the language of an attachment or garnishment bond is to be strictly construed in favor of the obligors.[1] Moreover, it has been ruled that if the words in an undertaking in attachment are not sufficiently explicit or, if literally construed, would be nonsensical, the bond must be construed with reference to the intention of the parties, and that in doing this, it is allowable to depart from the letter of the condition, to reject meaningless words, and to supply obvious omissions in order to uphold the bond.[2]

2. Validity, Efficacy, and Amendments

§ 899. Validity and Efficacy as Obligation.—The sufficiency of an attachment bond to procure or sustain an attachment is to be distinguished from its validity and efficacy as an obligation.[3] It is a settled rule of law, applicable to attachment and garnishment as well as to other bonds generally, that bonds intended to be taken in compliance with statutes, though failing in such compliance, if entered into voluntarily and founded upon a valid consideration, and if they do not violate public policy or contravene any statute, constitute valid common-law obligations and will be enforced by common-law remedies.[4] If an undertaking in attachment shows a conclusive purpose and intention to indemnify the defendant, the omission or insertion of unimportant words, surplusage, or mere clerical errors, will not vitiate it.[5] Moreover, the view has been taken that the validity of a bond in attachment is not affected by a noncompliance with the statute prescribing the steps precedent to the execution of the obligation—as, for example, a failure of the officer issuing the attachment to require the plaintiff to make affidavit that one of the statutory grounds for attachment exists.[6] Accordingly, the misrecital of facts is of no importance where the facts misstated are matter of inducement to the obligation, and not necessary to be stated at all as inducement or otherwise, and as mere surplusage the recitals may be disregarded;[7] a variance between the bond and the attachment cannot be assigned as error when the recital in the bond is unnecessary;[8] it is immaterial that the surety, by mistake, signs his name to the justification of the undertaking, instead of to the undertaking itself, where, since the statute prescribes no rule as to the execution of the undertaking, a signing and delivery is sufficient;[9] and an attachment bond is valid although the names of the obligors signed at the bottom of the bond do not appear in the body thereof.[10] However, a bond which is signed in blank when delivered and afterwards filled in[11] or a bond exacted by an officer in an attachment case without authority of law is null and void.[12] Moreover, where authority to require the bond is made to depend upon the issuance of the writ of attachment, a bond executed in the absence of any writ is ineffectual to create any liability on the part of the purported obligors.[13]

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[20] Kimbrell v. Heffner, 163 S. C. 35, 161 S. E. 175, 80 A.L.R. 591.

[1] National Surety Co. v. Jean (C. C. A. 6th) 36 F. (2d) 468, 68 A.L.R. 1326; Bedard v. Mahoney, 30 R. I. 469, 76 A. 113, 136 Am. St. Rep. 965.

[2] Simmons Hardware Co. v. Alturas Commercial Co. 4 Idaho, 334, 39 P. 550, 95 Am. St. Rep. 66.

[3] As to the sufficiency of a bond to procure the attachment or garnishment, see infra, § 900.

[4] Pacific Nat. Bank v. Mixter, 124 U. S. 721, 31 L. ed. 567, 8 S. Ct. 718; Barnes v. Webster, 16 Mo. 258, 57 Am. Dec. 232; Bunneman v. Wagner, 16 Or. 433, 18 P. 841, 8 Am. St. Rep. 306; Plumley v. Stewart, 165 S. C. 316, 163 S. E. 777, citing R. C. L.

Annotation: 80 A.L.R. 595; 97 Am. St. Rep. 69; 81 Am. Dec. 475.

Although the statute may provide for the execution of a bond, yet the form of the obligation is not material; and if the instrument is technically an undertaking, it is valid and enforceable. A bond or undertaking, as either may be prescribed by statute, is designed to serve the same purpose and to stand upon the same consideration; and when an action is brought upon either, the obligation is governed by like principles. No distinction may be drawn on the ground that a bond is a writing under seal, and that since an undertaking is only a promise to pay the debt of another, and not under seal, no consideration can be presumed; but the same must be expressed in the writing. Bunneman v. Wagner, 16 Or. 433, 18 P. 841, 8 Am. St. Rep. 306; Plumley v. Stewart, 165 S. C. 316, 163 S. E. 777, citing R. C. L.

[5] Troy v. Rogers, 116 Ala. 255, 22 So. 486, 67 Am. St. Rep. 110; Simmons Hardware Co. v. Alturas Commercial Co. 4 Idaho, 334, 39 P. 550, 95 Am. St. Rep. 66; Boger v. Cedar Cove Lumber Co. 165 N. C. 557, 81 S. E. 784, Ann. Cas. 1917D, 116.

Annotation: L.R.A.1917B, 993.

[6] McLean v. Wright, 137 Ala. 644, 35 So. 45, 97 Am. St. Rep. 67.

[7] Troy v. Rogers, 116 Ala. 255, 22 So. 486, 67 Am. St. Rep. 110.

Annotation: L.R.A.1917B, 993.

[8] Annotation: 107 Am. St. Rep. 89f

The rule of de minimis non curat lex is applicable to attachment bonds, at least where the deficiency is less than $1. However, it has been held that the rule does not cure a deficiency in an attachment bond of more than $1.[14]

§ 900. Sufficiency to Procure or Sustain Attachment or Garnishment; Amendments and Additional Bonds.—In many jurisdictions in which the filing of a proper bond is made a prerequisite to the issuance of the attachment writ, the courts have refused, in the absence of express statutory authority, to permit amendments to be made to defective attachment bonds after the issuance of the writ, the view taken being that the requirement must be strictly and rigidly enforced, since the remedy of attachment is an unusual and extraordinary one.[15] At least, the rule has been stated, where the bond is a nullity because jurisdictionally defective, that a cure cannot be effected by amendment or the filing of a new undertaking.[16] However, under the authority of statutes which in express terms authorize amendments to attachment bonds, in many jurisdictions wherein the giving of a prescribed bond or undertaking is a prerequisite to the issuance of an attachment writ, attachment bonds have been held to be amendable subsequent to the issuance of the writ either by the giving of a new bond or by a correction of the old one. Where amendments are thus expressly authorized by statute, some decisions not only hold that the plaintiff may exercise that right on request, but go further and make it the duty of the court to give an opportunity for amendment before quashing the attachment proceedings.[17] In other jurisdictions such authority is based upon a liberal construction of amendment statutes generally, or of those relating to attachment.[18] The view has been taken that where an amendment

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[9] Boger v. Cedar Cove Lumber Co. 165 N. C. 557, 81 S. E. 784, Ann. Cas. 1917D, 116.

[10] McLean v. Wright, 137 Ala. 644, 35 So. 45, 97 Am. St. Rep. 67.

[11] Perminter v. McDaniel, 19 S. C. L. (1 Hill) 267, 26 Am. Dec. 179.

[12] Lowe v. Southern Surety Co. 55 S. D. 623, 227 N. W. 78, citing R. C. L.

Annotation: 56 Am. Dec. 332.

[13] Benedict v. Bray, 2 Cal. 251, 56 Am. Dec. 332.

[14] Annotation: 44 A.L.R. 184.

[15] Annotation: L.R.A.1917B, 1005; Ann. Cas. 1917D, 117.

If an attachment bond has been executed with fewer than the required number of sureties, it will be quashed or dismissed on motion; and where the statute requires at least two good and sufficient securities, a bond with but one surety is insufficient and cannot be amended. Annotation: 9 Ann. Cas. 708.

[16] Annotation: Ann. Cas. 1917D, 118.

An attachment bond providing that the plaintiff would prove his demand on a trial at law has been held jurisdictionally defective. Annotation: L.R.A.1917B, 1005.

The California Practice Act, § 553, requires an undertaking in attachment to pay all damages without limitation as to amount. Under this statute, a bond limiting damages to "not exceeding $100" is illegal. Annotation: L.R.A.1917B, 1005.

[17] Annotation: Ann. Cas. 1917D, 118.

[18] Griffith v. Milwaukee Harvester Co. 92 Iowa, 634, 61 N. W. 243, 54 Am. St. Rep. 573 (bond insufficient in amount); Boger v. Cedar Cove Lumber Co. 165 N. C. 557, 81 S. E. 784, Ann. Cas. 1917D, 116.

Annotation: 61 Am. Dec. 130; Ann. Cas. 1917D, 117.

In several jurisdictions in which there is no express statutory authority for amending an attachment bond, it has been held that amendments of defective bonds subsequent to the issuance of the writ are allowable under statutes authorizing generally in furtherance of justice the amendment of any pleading, process, or proceeding. Annotation: Ann. Cas. 1917D, 118.

If an attachment undertaking was inval-

is allowed, either by correcting the original undertaking or by substituting a new one, the effect is to validate the proceeding from its inception,[19] and that until a reasonable opportunity has been given to the plaintiff to perfect proceedings in which there are curable defects, such proceedings will be treated as valid.[20]

B. Dissolution and Release Bonds

1. In General

§ 901. **Generally.**[1]—The bond to dissolve an attachment or garnishment or to release property subject to the attachment or garnishment takes different forms in different jurisdictions. However, such bonds fall into one of two general classes.[2] The first class of bonds comprises those which are conditioned generally that if judgment in the attachment suit is rendered against the defendant, the property shall be forthcoming to satisfy the execution on such judgment, otherwise that the sureties will be bound to the extent of the value of the property, in some instances, and to the amount of the indebtedness, in other instances. These bonds are variously called "bail bonds," "forthcoming bonds," and "delivery bonds." Such bonds release the property only from the custody of the officer; they do not release it from the lien of the attachment.[3] Such a bond may also be called and be in the form of a replevy or refunding bond.[4]

The second class of bonds comprises those which are conditioned generally that the defendant in the attachment suit will perform whatever judgment may be entered against him in such attachment suit, and that in default thereof, and in the event that judgment is entered against such defendant, the sure-

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id where the surety signed his name to the justification, instead of to the undertaking, the court had power, on a motion to vacate, to permit the filing of a proper undertaking. Boger v. Cedar Cove Lumber Co. 165 N. C. 557, 81 S. E. 784, Ann. Cas. 1917D, 116.

A sufficient bond may be permitted to be filed nunc pro tunc where the court has erroneously permitted the issuance of an attachment on a bond insufficient in amount. Griffith v. Milwaukee Harvester Co. 92 Iowa, 634, 61 N. W. 243, 54 Am. St. Rep. 573; Duxbury v. Dahle, 78 Minn. 427, 81 N. W. 198, 79 Am. St. Rep. 408.

[19] Griffith v. Milwaukee Harvester Co. 92 Iowa, 634, 61 N. W. 243, 54 Am. St. Rep. 573.

Annotation: Ann. Cas. 1917D, 118.

[20] Griffith v. Milwaukee Harvester Co. 92 Iowa, 634, 61 N. W. 243, 54 Am. St. Rep. 573.

The fact that an additional bond in an attachment suit is not filed within the specified time does not discharge the attachment where it is filed before the institution of proceedings attacking the validity of the attachment and the rules of court allow amendments. State ex rel. Nenzel v. District Ct. 49 Nev. 145, 241 P. 317, 43 A.L.R. 1331.

[1] See also, as to receipts for the release of attached property, infra, §§ 931 et seq.

[2] Annotation: 80 A.L.R. 595.

The Ohio practice is to permit a release of the attached property, but not a discharge of the attachment, on a bond to produce property, and to permit a discharge of the attachment on a bond to pay judgment. 4 Ohio Jur. pp. 263, 264. See also Jaynes v. Platt, 47 Ohio St. 262, 24 N. E. 262, 21 Am. St. Rep. 810; Fortman v. Rottier, 8 Ohio St. 548, 72 Am. Dec. 606.

The Pennsylvania practice is to permit a bond to dissolve a foreign attachment and a bond to release property subject to, but not to dissolve, a fraudulent debtor's attachment. See Standard Pa. Prac. Vol. 10.

The North Dakota statute makes provision for the discharge of an attachment upon the application of the defendant when he furnishes an undertaking. Kelly v. Stockgrowers Credit Corp. — N. D. —, 263 N. W. 717, 103 A.L.R. 460.

[3] Krippendorf v. Hyde, 110 U. S. 276, 28 L. ed. 145, 4 S. Ct. 27; King v. Watson, 51 Colo. 293, 117 P. 165, Ann. Cas. 1913B, 178; Floyd v. Cook, 118 Ga. 526, 45 S. E. 441, 63 L.R.A. 450; Waterman v. Treat, 49 Me. 309, 77 Am. Dec. 261; Smith v. Lacey, 86 Miss. 295, 38 So. 311, 109 Am. St. Rep. 707 (a forthcoming bond); People v. Metropolitan Surety Co. 205 N. Y. 135, 98 N. E. 412, Ann. Cas. 1913D, 1180; Bunneman v. Wagner, 16 Or. 433, 18 P. 841, 8 Am. St. Rep. 306; St. Joseph Stockyards Co. v. Love, 57 Utah, 450, 195 P. 305, 25 A.L.R. 569.

Annotation: 21 A.L.R. 272; 36 A.L.R. 449; 37 A.L.R. 1402; 80 A.L.R. 595; 81 A.L.R. 81; 89 A.L.R. 266; L.R.A.1916F, 589.

The giving of a delivery bond does not divest the lien of an attachment upon goods which remain, in contemplation of law, in the possession of the officer. Krippendorf v. Hyde, 110 U. S. 276, 28 L. ed. 145, 4 S. Ct. 27.

[4] Gordon v. Kentucky Midland Coal Co. 152 Tenn. 367, 278 S. W. 68, 42 A.L.R. 1052.

ties will pay the amount thereof. A bond of this class not only releases the officer from the further liability as to the care and custody of the property, but also releases the property itself from the lien of such attachment, working an entire dissolution of the attachment so far as the property is concerned, in consequence whereof the bond itself is held as a substitute of the res.[5] As these bonds are unknown to the common law and are purely the creatures of statutory law, it is necessary, of course, to look to the law of their creation for the definition of their character and their operation on the rights of the parties.[6] Where the mode is provided by statute in which the sheriff is authorized to release attached property, such officer cannot take any other obligation or security from the defendant or another for the purpose of such release than that authorized by the statute.[7] Under modern statutes a married woman has become a person sui juris and may procure the dissolution of an attachment of her property by giving the statutory bond.[8] If, after attached property is surrendered to the defendant in pursuance of a delivery bond, it is seized and taken from his possession under another writ, whereupon he executes, with sureties, another delivery bond and again gains possession of the property and, on judgment being recovered against him in the second action, surrenders possession of the property to an officer pursuant to the terms of the second bond, he cannot maintain an action against the second officer for the possession of the property, even though the second levy, by reason of the first, was unauthorized.[9]

§ 902. Duty to Give Bond and Procure Return of Property to Mitigate Damages.—In some cases the courts have taken the position that if the owner is financially able to do so, he must procure the return of his wrongfully attached property by giving a bond, thereby reducing the damages resulting from the wrongful attachment. Of course, if he is not financially able to procure an undertaking, the law will not require him to do so or lose his right to damages. In such a case he will be entitled to rely on the rule of compensation.[10]

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[5] Pacific Nat. Bank v. Mixter, 124 U. S. 721, 31 L. ed. 567, 8 S. Ct. 718; Johnson v. Chicago & P. Elevator Co. 119 U. S. 388, 30 L. ed. 447, 7 S. Ct. 254; Inbusch v. Farwell, 1 Black (U. S.) 566, 17 L. ed. 188; United States v. Morrison, 4 Pet. (U. S.) 124, 7 L. ed. 804; Smith v. Heineman, 118 Ala. 195, 24 So. 364, 72 Am. St. Rep. 150; Koehler v. Serr, 216 Cal. 143, 13 P. (2d) 673, 89 A.L.R. 262; Stevenson v. Palmer, 14 Colo. 565, 24 P. 5, 20 Am. St. Rep. 295; Worstman v. Wade, 77 Ga. 651, 4 Am. St. Rep. 102; Fidelity & D. Co. v. Bowen, 123 Iowa, 356, 98 N. W. 897, 6 L.R.A.(N.S.) 1021; Cole v. Parker, 7 Iowa, 167, 71 Am. Dec. 439; Toelle v. Sells-Floto Shows Co. 111 Kan. 562, 207 P. 849, citing R. C. L.; Rogers v. Abbot, 206 Mass. 270, 92 N. E. 472, 138 Am. St. Rep. 394; Walsh v. Brown, 194 Mass. 317, 80 N. E. 465, 120 Am. St. Rep. 556; Olds v. City Trust, S. D. & Surety Co. 185 Mass. 500, 70 N. E. 1022, 102 Am. St. Rep. 356; Fidelity & D. Co. v. B. F. Sturtevant Co. 86 Miss. 509, 38 So. 783, 109 Am. St. Rep. 716; Smith v. Lacey, 86 Miss. 295, 38 So. 311, 109 Am. St. Rep. 707; Martin v. McBryde, 182 N. C. 175, 108 S. E. 739, 21 A.L.R. 12; Jaynes v. Platt, 47 Ohio St. 262, 24 N. E. 262, 21 Am. St. Rep. 810; Moffitt v. Garrett, 23 Okla. 398, 100 P. 533, 32 L.R.A.(N.S.) 401, 138 Am. St. Rep. 818; Bedard v. Mahoney, 30 R. I. 469, 76 A. 113, 136 Am. St. Rep. 965; Nighbert v. Hornsby, 100 Tenn. 82, 42 S. W. 1060, 66 Am. St. Rep. 736; Portis v. Parker, 8 Tex. 23, 58 Am. Dec. 95.

Annotation: 21 A.L.R. 272; 36 A.L.R. 449; 37 A.L.R. 1402; 80 A.L.R. 595; 81 A.L.R. 81; 89 A.L.R. 266; 18 L.R.A.(N.S.) 1273; 123 Am. St. Rep. 1049; 12 Ann. Cas. 170.

Where, at the instance of the attachment debtor, a bond is substituted for the lien of the attachment, the original lien of the attachment is represented by the bond out of which judgment entered against the debtor may be satisfied. Martin v. McBryde, 182 N. C. 175, 108 S. E. 739, 21 A.L.R. 12.

Under a statute providing that an attachment bond "may be in a penalty of double the amount specified in the affidavit, annexed to the writ, as due to the plaintiff, conditioned for the payment of any judgment which may be recovered by the plaintiff in the suit commenced by such attachment, within sixty days after such judgment shall be rendered," the court held that a bond in the penalty of $5,600, to pay whatever judgment should be obtained, was within the statute where the judgment rendered was in the sum of $2,884.48 and costs. Huff v. Hutchinson, 14 How. (U. S.) 586, 14 L. ed. 553.

[6] Bank of United States v. Patton, 5 How. (Miss.) 200, 35 Am. Dec. 428.

[7] Cole v. Parker, 7 Iowa, 167, 71 Am. Dec. 439.

[8] Binney v. Globe Nat. Bank, 150 Mass. 574, 23 N. E. 380, 6 L.R.A. 379.

[9] Stevenson v. Palmer, 14 Colo. 565, 24 P. 5, 20 Am. St. Rep. 295.

§ 903. Requirement of Bail or Security as Condition of Right to Appear and Defend.[11]—By the custom of London a defendant could not appear or raise an issue about the debt claimed without entering special bail or surrendering his body. Hence, it naturally came about that the American colonies and states, in adopting foreign attachment as a remedy for collecting debts due from nonresident or absconding debtors, in many instances, made it a part of the procedure that if the defendant desired to enter an appearance and contest the plaintiff's demand, he must first give substantial security, usually in the form of special bail.[12] Such a requirement does not violate the due process[13] or privileges and immunities[14] clauses of the Federal Constitution.[15] Furthermore, no denial of the equal protection of the laws results from the provision of a foreign attachment statute under which a nonresident individual defendant is debarred from appearing and defending without first giving special security, while a foreign corporate defendant may appear and answer without giving any security except for the lien of the process upon the property attached.[16]

§ 904. Right of Sureties to Reimbursement, Subrogation, Contribution, Possession, and Injunctive Relief.—The principal and surety relationship on an attachment or garnishment bond is governed by the law of suretyship as it applies to that relationship on bonds generally.[17] Accordingly, a surety, upon actually paying the debt upon such a bond, where he is under legal obligation to make such payment, generally becomes entitled to reimbursement from the principal,[18] to contribution from cosureties to equalize the common burden,[1] and to subrogation to the lien of the attachment or garnishment to secure his rights.[2]

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[10] W. B. Moses & Sons v. Lockwood, 54 App. D. C. 115, 295 F. 936, 33 A.L.R. 1467.
Annotation: 33 A.L.R. 1479.

In W. B. Moses & Sons v. Lockwood, 54 App. D. C. 115, 295 F. 936, 33 A.L.R. 1467, it was held that one whose automobile had been wrongfully seized under an attachment was under a duty to procure its return by giving a bond with approved security, if financially able to do so, and thus to reduce the damages for the wrongful seizure. It was stated, however, that the owner would not lose his right to damages if he was financially unable to procure the necessary bond.

[11] Generally as to the effect of bonds in attachment or garnishment proceedings as constituting an appearance, see infra, § 948; as conferring jurisdiction on the court, see Vol. 4, p. 582, § 53.

[12] Ownbey v. Morgan, 256 U. S. 94, 65 L. ed. 837, 41 S. Ct. 433, 17 A.L.R. 873, stating this to have been the rule in Delaware, Maryland, New Jersey, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, and Virginia.
Annotation: 17 A.L.R. 884.

[13] Ownbey v. Morgan, 256 U. S. 94, 65 L. ed. 837, 41 S. Ct. 433, 17 A.L.R. 873.
Annotation: 17 A.L.R. 884.

[14] Ownbey v. Morgan, 256 U. S. 94, 65 L. ed. 837, 41 S. Ct. 433, 17 A.L.R. 873.
Annotation: 17 A.L.R. 884.

[15] In Ownbey v. Morgan, 256 U. S. 94, 65 L. ed. 837, 41 S. Ct. 433, 17 A.L.R. 873, the court sustained the validity of the Delaware statutes which afforded a nonresident individual defendant in a suit begun by a foreign attachment an opportunity to appear and defend only in case he gave bail or security for the discharge of the property seized to the value of such property and costs. The decision was based on cases which showed the custom of requiring special bail as a condition of appearance, but which did not discuss the validity of statutory provisions making this requirement.

[16] Ownbey v. Morgan, 256 U. S. 94, 65 L. ed. 837, 41 S. Ct. 433, 17 A.L.R. 873.

No other case than the above, expressly passing on the question of the constitutionality of such a statute, has been found. Attention is called, however, to several illustrative cases not involving attachment in which the right to make a defense was conditional. Annotation: 17 A.L.R. 885.

[17] Judgment on a forthcoming bond does not destroy the relation of principal and surety existing between the parties to the bond. Newell v. Hamer, 4 How. (Miss.) 684, 35 Am. Dec. 415.

See SURETYSHIP [Also PRINCIPAL AND SURETY, 21 R. C. L. p. 940].

[18] Edgerly v. Emerson, 23 N. H. 555, 55 Am. Dec. 207.

See SURETYSHIP [Also PRINCIPAL AND SURETY, 21 R. C. L. p. 1097, §§ 134 et seq.].

Sureties on a delivery bond induced to become such by representations that the property had been levied on, when in fact no legal levy had been made, are not bound and may have an injunction against the enforcement of their liability.[3]

2. VALIDITY, EFFICACY, AND WAIVER OF DEFECTS

§ 905. Generally.—The general rule is that a mere informality will not void a bond to dissolve an attachment or garnishment or release attached or garnished property.[4] The omission of words[5] or misrecitals in the bond[6] do not ordinarily vitiate it. Also, the fact that attached property is not in the name of the attachment debtor does not invalidate a bond for its release, on the giving of which the attachment is dissolved;[7] nor are the obligors in a bond released from liability for its forthcoming to meet the exigencies of executions against the real owner because of misrecitals in the obligation of its ownership.[8] However, a bond delivered with a blank left for the insertion of the amount is not the deed of the party signing; nor will it become so unless there is a redelivery thereof after the blanks have been filled in by someone properly authorized.[9]

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[1] Preston v. Preston, 4 Gratt. (Va.) 88, 47 Am. Dec. 717 (forthcoming bond for property taken on execution).

The sureties of one of the joint debtors in a forthcoming bond become, on the forfeiture thereof, sureties for the debt; hence, when they have discharged the same, they are entitled to be substituted to all the rights of the creditors against the original debtors subsisting at the time they became so bound for the debt. They may, therefore, have a decree against the other joint debtors, or either of them, as each is liable for the whole debt. However, they cannot charge them for the execution and forfeiture of the forthcoming bond. Robinson v. Sherman, 2 Gratt. (Va.) 178, 44 Am. Dec. 381.

However, a surety on a supersedeas bond on appeal in an action based on attachment dissolved on execution of a release bond, which supersedeas bond was entered into without the request of the sureties on the release bond, is not, on payment of the judgment after affirmance, entitled by right of subrogation to look to the sureties on the release bond for reimbursement. Fidelity & D. Co. v. Bowen, 123 Iowa, 356, 98 N. W. 897, 6 L.R.A.(N.S.) 1021.

See SURETYSHIP [Also PRINCIPAL AND SURETY, 21 R. C. L. p. 1130, §§ 167 et seq.].

[2] Edgerly v. Emerson, 23 N. H. 555, 55 Am. Dec. 207.

However, sureties on a delivery bond under which attached property has been surrendered to the defendant by the officer levying the writ have no right to the possession thereof before the entry of final judgment in the action, and hence cannot maintain an action of replevin against an officer who subsequently seizes the property under another writ. Stevenson v. Palmer, 14 Colo. 565, 24 P. 5, 20 Am. St. Rep. 295.

See SURETYSHIP [Also PRINCIPAL AND SURETY, 21 R. C. L. p. 1112, § 148].

[3] Bradley v. Kesee, 5 Coldw. (Tenn.) 223, 94 Am. Dec. 246.

[4] Williams v. Lyles, 2 Cranch (U. S.) 9, 2 L. ed. 191; Troy v. Rogers, 116 Ala. 255, 22 So. 486, 67 Am. St. Rep. 110; Fidelity & D. Co. v. Bowen, 123 Iowa, 356, 98 N. W. 897, 6 L.R.A.(N.S.) 1021; Doe ex dem. Robinson v. Parker, 3 Smedes & M. (Miss.) 114, 41 Am. Dec. 614; Evans v. Matson, 51 Pa. 366, 88 Am. Dec. 584.

If a forthcoming bond shows on its face that it was given for the forthcoming of certain property levied on and claimed as exempt, identifies the contest with respect to the pendency of which it is given, and shows that the obligors bind themselves to the forthcoming of the particular property involved in the contest, it is sufficient as a statutory obligation and in respect of the summary proceedings on it authorized by statute, and its validity or sufficiency is not affected by the fact that it erroneously recites the levy of an execution on the property when the levy in question was in fact that of an attachment. Troy v. Rogers, 116 Ala. 255, 22 So. 486, 67 Am. St. Rep. 110.

[5] **The omission of the words "aforesaid property"** in a forthcoming bond after the words "shall have forthcoming and deliver" does not vitiate the bond, as these words are supplied by intendment. Doe ex dem. Robinson v. Parker, 3 Smedes & M. (Miss.) 114, 41 Am. Dec. 614.

[6] **A forthcoming bond** which, in reciting the execution, states the cost to be slightly in excess of the correct amount is not thereby vitiated if the aggregate of debts and costs is truly stated, but will support a judgment on motion. Williams v. Lyles, 2 Cranch (U. S.) 9, 2 L. ed. 191.

[7] Fidelity & D. Co. v. Bowen, 123 Iowa, 356, 98 N. W. 897, 6 L.R.A.(N.S.) 1021.

[8] Evans v. Matson, 51 Pa. 366, 88 Am. Dec. 584.

[9] Sievers v. Samuel, 172 La. 1005, 136 So. 33, citing R. C. L.; Williams v. Crutcher, 5 How. (Miss.) 71, 35 Am. Dec. 422.

The dissolution of the attachment alone is a sufficient consideration for a release bond.[10]

§ 906. Waiver of Defects and Irregularities.—A plaintiff may waive defects and irregularities in a bond to dissolve an attachment or garnishment or to release attached or garnished property;[11] and if he does so, there is no reason why the bond should not be binding on the signers[12] or why anyone else should object to its validity.[13] Thus, the plaintiff, for whose protection the bond is executed, may waive its formal approval by the sheriff or clerk, as provided by statute, and accept it as tendered under the statute, without invalidating its efficacy as a statutory release bond.[14]

§ 907. Formal Approval.—Bonds for the discharge of attachments are required in some states to be approved officially, the purpose of approval being that by exacting specific approval, mistakes in receiving bonds executed by persons of doubtful responsibility are thereby more likely to be avoided. It is a condition to the acceptance of the bond by the officer, however, without which, in the absence of a waiver, the attachment is not dissolved. Nor can the bond, without approval, be deemed statutory, whatever its efficacy as a common-law obligation. But the plaintiff, for whose protection the bond is executed, may waive the formality of approval and accept it as tendered under the statute, without invalidating its efficacy as a statutory release bond.[15]

§ 908. Obligation Valid as Common-law Recognizance Despite Defectiveness as Statutory Bond.—It is a familiar principle, applicable to bonds in attachment or garnishment proceedings as well as to bonds generally, that though voluntary and not authorized by, or not in accord with, statutory provision, if they do not contravene public policy or violate any statute, they are valid and binding on the parties to them.[16] Accordingly, it is a settled rule that bonds intended to be taken in compliance with statutes, but failing in such compliance, nevertheless constitute, if entered into voluntarily and founded upon a valid consideration and if not violative of public policy or in contravention of any statute, valid common-law obligations and will be enforced by common-law remedies.[17] Thus, a surety on a release bond cannot escape liability thereon because it was accepted by the parties by stipulation and not approved by the officer as provided by statute.[18] This does not mean that a bond insufficient under the statute will ground the dissolution of an attachment or garnishment or the release of attached or garnished property, but only that if it is given that effect, it will be binding between the parties as an undertaking if it is sufficient for that purpose.

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[10] Fidelity & D. Co. v. Bowen, 123 Iowa, 356, 98 N. W. 897, 6 L.R.A.(N.S.) 1021.

[11] Ibid.

It would seem, in any case, that the statutory requirement of more than one surety may be dispensed with by the party for whose benefit the bond is taken. And it has been held that a statutory requirement that there shall be two sureties in a bond to procure the discharge of an attachment upon a vessel may be dispensed with by the creditor without invalidating the bond. Annotation: 9 Ann. Cas. 708.

[12] Sievers v. Samuel, 172 La. 1005, 136 So. 33, citing R. C. L.; Coffee v. Planters' Bank, 11 Smedes & M. (Miss.) 458, 49 Am. Dec. 68.

[13] Sievers v. Samuel, 172 La. 1005, 136 So. 33, citing R. C. L.; Walker v. McDowell, 4 Smedes & M. (Miss.) 118, 43 Am. Dec. 476.

[14] Fidelity & D. Co. v. Bowen, 123 Iowa, 356, 98 N. W. 897, 6 L.R.A.(N.S.) 1021.

[15] Ibid.

[16] Pacific Nat. Bank v. Mixter, 124 U. S. 721, 31 L. ed. 567, 8 S. Ct. 718; McLean v. Wright, 137 Ala. 644, 35 So. 45, 97 Am. St. Rep. 67; Barnes v. Webster, 16 Mo. 258, 57 Am. Dec. 232; Plumley v. Stewart, 165 S. C. 316, 163 S. E. 777, citing R. C. L.

Annotation: 80 A.L.R. 595.

However, it has been held that where a statutory bond to release property would become effective if the attachment should be "sustained," a bond to become effective if the attachment was "discharged" was inoperative and no recovery could be had on it even as a common-law obligation. Annotation: L.R.A.1917B, 1005.

[17] Pacific Nat. Bank v. Mixter, 124 U. S. 721, 31 L. ed. 567, 8 S. Ct. 718; Fidelity & D. Co. v. Bowen, 123 Iowa, 356, 98 N. W. 897, 6 L.R.A.(N.S.) 1021; Barnes v. Webster, 16 Mo. 258, 57 Am. Dec. 232; Bunneman v. Wagner, 16 Or. 433, 18 P. 841, 8 Am. St. Rep. 306; Plumley v. Stewart, 165 S. C. 316, 163 S. E. 777, citing R. C. L.

Annotation: 80 A.L.R. 595; 97 Am. St. Rep. 69; 81 Am. Dec. 475.

The failure to procure more than one surety to an attachment bond does not invalidate it so as to relieve the single surety from liability thereon in case of a breach of its conditions. Annotation: 9 Ann. Cas. 708.

§ 909. Bond Void where Attachment Void.—The general rule is that an attachment which is void will not sustain a bond given to discharge it or to release property levied on under it, and that principal or surety on such a bond, in an action to enforce his liability thereon, may show that the attachment was void.[19] Nor is the bond binding as a common-law bond.[20]

A delivery bond exacted by legal coercion for property exempt from execution, but levied on without the defendant's assent, is no recognition of the validity of the levy or waiver of the defendant's right, but is void and equity will relieve against it.[1]

§ 910. Attacking the Bond.—While ordinarily, if a bond is irregularly taken, it may be quashed on the motion of either party,[2] as a general rule, a party to a forthcoming bond cannot have it quashed after the return term,[3] although it is never too late for one who is not a party to it to object to its operating to charge him, since as to him it is void.[4]

It has been held that relief upon the motion of a surety on a forthcoming bond may be granted in a proper case in the court in which the bond was taken, which court may direct an exoneretur of the surety, and need not require him to seek his remedy by audita querela or by a bill in chancery.[5]

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[18] Fidelity & D. Co. v. Bowen, 123 Iowa, 356, 98 N. W. 897, 6 L.R.A.(N.S.) 1021.

[19] Pacific Nat. Bank v. Mixter, 124 U. S. 721, 31 L. ed. 567, 8 S. Ct. 718; Fleitas v. Cockrem, 101 U. S. 301, 25 L. ed. 954; Koehler v. Serr, 216 Cal. 143, 13 P. (2d) 673, 89 A.L.R. 262; Murphy v. Montandon, 3 Idaho, 325, 29 P. 851, 35 Am. St. Rep. 279. See also Ex parte Cheatham, 6 Ark. 531, 44 Am. Dec. 525; Murphy v. Montandon, 3 Idaho, 325, 29 P. 851, 35 Am. St. Rep. 279; Olson v. Nunnally, 47 Kan. 391, 28 P. 149, 27 Am. St. Rep. 296; Jaynes v. Platt, 47 Ohio St. 262, 24 N. E. 262, 21 Am. St. Rep. 810; Lowe v. Southern Surety Co. 55 S. D. 623, 227 N. W. 78, citing R. C. L. (holding rule not applicable to facts of case). Bradley v. Kesee, 5 Coldw. (Tenn.) 223, 94 Am. Dec. 246.

Annotation: 89 A.L.R. 277; 32 L.R.A. (N.S.) 407.

Where property of a national bank was attached in contravention of a Federal statute (12 U. S. C. A. § 91), it was held, in Pacific Nat. Bank v. Mixter, 124 U. S. 721, 31 L. ed. 567, 8 S. Ct. 718, that the sureties on a bond given to release such property, which was conditioned to pay any judgment which might be rendered against the bank, were not bound and could assert the invalidity of the attachment, since, there being no authority of law for the attachment, there could be none for taking the bond, which was consequently not good under the statute or at common law, because there was no sufficient foundation to support it.

[20] Pacific Nat. Bank v. Mixter, 124 U. S. 721, 31 L. ed. 567, 8 S. Ct. 718.

Where a writ of attachment was void because issued on the clerk's own fiat, and not granted by a court or judge, it was held that a replevin bond given to the sheriff to release property levied on under the attachment was not authorized by law, and that no decree could properly be entered thereon against the sureties. Annotation: 89 A.L.R. 277.

[1] Perry v. Hensley, 14 B. Mon. (Ky.) 474, 61 Am. Dec. 164. See also Eltzroth v. Webster, 15 Ind. 21, 77 Am. Dec. 78, wherein it was held that giving up property under a writ and executing a delivery bond therefor do not estop the execution defendant from claiming the property as exempt from execution at any time before sale, and that since the levy has to be made, there is no good reason why the fact that the property was given up should be considered a waiver of the right to claim it as exempt from sale.

The payment of money by a person to free his goods from an attachment sued out for the purpose of extortion by one who knows that he has no valid cause of action has been held to be a compulsory payment and recoverable as such. Spaids v. Barrett, 57 Ill. 289, 11 Am. Rep. 10; Chandler v. Sanger, 114 Mass. 364, 19 Am. Rep. 367; Adams v. Reeves, 68 N. C. 134, 12 Am. Rep. 627; Collins v. Westbury, 2 S. C. L. (2 Bay) 211, 1 Am. Dec. 643. Annotation: Ann. Cas. 1913A, 1355.

[2] Steele v. Boyd, 6 Leigh (Va.) 547, 29 Am. Dec. 218.

[3] Coffee v. Planters' Bank, 11 Smedes & M. (Miss.) 458, 49 Am. Dec. 68.

[4] Doe ex dem. Smith v. Roe, 4 Smedes & M. (Miss.) 261, 43 Am. Dec. 483.

3. Accrual and Measure of Liability

§ 911. Accrual of Liability.—The general rule is that liability of obligors on a bond to dissolve or release an attachment is fixed by judgment against the defendant in the attachment, according to their undertaking,[6] and there is a breach of such a bond when the sureties fail to pay the amount of the judgment within the statutory period after its rendition.[7] The obligors on a forthcoming bond are bound thereby without an express demand or notice from the obligee to deliver the property.[8] The view has been taken that it is the final judgment of the appellate court that determines liability. Sureties are not exonerated from liability by judgment of the trial court for the defendant and dissolution of the attachment, where an appellate court on a trial de novo renders judgment for the plaintiff and sustains the attachment.[9]

Where the statute under which a release bond is given forms a part of the bond and provides that in case the plaintiff in the attachment action should be entitled to recover, judgment might go against the surety on the bond, the surety, by signing the bond, is bound by the statute and virtually consents that judgment may go against him in the action.[10]

§ 912. Measure of Liability.—The extent of the liability upon a bond for the release of property from attachment depends upon the terms and conditions of the bond actually given.[11] A bond given to obtain the redelivery to the defendant of the property attached, and conditioned upon the return of such property, limits the liability to the extent of the value of the property.[12] But a bond conditioned upon the payment to the plaintiff of the amount of the judgment that may be rendered against the defendant imposes a liability in the amount of such judgment.[13] Indeed, where both statute and bond are conditioned solely for the payment of the judgment recovered by the attachment plaintiff, liability is not limited to the value of the property released, although the plaintiff and the defendant in attachment have stipulated as to the value of such property in lieu of an appraisal.[14]

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[5] Steele v. Boyd, 6 Leigh (Va.) 547, 29 Am. Dec. 218.

[6] People v. Metropolitan Surety Co. 205 N. Y. 135, 98 N. E. 412, Ann. Cas. 1913D, 1180; Jaynes v. Platt, 47 Ohio St. 262, 24 N. E. 262, 21 Am. St. Rep. 810.

Annotation: 40 L.R.A.(N.S.) 743.

The liability of a surety for the return of attached property is contingent, though the receipt given for the return of the property is absolute in terms. Goldberg v. Parker, 87 Conn. 99, 87 A. 555, 46 L.R.A. (N.S.) 1097, Ann. Cas. 1914C, 1059.

When a bond given to dissolve an attachment is conditioned for the payment of any judgment which may be recovered in the action, the sureties cannot require the obligee to exhaust any collateral securities which he may have held before taking judgment in the action in which the bond was given. If the sureties have any interest or concern with the action of the obligee in such collateral, it can be no more than a right to subrogation on the payment of the bond. Olds v. City Trust, S. D. & Surety Co. 185 Mass. 500, 70 N. E. 1022, 102 Am. St. Rep. 356.

A forthcoming bond in an attachment suit cannot be held to be conditioned upon the outcome of an intervention suit to test title to the property, which was not instituted until nearly a week after the bond was executed. Cermak v. Schaaf, 308 Ill. 61, 139 N. E. 39, 37 A.L.R. 1398.

[7] Rogers v. Abbot, 206 Mass. 270, 92 N. E. 472, 138 Am. St. Rep. 394.

[8] King v. Watson, 51 Colo. 293, 117 P. 165, Ann. Cas. 1913B, 178; Janes v. Horton, 32 Ga. 245, 79 Am. Dec. 300.

If a bond given to release an attachment contains a provision that it shall be void if at any time after final judgment, the goods, on request therefor, shall be returned to the officer taking the bond, it has been held that the possession of an execution on such judgment is not necessary to enable the officer to demand a return of the property. Tucker v. Carr, 20 R. I. 477, 40 A. 1, 78 Am. St. Rep. 893.

[9] King v. Watson, 51 Colo. 293, 117 P. 165, Ann. Cas. 1913B, 178.

[10] Johnson v. Chicago & P. Elevator Co. 119 U. S. 388, 30 L. ed. 447, 7 S. Ct. 254.

[11] Annotation: 80 A.L.R. 595.

[12] Annotation: 80 A.L.R. 595.

[13] Kimbrell v. Heffner, 163 S. C. 35, 161 S. E. 175, 80 A.L.R. 591.

Annotation: 80 A.L.R. 597.

These bonds usually contain a penalty, and it is a fundamental rule that the extent of the surety's liability is limited by the penalty in the bond.

4. Discharge and Estoppel

a. What Operates to Discharge Liability

§ 913. Generally.—A defendant who has given a bond to secure the redelivery of his property or release it from the attachment or garnishment lien is discharged of all liability on such bond by a judgment in the principal case in his favor. He is likewise discharged by a decision to the effect that the attachment or garnishment is invalid. The surety on such bond is discharged by anything which discharges the principal obligor and, in addition thereto, is discharged under the rules applicable to the suretyship relation generally.[15] He may be discharged by an extension of time without his knowledge or consent. Such a discharge arises generally where the record or pleading is amended by the introduction of a new cause of action or different measure of damages; by an amendment to the prejudice of the surety; by judgment or favorable outcome for the defendant; sometimes by the death, bankruptcy, or insolvency of the defendant, depending upon the condition of the bond and the effect of such event on the attachment or garnishment;[16] or by a binding agreement with the principal debtor enlarging the time of payment without the consent of the surety.[17] As to a forthcoming or redelivery bond, which generally does not effect the dissolution of the attachment or garnishment,[18] the surety will be discharged by subsequent events or transactions having the effect of discharging the attachment or garnishment or releasing the attached or garnished property from the lien of the same.[19] Liability of

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[14] Kimbrell v. Heffner, 163 S. C. 35, 161 S. E. 175, 80 A.L.R. 591.

Where an $8,000 bond was given to release an attachment upon property of the actual value of $1,000, the condition being that if, upon judgment being rendered for the plaintiff, the property should be returned, the obligation should be void, the statute providing for a bond in double the appraised value "conditioned for the return of the said property in case judgment shall be rendered for the plaintiff," it was held that, there having been no appraisal of the property as provided for by the statute, the liability on the bond was the penal sum thereof, not exceeding the amount of the judgment rendered, irrespective of the value of the property. Annotation: 80 A.L.R. 599.

[15] See Suretyship [Also Principal and Surety, 21 R. C. L. p. 1000, §§ 50 et seq.].

[16] See infra, §§ 914 et seq.

Generally, as to effect of death, bankruptcy, or insolvency of defendant on attachment, see Vol. 4, p. 928, §§ 625 et seq.; on garnishment, see supra, §§ 742 et seq.

[17] **It has been held** that a surety on a forthcoming bond is released if the creditor makes an agreement with the principal debtor to give the latter time and to take a specified sum payable in annual instalments in satisfaction of the bond. Steele v. Boyd, 6 Leigh (Va.) 547, 29 Am. Dec. 218.

A mere voluntary indulgence to the debtor, however, is not within the policy of this rule, and abridges none of the rights of the creditor. There must be a positive and binding agreement, and for this purpose it must be based on some new and valuable consideration which is sufficient to tie up the creditor and prevent him from asserting any remedy during the time for which the indulgence has been given (see Suretyship [Also Principal and Surety, 21 R. C. L. p. 940]). Holding up execution on a forthcoming bond does not, therefore, discharge the surety, where it is a voluntary act on the part of the creditor, for which no consideration has been given (Wright v. Yell, 13 Ark. 503, 58 Am. Dec. 336; Blandford v. Barger, 9 Dana (Ky.) 22, 33 Am. Dec. 519), even though during the time that the writ is so held, the principal debtor becomes insolvent (Newell v. Hamer, 4 How. (Miss.) 684, 35 Am. Dec. 415).

[18] See supra, § 901.

[19] Inbusch v. Farwell, 1 Black (U. S.) 566, 17 L. ed. 188; Crook Horner Co. v. Gilpin, 112 Md. 1, 75 A. 1049, 28 L.R.A.(N.S.) 233, 136 Am. St. Rep. 376; Jaynes v. Platt, 47 Ohio St. 262, 24 N. E. 262, 21 Am. St. Rep. 810.

However, see King v. Watson, 51 Colo. 293, 117 P. 165, Ann. Cas. 1913B, 178, holding the surety still liable where, on a trial de novo, judgment for the defendant was reversed and the attachment sustained after it had been dissolved in a proceeding in a justice court.

This rule, of course, does not apply to a bond to dissolve an attachment or garnish-

both principal and surety on such a bond is discharged by loss of the attached or garnished property without their fault, as by fire, this condition of liability being implicit in the ordinary undertaking of this nature;[20] or by the interference of the law making performance of the condition impossible.[1] But if property has been levied on by writ of attachment and a forthcoming bond has been given, the surrender of such property by the attachment defendant voluntarily, to a third person having no valid prior right thereto, does not release the surety on the forthcoming bond.[2]

§ 914. Amendments—New Cause of Action as Test.—Assuming the permissibility of an amendment of the original cause of action in an attachment or garnishment suit, there is some variation in opinion as to the effect of such an amendment on the liability of a surety on a bond to dissolve the attachment or garnishment. The prevailing view seems to be that only if the amendment materially changes the cause of action, are the sureties to be deemed discharged from liability. They are not discharged if the judgment was entered on one of the original counts of the pleadings.[3] Accordingly, amendments correcting clerical or other errors as to parties, whether occurring in the pleadings or in the writ,[4] dismissing or striking out the name of one of the parties defendant,[5] adding new parties defendant,[6] changing the form of

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ment, conditioned to perform any judgment against the defendant, the effect of which is to dissolve the attachment or garnishment.

[20] George v. Hewlett, 70 Miss. 1, 12 So. 855, 35 Am. St. Rep. 626 (discussed, case differing on facts).

As to liability for loss of attached property, see Vol. 4, p. 888, § 548.

[1] **As the law controls the rights and remedies** of every person, if it interferes and prevents an obligor from complying with the conditions of a bond, the obligor will not be held liable because of his noncompliance, the interference of the law in such a case being analogous to an act of God operating to prevent compliance. Thus, where a claimant gives a levying officer a forthcoming bond, and retains possession of the property, which the same officer subsequently seizes and sells under a lien of superior dignity, applying the proceeds to such superior lien, the maker of the forthcoming bond is not liable thereon for a failure to produce the property at the time and place of sale. Floyd v. Cook, 118 Ga. 526, 45 S. E. 441, 63 L.R.A. 450.

[2] Fidelity & D. Co. v. B. F. Sturtevant Co. 86 Miss. 509, 38 So. 783, 109 Am. St. Rep. 716.

[3] Warren Bros. Co. v. Kendrick & Roberts, 113 Md. 603, 77 A. 847, 140 Am. St. Rep. 445; Aronow v. Gold, 274 Mass. 65, 174 N. E. 267, 74 A.L.R. 910; Norris v. Anderson, 181 Mass. 308, 64 N. E. 71, 92 Am. St. Rep. 420; Ball v. Claflin, 5 Pick. (Mass.) 303, 16 Am. Dec. 407; Jaynes v. Platt, 47 Ohio St. 262, 24 N. E. 262, 21 Am. St. Rep. 810; Com. use of Gettman v. A. B. Baxter & Co. 235 Pa. 179, 84 A. 136, 42 L.R.A. (N.S.) 484; Bedard v. Mahoney, 30 R. I. 469, 76 A. 113, 136 Am. St. Rep. 965; Petri v. Manny, 99 Wash. 601, 170 P. 127, 1 A.L.R. 1595; Hare v. Marsh, 61 Wis. 435, 21 N. W. 267, 50 Am. Rep. 141.

Annotation: 74 A.L.R. 913; 40 L.R.A. (N.S.) 743, s. L.R.A.1918E, 820.

One of the reasons for the rule is that the surety may have been satisfied that the plaintiff could not prevail upon the cause of action set forth in the complaint as it stood when he executed the undertaking to release the attached property, and for that reason may have been willing to afford the defendant relief by signing as his surety, though he might not have been willing to do so if another and different cause of action had been stated in the complaint. Annotation: 74 A.L.R. 917.

Under a statute providing for the entry of judgment in an attachment suit against the defendant and his sureties on a bond releasing the attachment, judgment cannot be entered against the surety upon a cause of action introduced by amendment after such dissolution, which was in no way related to the cause upon which the action was originally founded. Petri v. Manny, 99 Wash. 601, 170 P. 127, 1 A.L.R. 1595.

However, in Connor Livestock Co. v. Fisher, 32 Ariz. 80, 255 P. 996, 57 A.L.R. 196, it was held, on the theory of estoppel of the obligor on the bond to question the validity of the attachment proceedings (see infra, § 921), that the fact that the affidavit for an attachment in aid of an action on an account set up a cause of action different from that proved and upon which judgment was rendered did not release the sureties on the bond, where it was conditioned that if the defendant was condemned in said action and satisfied the judgment which might be rendered, the obligation should be and become void and of no effect, otherwise to remain in full force and effect.

[4] Norris v. Anderson, 181 Mass. 308, 64 N. E. 71, 92 Am. St. Rep. 420.

Annotation: 74 A.L.R. 918.

[5] Annotation: 74 A.L.R. 919.

[6] Bedard v. Mahoney, 30 R. I. 469, 76 A. 113, 136 Am. St. Rep. 965.

Annotation: 74 A.L.R. 920.

A change of parties to an attachment or garnishment suit may have the effect of action,[7] changing the nature of the action from one in assumpsit on an express contract to one on an implied contract by the substitution of or addition to the common counts,[8] merely putting the statement of cause of action in proper form,[9] merely striking out surplusages in the pleadings, changing the phraseology of the complaint, describing one of the counts in greater detail,[10] changing the relief sought from specific performance to recovery of money paid under the contract sued upon,[11] adding or substituting counts,[12] and increasing the ad damnum, without changing the identity of the cause of action,[13] have been held not to be such changes in the cause of action as to

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discharging the surety on a bond to dissolve an attachment, although the point is one on which the cases are conflicting. Where an amendment changing the parties to a suit does not introduce distinct parties and materially change those contemplated, it is generally held that the sureties are not discharged thereby. But an amendment altering the parties so that they are distinct from those contemplated by the obligors has been held to release them (Annotation: 42 L.R.A.(N.S.) 485, 490). The question is settled in some states by statutory provisions which authorize changes of parties to be made without impairing the obligations of the bond (Bedard v. Mahoney, 30 R. I. 469, 76 A. 113, 136 Am. St. Rep. 965). In the absence of such statute, the view has been expressed that the condition of the bond which binds the surety to pay the judgment rendered against the principal must be deemed to contemplate a judgment not only against the person who occupies the position of a party at the time, but also against a person who may be substituted in his place. In other words, if the original defendant in case of a bond to procure an attachment has ceased to occupy his position as a party, and another person has been substituted in his stead, the surety of such party continues liable. Also, if the plaintiff assigns his cause of action, the sureties on the bond to procure the attachment are not discharged (Brown v. Tidrick, 14 S. D. 249, 85 N. W. 185, 86 Am. St. Rep. 754).

[7] Warren Bros. v. Kendrick & Roberts, 113 Md. 603, 77 A. 847, 140 Am. St. Rep. 445.
Annotation: 42 L.R.A.(N.S.) 487.

[8] Warren Bros. Co. v. Kendrick & Roberts, 113 Md. 603, 77 A. 847, 140 Am. St. Rep. 445 (where the judgment recovered was not greater than that originally claimed); Aronow v. Gold, 274 Mass. 65, 174 N. E. 267, 74 A.L.R. 910.
Annotation: 74 A.L.R. 921.

[9] Annotation: 74 A.L.R. 921.

[10] Annotation: 74 A.L.R. 924.

[11] Annotation: 74 A.L.R. 921.

[12] Koehler v. Serr, 216 Cal. 143, 13 P. (2d) 673, 89 A.L.R. 262; Ball v. Claflin, 5 Pick. (Mass.) 303, 16 Am. Dec. 407; Jaynes v. Platt, 47 Ohio St. 262, 24 N. E. 262, 21 Am. St. Rep. 810.
Annotation: 74 A.L.R. 922.

Where the original complaint declared upon a claim for money had and received by the defendants to and for the use of the plaintiff, it was held that the sureties would not be released by the fact that the complaint was subsequently amended so as to state the same claim for the same amount in a different form by stating that after the dissolution of a partnership existing between the defendants and the plaintiff, the defendants collected the assets of the partnership and failed to apply them to its debts. Jaynes v. Platt, 47 Ohio St. 262, 24 N. E. 262, 21 Am. St. Rep. 810.

New counts averring that the defendant received the property and did not account for the same may, by amendment, be added to the original count for indebitatus assumpsit for goods sold and delivered (the goods being the same); such an amendment, constituting a mere change in the form of declaring on the same cause of action, does not discharge the attachment so as to release the bail or to give precedence to the rights of intermediate attaching creditors. Ball v. Claflin, 5 Pick. (Mass.) 303, 16 Am. Dec. 407.

An undertaking, given to prevent an attachment, to pay the amount of the judgment recovered "in said action," cannot be deemed limited to the cause of action for money received first stated in the complaint, joined therein with counts alleging conversion, so as to exonerate the sureties, where the court made no findings upon the issues raised by the first cause of action, though such cause of action was the only one affording foundation for an attachment. Koehler v. Serr, 216 Cal. 143, 13 P. (2d) 673, 89 A.L.R. 262.

[13] Warren Bros. Co. v. Kendrick & Roberts, 113 Md. 603, 77 A. 847, 140 Am. St. Rep. 445; Hare v. Marsh, 61 Wis. 435, 50 Am. Rep. 141, 21 N. W. 267.
Annotation: 74 A.L.R. 923.

In Hare v. Marsh, 61 Wis. 435, 21 N. W. 267, 50 Am. Rep. 141, it was held that an amendment which did not change the cause of action or add a new cause of action, but simply authorized a larger recovery upon the same cause of action, by changing the amount of the ad damnum from one within the jurisdiction of the justice of the peace to one beyond it, when the case came before the upper court, would not release the surety, even pro tanto, the obligation of the bond being that he would pay not any judgment rendered by the justice of the peace, but any judgment rendered by the upper court, by which undertaking the surety may be deemed to have had in contemplation any amendment which might be allowed by the court.

It has been held that though the amendment changed the nature of the action from one in assumpsit to one on an implied contract, with an increase of the ad damnum, the surety was not discharged, where the judgment ultimately recovered was not greater than the amount originally claimed. Warner Bros. Co. v. Kendrick & Roberts, 113 Md. 603, 77 A. 847, 140 Am.

discharge the surety.[14] In some cases, however, the sureties have been held discharged by amendments affecting the name or identity of parties,[15] changing the form of action so that it is virtually a new action,[16] adding new counts,[17] or increasing the amount of the claim.[18]

In some jurisdictions it has been held that the two tests by which to determine whether an amendment introduces a new cause of action are (1) whether the same evidence will support both the original and amended declarations, and (2) whether the same measure of damages will apply to both; if both of these fail, the new pleadings must be held to introduce a new cause of action.[19]

It will be presumed that the court, in allowing an application to amend, ascertained and found that the claim declared upon in the amended declaration or complaint, though stated in different form, was based upon the same facts and transactions as the claim stated in the original petition.[20]

§ 915. **—Prejudice Caused Surety as Test.**—There is a strong and growing inclination on the part of some courts to decline to discharge the surety from his liability in toto merely because the amendment in some way changes the original pleadings or the writ, or increases the amount of the claim. These courts, under the theory that the test whether the surety shall be discharged or not is whether the amendment would prejudicially affect him and subject him to a greater liability than he assumed by the signing of the bond, have evolved the rule that when the amendment does introduce a greater or different claim from that asserted in the original pleadings, the surety will not be discharged in toto, but merely pro tanto to the extent of the increase in the claim, and will still be held liable to the extent, and to the extent only, of the original claim.[1]

§ 916. **Judgment or Favorable Outcome for Defendant.**—The condition of liability in a dissolution or release bond in attachment or garnishment contemplates, of course, the exoneration of the obligor upon judgment or favor-

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St. Rep. 445, the court, however, basing its decision on the theory that the causes of action were the same.

[14] Annotation: 74 A.L.R. 926.

It has been held that the sureties will not be discharged by an amendment consolidating two actions instituted on different notes, and bringing in a new claim upon another note, but will be liable to the extent of the amount involved in the original action under which the attachment was obtained. Annotation: 74 A.L.R. 923.

[15] Annotation: 74 A.L.R. 920.

[16] Annotation: 74 A.L.R. 924.

[17] Annotation: 74 A.L.R. 924.

[18] Annotation: 74 A.L.R. 924.

[19] Com. use of Gettman v. A. B. Baxter & Co. 235 Pa. 179, 84 A. 136, 42 L.R.A.(N.S.) 484.

[20] Jaynes v. Platt, 47 Ohio St. 262, 24 N. E. 262, 21 Am. St. Rep. 810.

[1] Aronow v. Gold, 274 Mass. 65, 174 N. E. 267, 74 A.L.R. 910; Com. use of Gettman v. A. B. Baxter & Co. 235 Pa. 179, 84 A. 136, 42 L.R.A.(N.S.) 484 (holding that the sureties are neither totally discharged by, nor made liable to the full extent of the claim asserted in, the amended statement of claim, but are liable only to the extent of the amount claimed in the original declaration); Petri v. Manny, 99 Wash. 061, 170 P. 127, 1 A.L.R. 1595.

Annotation: 74 A.L.R. 925.

Upon this theory it has been held that an amendment to the original complaint which adds to the two causes of action stated in the original complaint, for goods sold and delivered to the defendant and for goods furnished to other parties at the request of the defendant, three additional causes of action upon three separate promissory notes made payable to the defendant and by him indorsed to the plaintiff, does not bind the surety for the discharge of the attachment for any amount greater than that involved in the original causes of action, and operates as a release of the surety upon such bond against that portion of the judgment which is based upon the new causes of action, even under as vigorous a statute as that of Washington, which provides that the bond for the release of the attachment shall be conditioned to perform the judgment, and, if the judgment goes against the defendant, it shall be entered against him and the sureties, the proper construction of such statute being that the bond given to perform the judgment of the court merely contemplates such a judgment as will follow from the cause of action pleaded at the time of its execution. Petri v. Manny, 99 Wash. 601, 170 P. 127, 1 A.L.R. 1595.

able outcome of the suit for the defendant.[2] This means, according to one view, the final outcome of the case; the fact that the trial court finds for the defendant does not effect a release if, on appeal, judgment is against the defendant.[3] Generally dismissal or discontinuance will effect exoneration of the surety.[4] However, it is well settled that by discontinuing the action as to a part of the defendants and proceeding to judgment against the remainder, the sureties are not released from liability upon their undertaking.[5]

§ 917. **Death of Defendant.**[6]—Whether a surety on a bond given to release an attachment is discharged by the death of the principal defendant depends on whether the bond is conditioned for the payment of the judgment obtained by the plaintiff, if successful, or merely conditioned for the redelivery of the attached property. Where its condition, either by its own terms or by judicial construction, is to return the property levied on, it is generally held that the sureties thereon are discharged by the death of their principal,[7] at least where the death of the defendant before judgment has the effect of dissolving the attachment or garnishment.[8] Where the condition of the bond is to perform the judgment and thereby dissolve the attachment or garnishment, the rule is generally otherwise, the attachment or garnishment not being dissolved by the death of the defendant, at least where personal jurisdiction of the defendant is obtained and the action against him is not abated by his death.[9]

§ 918. **Bankruptcy of Defendant.**[10]—It is clear that bankruptcy proceedings commenced against a defendant in an attachment or garnishment suit more than four months after the attachment or garnishment do not discharge the liability of the surety on a bond to dissolve or release the attachment or garnishment.[11] It is likewise clear that such liability is not discharged where it becomes fixed before the commencement of the bankruptcy proceedings, as where judgment is taken against the defendant in the attachment or garnishment,[12] or where surrender or redelivery of the attached or garnished property to the attaching officer is wrongfully refused.[13-14] Where, however, the attachment or garnishment proceedings are commenced within four months before the bankruptcy proceedings, the effect of the bankruptcy proceedings upon the liability of the surety is not so clear. The general rule is that the liability of the surety is discharged [15] where the condition of the bond, either by its own terms or by judicial construction, is to return the property levied on,[16] but not where the bond is conditioned to pay the amount of any judgment the plaintiff may recover.[17] However, where the attaching creditor proves his claim against the estate of the defendant and receives a dividend, the sureties' liability is reduced pro tanto.[18]

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[2] Barton v. Petit, 7 Cranch (U. S.) 288, 3 L. ed. 347 (reversal of judgment).

Annotation: 51 L.R.A.(N.S.) 659.

[3] King v. Watson, 51 Colo. 293, 117 P. 165, Ann. Cas. 1913B, 178 (appeal from justice court; trial de novo).

[4] Inbusch v. Farwell, 1 Black (U. S.) 566, 17 L. ed. 188.

Annotation: 51 L.R.A.(N.S.) 659.

[5] Inbusch v. Farwell, 1 Black (U. S.) 566, 17 L. ed. 188.

Annotation: 51 L.R.A.(N.S.) 659.

[6] See infra, § 918, as to the corresponding effect of the bankruptcy of the defendant on the liability of the surety on the bond to dissolve or release.

[7] Bunneman v. Wagner, 16 Or. 433, 18 P. 841, 8 Am. St. Rep. 306.

Annotation: 21 A.L.R. 290.

[8] As to the rule in many jurisdictions that the death of the defendant before judgment dissolves the attachment or garnishment, see Vol. 4, p. 928, § 625; supra, § 742.

If the attachment or garnishment is dissolved and the property released, there is no reason to hold security conditioned it will be forthcoming.

[9] Pacific Nat. Bank v. Mixter, 124 U. S. 721, 31 L. ed. 767, 8 S. Ct. 718.

Annotation: 21 A.L.R. 290.

If conditioned for the payment of any judgment rendered, it would seem that the surety would not be discharged unless the death of the defendant terminated the action as well as the attachment or garnishment, which, as a general rule, is the case only where no jurisdiction of the defendant has been acquired, so that the main action is purely in rem. See Vol. 4, p. 556, § 10; p. 928, § 625; supra, § 742.

[10] See supra, § 917, as to the effect of the death of the defendant on the liability of the surety on the bond to dissolve or release.

As to effect of the bankruptcy of the debtor on the liability of the receiptor on the receipt to restore the attached property, see infra, § 934.

[11] Hill v. Harding, 130 U. S. 699, 32 L. ed. 1083, 9 S. Ct. 725; Hill v. Harding, 107 U. S. 631, 27 L. ed. 493, 2 S. Ct. 404; Rosenthal v. Nove, 175 Mass. 559, 56 N. E. 884, 49 Am. St. Rep. 512.

Annotation: 14 L.R.A.(N.S.) 508, s. 28 L.R.A.(N.S.) 234; 15 Ann. Cas. 956.

[12] Annotation: 15 Ann. Cas. 957.

Special judgment may, in some jurisdictions, be rendered against the debtor to enable the plaintiff to proceed against sureties upon the bond.[19]

§ 919. Insolvency of Defendant.—Sureties on a bond to dissolve an attachment conditioned to satisfy such judgment as might be rendered against the defendant, otherwise the obligation to be void, are discharged by insolvency proceedings having the effect of preventing the entry of such a judgment.[20] A different result would seem to follow where the insolvency does not have that effect.[21]

Where the debt of an attachment debtor is not discharged by his discharge in insolvency, the sureties on an attachment bond given by a third person on behalf of the debtor are not discharged.[22]

b. Defenses and Estoppel

§ 920. Generally.[1]—Obligors on a bond to dissolve an attachment or gar-

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[13-14] Where a receiptor wrongfully refused to redeliver to the sheriff, and on the next day the debtor filed his petition in bankruptcy, the liability of the receiptor was fixed, and not discharged, by the bankruptcy. Parks v. Sheldon, 36 Conn. 466, 4 Am. Rep. 95.

[15] See Bankruptcy [Also 3 R. C. L. p. 341, § 157]; Suretyship [Also Principal and Surety, 21 R. C. L. p. 1067, § 108].

[16] Crook Horner Co. v. Gilpin, 112 Md. 1, 75 A. 1049, 28 L.R.A.(N.S.) 233, 136 Am. St. Rep. 376; Smith v. Lacey, 86 Miss. 295, 38 So. 311, 109 Am. St. Rep. 707.

Annotation: 36 A.L.R. 450.

The theory of the rule is stated, in Crook Horner Co. v. Gilpin, 112 Md. 1, 75 A. 1049, 28 L.R.A.(N.S.) 233, 136 Am. St. Rep. 376, to be that the bond stands in the place of the attachment and should be released accordingly, citing Metcalf Bros. v. Barker, 187 U. S. 165, 47 L. ed. 122, 23 S. Ct. 67; Hill v. Harding, 130 U. S. 699, 32 L. ed. 1083, 9 S. Ct. 725; Wolf v. Stix, 99 U. S. 1, 25 L. ed. 309.

In Payne v. Able, 7 Bush (Ky.) 344, 3 Am. Rep. 316, where, in one bond the sureties undertook that the defendant in the attachment proceedings should perform the judgments of the court, and in another, that the attached property or its value should "be forthcoming and subject to the order of the court for the satisfaction of such judgment," the court held that the sureties were released by the discharge in bankruptcy of their principal.

[17] Andrews v. Jones, 46 R. I. 141, 125 A. 356, 36 A.L.R. 447.

Annotation: 36 A.L.R. 451.

In Andrews v. Jones, 46 R. I. 141, 125 A. 356, 36 Am. St. Rep. 447, it is held that a surety on a bond conditioned on payment of the judgment in an attachment proceeding is not released by an adjudication in bankruptcy against the principal within four months of the attachment, although by the provisions of the Bankruptcy Act, such proceedings nullified the attachment. **However,** sureties on a bond to perform judgment have been held released on the theory that the bankruptcy made performance of the condition impossible. Payne v. Able, 7 Bush (Ky.) 344, 3 Am. Rep. 316. See also Keyes v. Shannon, 8 Rob. (La.) 172, 41 Am. Dec. 299. Annotation: 15 Ann. Cas. 956.

[18] Annotation: 26 A.L.R. 452.

[19] See infra, §§ 962, 963, as to right to, and form of, such special judgment.

[20] Keyes v. Shannon, 8 Rob. (La.) 172, 41 Am. Dec. 299.

A suit in equity may be maintained by a receiver of a bank against the attaching creditors and sureties on the bonds given to dissolve the attachments, to reduce to the possession of the receiver securities held by such sureties for their protection, and to restrain the attaching creditors from enforcing the attachment bonds, although such bonds are invalid, and a decree in such action will, if the sureties are held not to be liable, conclude the creditors from all further procedings against them on the bonds. Pacific Nat. Bank v. Mixter, 124 U. S. 721, 31 L. ed. 567, 8 S. Ct. 718.

[21] As to the rule that an attachment generally has priority over a subsequent insolvency, proceeding, see supra, §§ 880 et seq.

[22] Annotation: 15 Ann. Cas. 957.

[1] Generally, as to estoppel on bonds to

nishment or to release attached or garnished property are estopped, by the nature of their undertaking, from certain defenses to an action upon it. Consequently, objections can be made to an attachment issued on proper legal authority, which cannot be used as a defense to an action on a bond taken under the statute for its dissolution.[2]

In some cases where the giving of a bond containing no undertaking to pay the judgment has the effect of discharging and releasing the attached property, it is held that the fact that such a bond is executed does not preclude the defendant from attacking the attachment in the case in which the attachment issued, though in some cases where the bond given discharges and releases the property, it has been held that the defendant or his sureties cannot attack the attachment.[2a]

§ 921. Defects and Irregularities.—By the weight of authority, a surety on a bond given to prevent an attachment or garnishment or to secure the release of property levied on cannot, after the recovery of judgment against the defendant in the original action, avoid liability on the bond on the ground of irregularities in the attachment or garnishment proceedings, whether the bond was one conditioned for the payment of any judgment that might be rendered in the original action, or was a mere forthcoming bond conditioned for the redelivery of the property or, in the alternative, for such redelivery, or the payment of the value of the property or of the defendant's interest therein, as the case may be,[3] unless such irregularities go to the jurisdiction of the

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procure attachment or garnishment, see infra, §§ 921 et seq.

The discussion in this subdivision should be read in connection with the discussion in the preceding subdivision of events discharging liability on dissolution and release bonds in attachment and garnishment, for it is obvious that the questions are closely related, since the obligor on such a bond cannot be said to be estopped from pleading, as a defense to an action to enforce his undertaking, that it was discharged. See supra, §§ 913 et seq.

[2] Pacific Nat. Bank v. Mixter, 124 U. S. 721, 31 L. ed. 567, 8 S. Ct. 718.
Annotation: 89 A.L.R. 267.

[2a] Annotation: 32 L.R.A.(N.S.) 404.

It has been held in some cases that the giving of an undertaking for the release of attached property does not preclude the defendant from moving in the principal case to vacate the attachment where the attachment is not put to an end by the undertaking. Annotation: 32 L.R.A.(N.S.) 406.

[3] Pacific Nat. Bank v. Mixter, 124 U. S. 721, 31 L. ed. 567, 8 S. Ct. 718; Huff v. Hutchinson, 14 How. (U. S.) 586, 14 L. ed. 553; Troy v. Rogers, 116 Ala. 255, 22 So. 486, 67 Am. St. Rep. 110; Connor Livestock Co. v. Fisher, 32 Ariz. 80, 255 P. 996, 57 A.L.R. 196; Kettle Creek Ref. Co. v. Scales, 181 Ark. 295, 25 S. W. (2d) 446, citing R. C. L.; Koehler v. Serr, 216 Cal. 143, 13 P. (2d) 673, 89 A.L.R. 262; Crisman v. Matthews, 2 Ill. 148, 26 Am. Dec. 417; Roche v. American Surety Co. 193 Iowa, 965, 184 N. W. 317, 27 A.L.R. 1537; Olds v. City Trust, S. D. & Surety Co. 185 Mass. 500, 70 N. E. 1022, 102 Am. St. Rep. 356; Haggert v. Morgan, 5 N. Y. 422, 55 Am. Dec. 350; Moffitt v. Garrett, 23 Okla. 398, 100 P. 533, 32 L.R.A.(N.S.) 401, 138 Am. St. Rep. 818; Bunneman v. Wagner, 16 Or. 433, 18 P. 841, 8 Am. St. Rep. 306; Amarillo Nat. Bank v. Sanborn, — Tex. Civ. App. —, 169 S. W. 1075, citing R. C. L.; Truax v. Title Guaranty & Surety Co. 94 Wash. 472, 162 P. 586, citing R. C. L.
Annotation: 89 A.L.R. 267; 32 L.R.A. (N.S.) 401.

It is no defense to such an action that the attachment or garnishment was wrongfully sued out. Koehler v. Serr, 216 Cal. 143, 13 P. (2d) 673, 89 A.L.R. 262; Moffitt v. Garrett, 23 Okla. 398, 100 P. 533, 32 L.R.A.(N.S.) 401, 138 Am. St. Rep. 818.

This is in accordance with the general principle that wherever the surety has contracted in reference to the conduct of one of the parties in some suit or proceeding in the courts or for the result of such suit or proceeding, he is concluded by the judgment. Huff v. Hutchinson, 14 How. (U. S.) 586, 14 L. ed. 553. Annotation: 83 Am. Dec. 380.

In Bunnerman v. Wagner, 16 Or. 433, 18 P. 841, 8 Am. St. Rep. 306, the court said: "A bond or undertaking given to obtain the release of property seized upon attachment is not rendered invalid by irregularity in making such attachment. By means of it the property was released and surrendered, and the plaintiffs consented to dissolve the attachment, and the defendant in this action cannot defeat his liability because of some irregularity in such proceeding. The undertaking served its purpose to secure the release of the property attached, and the defendant is estopped now from setting up such irregularities."

In Koehler v. Serr, 216 Cal. 143, 13 P. (2d) 673, 89 A.L.R. 262, it was held that sureties on an undertaking given to prevent an attachment cannot escape liability merely by showing that the attachment court and void the process.[4] Accordingly, the defectiveness or falsity of an affidavit to procure an attachment or garnishment, unless such defectiveness or falsity goes to the jurisdiction of the court and voids the attachment or garnishment,[5] constitutes no defense to an action to enforce a bond to dissolve an attachment or garnishment or to release attached or garnished property. Nor are the recitals of the bond an important element in determining whether this estoppel arises.[6] However, fraud, collusion, or clear mistake in the attachment or garnishment proceedings constitutes such a defense.[7] There are cases holding that the surety on a bond to dissolve or release an attachment can set up as a defense to an action on the bond that the affidavit on which it issued was false, where the falsity of the affidavit renders the attachment void and defeats the jurisdiction of the court.[8] The view has been taken that sureties in a bond conditioned for the payment of any judgment that may be rendered are estopped to deny the issuance of the writ of attachment or any other fact recited in their undertaking. It has also been held that a surety on such a bond may be estopped by the recitals in the bond to deny the sufficiency of the writ.[9]

§ 922. —Defective Levy, Return, Inventory, and Appraisement.—Sureties on a bond given to release property from attachment, conditioned for the payment of the judgment, are generally held to be estopped, in an action on the bond, to deny the making of a valid levy.[10] The same rule of estoppel applies where a forthcoming bond was given.[11] It has been said that in such cases

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proceedings were voidable, but must show that they were void and a nullity from their inception.

[4] See supra, § 909.

[5] As to when the absence, falsity, or insufficiency of the affidavit has this effect, see Vol. 4, p. 849, §§ 485 et seq.; supra, §§ 723 et seq.

[6] Huff v. Hutchinson, 14 How. (U. S.) 586, 14 L. ed. 553; Koehler v. Serr, 216 Cal. 143, 13 P. (2d) 673, 89 A.L.R. 262 (false affidavit that action in tort was action on contract for payment of money); Moffitt v. Garrett, 23 Okla. 398, 100 P. 533, 32 L.R.A.(N.S.) 401, 138 Am. St. Rep. 818.

Annotation: 89 A.L.R. 269.

In Moffitt v. Garrett, 23 Okla. 398, 100 P. 533, 32 L.R.A.(N.S.) 401, 138 Am. St. Rep. 818, the court, in an action on the bond, said that where a defendant in attachment gave a bond to procure the release of the property levied on, the obligors in the bond were estopped to traverse the truth of the allegations of the affidavit after judgment had been rendered against the defendant in the original action.

[7] Troy v. Rogers, 116 Ala. 255, 22 So. 486, 67 Am. St. Rep. 110; Charles v. Hoskins, 14 Iowa, 471, 83 Am. Dec. 378; Jaynes v. Platt, 47 Ohio St. 262, 24 N. E. 262, 21 Am. St. Rep. 810.

[8] Murphy v. Montandon, 3 Idaho, 325, 29 P. 851, 35 Am. St. Rep. 279.

Annotation: 89 A.L.R. 278.

In Murphy v. Montandon, 3 Idaho, 325, 29 P. 851, 35 Am. St. Rep. 279, it was held that sureties on a bond given to release an attachment and containing a condition to pay any judgment which might be rendered could defend an action on the bond by showing the falsity of an allegation in the affidavit on which the attachment was issued, that the attachment plaintiff had no security for the payment of the debt, which allegation was necessary to give the court jurisdiction to issue the writ. In thus holding, the court said: "The defendants . . . were not parties to the original suit, and could not appear therein and move for a dissolution of the attachment. They have had no day in court. An attachment issued upon a false or fatally defective affidavit stands in the same position as an attachment issued without any affidavit; and can it be successfully contended that a bond executed to release property from the lien of an attachment issued without affidavit, and therefore without any jurisdiction, is supported by a valuable consideration? If the defendants in this suit cannot go back of the naked bond, then they cannot show that their obligation is without any consideration—a position, it seems to us, contrary to the plainest principles of justice."

[9] Annotation: 89 A.L.R. 273.

Courts adhering to the doctrine that there is no jurisdiction in an attachment suit wherein there has been no issue of a writ, or wherein the writ is substantially defective will necessarily take the view that such absence of, or defects in, the writ can be pleaded as a defense by sureties in an action on a bond given to dissolve the attachment. Annotation: 89 A.L.R. 279.

[10] Mead v. Figh, 4 Ala. 279, 37 Am. Dec. 742; Olds v. City Trust, S. D. & Surety Co. 185 Mass. 500, 70 N. E. 1022, 102 Am. St. Rep. 356.

Annotation: 89 A.L.R. 274; 4 L.R.A. (N.S.) 1020, s. 51 L.R.A.(N.S.) 635; 81 Am. Dec. 470, 475.

[11] Mead v. Figh, 4 Ala. 279, 37 Am. Dec. 742; Moore v. Holder, 95 Fla. 504, 116 So. 498, citing R. C. L.; Oliver v. Warren, 124

the execution by the obligors of the bond is deemed to amount to an admission on their part that the levy was a valid one, and the admission operates as an estoppel to their denial of the legality.[12] Thus, it has been held that sureties are estopped in such an action from denying the validity of the levy on the ground that it was made by the sheriff instead of by the coroner.[13] The rule has been applied in the case of a common-law undertaking not in the form prescribed by statute.[14] But where a statute provides that an attachment be discharged on the giving of a bond conditioned to pay any judgment that may be rendered against the attachment defendant, it has been held that a summary judgment against a surety on such a bond cannot be sustained, in the absence of a levy on the property recited in the bond.[15]

Sureties on a bond conditioned for the payment of any judgment that may be rendered have been held estopped, in an action on the bond, to raise objections to the officer's return to the writ of attachment.[16]

The general rule as to estoppel in an action on a bond to dissolve an attachment or garnishment applies to failure to make an inventory of the attached property. Thus, it has been held that where an attachment was dissolved by the giving of a bond which was substituted for the property, the making of an inventory of the attached property was waived, and the sureties could not defend an action on the bond on the ground that no inventory was made. Likewise, it has been held that the surety on a bond in statutory form conditioned for payment of the actual value of the interest of the attachment defendant in the property was estopped to assert the invalidity of the attachment on the ground of the failure of the officer to inventory the attached property.[17]

Sureties in a forthcoming bond cannot, as a defense in an action on the bond, set up the failure of the officer to appraise the attached property.[18]

§ 923. —**Defective Grounds for Attachment.**—In some jurisdictions it has been held that where the court had jurisdiction to issue the writ of attachment, a surety on a bond conditioned for the payment of any judgment that might be recovered against the defendant in the attachment suit could not, in an action on the bond, controvert the ground of the attachment.[19] But in

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Ga. 549, 53 S. E. 100, 4 L.R.A.(N.S.) 1020, 110 Am. St. Rep. 188; Crisman v. Matthews, 2 Ill. 148, 26 Am. Dec. 417; Bunneman v. Wagner, 16 Or. 433, 18 P. 841, 8 Am. St. Rep. 306; Portis v. Parker, 8 Tex. 23, 58 Am. Dec. 95; Wells v. Cloud (Tex. Civ. App.) 202 S. W. 331, citing R. C. L.

Annotation: 89 A.L.R. 274; 4 L.R.A.(N.S.) 1020, s. 51 L.R.A.(N.S.) 635.

In a suit on a forthcoming bond given by a claimant, where its execution is not denied, the main issue to be decided is whether or not there has been a breach of the bond. Neither the legality of the levy nor the authority of the officer to make it is an issuable fact, these issues being concluded by the judgment in the claim case. Peeples v. Garrison, 141 Ga. 411, 81 S. E. 116, 51 L.R.A.(N.S.) 635.

[12] Annotation: 4 L.R.A.(N.S.) 1020.

[13] Annotation: 89 A.L.R. 274.

[14] Annotation: 89 A.L.R. 274.

[15] Annotation: 89 A.L.R. 274.

[16] Huff v. Hutchison, 14 How. (U. S.) 586, 14 L. ed. 553.

Annotation: 89 A.L.R. 276.

[17] Annotation: 89 A.L.R. 277.

[18] Annotation: 89 A.L.R. 277.

[19] Haggart v. Morgan, 5 N. Y. 422, 55 Am. Dec. 350; Moffitt v. Garrett, 23 Okla. 398, 100 P. 533, 32 L.R.A.(N.S.) 401, 138 Am. St. Rep. 818.

Annotation: 89 A.L.R. 271.

In Haggart v. Morgan, 5 N. Y. 422, 55 Am. Dec. 350, the court held that where an attachment was issued on an affidavit alleging the nonresidence of the defendant, the sureties were estopped, in an action on their bond, from showing that the defendant was a resident of the state. In thus holding, the court said that the fact of nonresidence was not jurisdictional, although competent proof of that fact was.

An obligor on a statutory bond to discharge an attachment, conditioned that the defendant will perform the judgment of the court in the action in which the attachment is issued, is absolutely liable in an action against him on the bond for the amount recovered in the action in which the bond was given, without reference to the question whether the attachment was rightfully or wrongfully issued, and the defendant is precluded by such bond from controverting the grounds of the attachment. Moffitt v. Garrett, 23 Okla. 398, 100 other jurisdictions a contrary doctrine has been announced where the attachment was dissolved in the original action on the defendant's motion on traverse, or where the ground of attachment was abandoned.[20]

§ 924. —Property Not Liable to Attachment or Garnishment.—In most jurisdictions in which the question has been considered, it has been held that sureties on a bond conditioned for the payment of the judgment, given to release property from attachments, cannot avoid liability in an action on the bond by showing that the property was not subject to levy under the attachment.[1] The same rule has been applied where a forthcoming bond was given.[2]

§ 925. —Defendant's Lack of Title, or Title in Surety.—The decisions on the question whether the obligors on a forthcoming or delivery bond are estopped by the bond, in an action upon it, from contesting the defendant's right to the property are conflicting. The question does not seem to arise on a bond to perform the judgment dissolving the attachment, except perhaps where no jurisdiction of the defendant is obtained and the proceeding is purely in rem.[3] The weight of opinion is that the obligor is estopped, in such an action upon a forthcoming bond, to set up title in himself or in another than the defendant in discharge of his liability on such bond.[4] Likewise, the majority rule is that where one has given a receipt conditioned for the redelivery, to the officer, on demand, of property described as taken on a writ against another person, the receiptor is estopped, in an action upon the receipt, from setting up property in himself; however, it has been said that such a receiptor may show as a defense that the property did not belong to the defendant, and that he has restored it to the true owner.[5] On the other hand, there is authority, sometimes under statute, to the effect that an owner of property who gives a bond to secure its release from attachment is not there-

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P. 533, 32 L.R.A.(N.S.) 401, 138 Am. St. Rep. 818.

[20] Annotation: 89 A.L.R. 272.

The giving of a replevin bond has been held not to preclude the defendant in the attachment suit from attacking the ground of attachment, where the bond does not discharge the lien. Annotation: 32 L.R.A. (N.S.) 406.

[1] Moffitt v. Garrett, 23 Okla. 398, 100 P. 533, 32 L.R.A.(N.S.) 401, 138 Am. St. Rep. 818.

Annotation: 89 A.L.R. 274.

[2] Annotation: 89 A.L.R. 275.

[3] See Vol. 4, p. 556, § 10.

[4] Pacific Nat. Bank v. Mixter, 124 U. S. 721, 31 L. ed. 567, 8 S. Ct. 718; Roswald v. Hobbie, 85 Ala. 73, 4 So. 177, 7 Am. St. Rep. 23; Moore v. Holder, 95 Fla. 504, 116 So. 498, citing R. C. L.; Murphy v. Montandon, 3 Idaho, 325, 29 P. 851, 35 Am. St. Rep. 279; Cermak v. Schaaf, 308 Ill. 61, 139 N. E. 39, 37 A.L.R. 1398; Fidelity & D. Co. v. Bowen, 123 Iowa, 356, 98 N. W. 897, 6 L.R.A. (N.S.) 1021; Morgan v. Furst, 4 Mart. N. S. (La.) 116, 16 Am. Dec. 166; Morrison v. Blodgett, 8 N. H. 238, 29 Am. Dec. 653; Nagle v. Stroh, 4 Watts (Pa.) 124, 28 Am. Dec. 695; Portis v. Parker, 8 Tex. 23, 58 Am. Dec. 95.

Annotation: 37 A.L.R. 1402; 4 L.R.A. (N.S.) 1021; 30 Am. St. Rep. 330; 25 Am. Dec. 429.

In Pacific Nat. Bank v. Mixter, 124 U. S. 721, 31 L. ed. 567, 8 S. Ct. 718, it was held that it is no defense, to an action against sureties for a breach of the condition of a bond to discharge an attachment, that the property attached did not belong to the defendant.

One in whose possession property attached as belonging to another is found, who gives a forthcoming bond to retain possession of the property, cannot defeat liability on the bond, in case judgment goes against the defendant in the attachment, by showing title in himself or the pendency in the attachment proceeding of an interpleader asserting his title to the property. Cermak v. Schaaf, 308 Ill. 61, 139 N. E. 39, 37 A.L.R. 1398.

In Morgan v. Furst, 4 Mart. N. S. (La.) 116, 16 Am. Dec. 166, it was held that one who obtained the release of property attached as belonging to another, by giving bond that the property or its proceeds should be forthcoming to answer the judgment of the court in the attachment suit, cannot, in an action upon the bond brought by the sheriff to whom it was given, deny the right of the latter to sue, by asserting that at the time of the attachment he himself was the owner.

That attached property is not in the name of the attachment debtor does not invalidate a bond for its release, upon the giving of which the attachment is dissolved. Fidelity & D. Co. v. Bowen, 123 Iowa, 356, 98 N. W. 897, 6 L.R.A.(N.S.) 1021.

[5] See infra, § 935.

by estopped from showing that the property belongs to him,[6] especially where the property for which the bond is given is surrendered or redelivered to the sheriff.[7] Also, it has been ruled that in an action on a delivery bond, it is a sufficient defense that at the time of the levy the property belonged to a person other than the defendant in the writ.[8] A redelivery bond does not estop a surety from subsequently claiming the property as against the sheriff or the attachment plaintiff, where he was induced to sign the bond by a fraudulent misrepresentation of the facts, although a mere statement by the officer who takes the bond, concerning its legal effect, does not entitle him so to escape from his bond or to insist that the property was his.[9-10]

5. ENFORCEMENT; PRACTICE AND PROCEDURE

§ 926. Generally.—Statutory provisions are sometimes encountered requiring that if the judgment in an action goes against the defendant, the same shall be entered against him and his sureties on the bond releasing the attachment.[11]

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[6] Roche v. American Surety Co. 193 Iowa, 965, 184 N. W. 317, 27 A.L.R. 1537; Ayres, W. & R. Co. v. Dorsey Produce Co. 101 Iowa, 141, 70 N. W. 111, 63 Am. St. Rep. 376; Halbert v. McCulloch, 3 Met. (Ky.) 456, 79 Am. Dec. 556.

Annotation: 37 A.L.R. 1405; 25 Am. Dec. 429, 430.

A surety on a delivery bond in an attachment proceeding may show that the property attached did not, at the time of the attachment, belong to the attachment debtor, under a statute providing that in an action upon such bond, it shall be a sufficient defense that the property for the delivery of which the bond was given did not, at the time of the levy, belong to the one against which the attachment was issued. Roche v. American Surety Co. 193 Iowa, 965, 184 N. W. 317, 27 A.L.R. 1537.

It has been held that a surety on a delivery bond in a garnishment proceeding is not estopped from setting up the defense that the property garnished did not belong to the attachment debtor by the fact that judgment was entered against the attachment debtor in the main proceeding, after one with whom it has reinsured its risk had guaranteed the fees of an attorney employed by the attachment debtor to represent him in the main proceeding. Roche v. American Surety Co. 193 Iowa, 965, 184 N. W. 317, 27 A.L.R. 1537.

[7] Roswald v. Hobbie, 85 Ala. 73, 4 So. 177, 7 Am. St. Rep. 23.

There is some authority to the contrary. Annotation: Ann. Cas. 1915D, 407.

See also Lester v. Ladrigan, 90 Conn. 570, 98 A. 124, L.R.A.1916F, 939; Johns v. Church, 12 Pick. (Mass.) 557, 23 Am. Dec. 651.

In Roswald v. Hobbie, 85 Ala. 73, 4 So. 177, 7 Am. St. Rep. 23, the plaintiffs gave the sheriff a replevy bond conditioned, if the defendant failed in the action, to return the property in thirty days, and later asked him to withdraw and destroy it; on his refusal, the plaintiffs handed him an affidavit of claim and a claim bond, and demanded the return of the replevy bond, but the sheriff returned both bonds and the affidavit of claim into court. It was held that the refusal of the trial court to strike the claim proceeding from the file was proper.

See also infra, § 935.

[8] Ayres, W. & R. Co. v. Dorsey Produce Co. 101 Iowa, 141, 70 N. W. 111, 63 Am. St. Rep. 376.

Where a plaintiff, by its agent, directed the sheriff to levy upon property in the possession of the defendant, after the fullest assertion of title by a third person, the court held that the true owner was not estopped from showing his title to the property by reason of the recitals in a release bond executed by him in order that the defendant might retain possession of the property, as the plaintiff company, being advised of his claim of title, was in no way deceived or injured by the recitals in the bond. Woods-Egan Live-Stock Commission Co. v. Hicks, 92 Kan. 922, 142 P. 276, L.R.A.1915A, 1132.

It has been held that in an action against a surety upon a forthcoming bond for property attached as that of his principal, he may show in defense of his liability that he himself was in possession of the property at the time of the attachment, and that he was then the owner of said property under a chattel mortgage from the principal obligor, which mortgage was valid against creditors, where, by the recitals of the bond, the surety expressly reserved his rights under the mortgage. Annotation: 37 A.L.R. 1407.

[9-10] Peterson v. Woollen, 48 Kan. 770, 30 P. 128, 30 Am. St. Rep. 327.

A surety on a bond executed for the delivery of property, who signed upon the officer's representation that the property had been attached, and who was not present when the supposed levy was made, is not liable thereon. Annotation: 32 L.R.A.(N.S.) 409.

[11] Johnson v. Chicago & P. Elevator Co. 119 U. S. 388, 30 L. ed. 447, 7 S. Ct. 254; Brown v. Clarke, 4 How. (U. S.) 4, 11 L. ed. 850; Roche v. American Surety Co. 193 Iowa, 965, 184 N. W. 317, 27 A.L.R. 1537; Bank of United States v. Patton, 5 How. (Miss.) 200, 35 Am. Dec. 428; Petri v. Manny, 99 Wash. 601, 170 P. 127, 1 A.L.R. 1595.

Judgment against a surety on a bond given to obtain the return of attached property may be entered without notice to him on establishing the liability for which the bond was given, where such procedure is allowed by the statute under which the bond was given. Johnson v. Chicago & P.

However, the usual practice in the enforcement of a bond to dissolve an attachment or garnishment or to release attached or garnished property is by an action on such bond.[12] Such an action is, in general, governed by the same principles as if brought on an undertaking.[13] Likewise, in the absence of other provisions, the rules applicable to actions on the case for wrongful attachment will apply and govern the procedure in such an action.[14]

§ 927. **Parties.**—The plaintiff may, of course, sue on a bond to dissolve an attachment or garnishment or release attached or garnished property, provided the liability thereon is absolute.[15] It has been both held and denied that an undertaking for the release of an attachment levied on the property of the judgment debtor is an incident of the judgment, and that the assignment of the judgment entitles the assignee to maintain an action on the bond against the sureties.[16] Where a statute requires an attachment bond to be made payable to all of the defendants named in a bill praying for a writ of attachment, for the benefit of whom it may concern, one of the defendants whose property has been attached is entitled to sue on the bond, even though it is made payable to another defendant by name, followed by the phrase "et al." [17]

One who has not joined in the execution of a dissolution or delivery bond in attachment or garnishment cannot, of course, be liable thereon, as there is nothing on which a statutory judgment on such bond can rest,[18] and he can object at any time after the return term to its operating so as to charge him.[19] Thus, as one partner cannot bind a copartner by a forthcoming bond to which he has signed the latter's name without authority, a statutory judgment on such bond is invalid as to the partner not signing.[20]

§ 928. **Pleadings and Defenses.**—In an action on an undertaking to release an attachment it is not essential that the declaration or complaint set out all the facts which authorize the issuing of an attachment,[1] for the obligors on the bond are estopped from attacking the attachment proceedings except where they are void.[2] The general rule is that the obligors in an action on a bond to dissolve an attachment or garnishment can set up in defense of an action on the bond their discharge of liability thereon,[3] but they cannot set up any defense which they are estopped from making by the nature of their undertaking.[4]

§ 929. **Evidence.**—The general rule is that judgment against the principal and other facts and circumstances rendering liability absolute on a bond to

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Elevator Co. 119 U. S. 388, 30 L. ed. 447, 7 S. Ct. 254.

[12] Bunneman v. Wagner, 16 Or. 433, 18 P. 841, 8 Am. St. Rep. 306.

Annotation: 63 A.L.R. 291; 81 Am. Dec. 467.

[13] Bunneman v. Wagner, 16 Or. 433, 18 P. 841, 8 Am. St. Rep. 306.

[14] Annotation: 81 Am. Dec. 467.

As to action for wrongful attachment, see infra, §§ 984 et seq.

[15] Generally as to accrual of liability on such bond, see supra, § 911.

[16] Annotation: 63 A.L.R. 291.

Where a bond to pay any judgment which may be recovered was given to release an attachment and was assigned to a third party in trust for another, who paid the consideration of the assignment, and after the death of the equitable owner it was assigned to the trustee, widow of the deceased, it was held that such widow held the bond in trust for the estate, and, having the legal title, was the real party in interest in the undertaking sued on, and was entitled to maintain an action as the "real party in interest." Annotation: 64 L.R.A. 605.

[17] Annotation: 14 Ann. Cas. 572.

[18] Doe ex dem. Smith v. Roe, 4 Smedes & M. (Miss.) 261, 43 Am. Dec. 483.

[19] Ibid.

[20] Doe ex dem. Smith v. Roe, 4 Smedes & M. (Miss.) 261, 43 Am. Dec. 483; Brown v. M'Donald, 8 Yerg. (Tenn.) 158, 29 Am. Dec. 112.

[1] Bunneman v. Wagner, 16 Or. 433, 18 P. 841, 8 Am. St. Rep. 306.

[2] See supra, §§ 909, 921.

[3] Generally as to such discharge, see supra, §§ 913 et seq.

[4] Generally as to such estoppel, see supra, §§ 920 et seq.

dissolve an attachment or garnishment or to release attached or garnished property[5] may be introduced in evidence in an action to enforce such an undertaking.[6] Such a judgment has generally been held to be conclusive against the surety,[7] and in such an action the judgment that the property be sold is sufficient evidence of the levy of the attachment.[8] In an action to recover upon a bond to dissolve an attachment to enforce a judgment on a promissory note, which judgment was alleged to have been compromised by the plaintiff's attorney, a witness may testify that he gave the note to the attorney, and not to the plaintiff in the action, for the purpose of showing which was the real party in interest.[9] Although an obligor on a bond to dissolve an attachment or garnishment is estopped from setting up title to the attached or garnished property in himself in an action on his undertaking,[10] he may show such title in order to mitigate the damages.[11]

To warrant judgment against a surety on a replevin bond in an action on an account in support of which an attachment is levied, the attachment and bond need not be introduced in evidence.[12]

§ **930. Trial.**—The law of trial applies generally to an action on a bond to dissolve an attachment or garnishment. The issue on such a trial is whether or not there has been a breach of the bond.[13]

C. Receipting for Release of Attached or Garnished Property

§ **931. Generally.**—The giving of receipts for property attached is not only lawful everywhere between the parties to them, but the law encourages such transactions. The purposes of the practice are to save litigants the trouble and expense attending the keeping of property attached pending the attachment proceedings[14] and to perfect and continue the attachment lien or to hold the liability of the receiptor as a substitute security for the plaintiff's claim where actual removal of the attached goods is impractical,[15] where it is impractical for the attaching officer to keep them in his personal custody,[16] or where the plaintiff, defendant, or other claimant desires their use pending the attachment proceedings.[17] The contract of a receiptor is usually a written undertaking to keep the property safely, to redeliver it on demand or to pay its value,[18] and in some cases, if there is no demand for the attached property, to redeliver it within a stipulated time after the rendering of a judgment against the defendant so that it may be taken on execution.[19] Sometimes, however, it is merely a contract to redeliver or pay the value of the property and contains no condition to redeliver on demand.[20]

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[5] As to when such liability becomes absolute, see supra, § 911.

[6] Crisman v. Matthews, 2 Ill. 148, 26 Am. Dec. 417.

Annotation: 9 Ann. Cas. 157; Ann. Cas. 1915D, 407.

The record of a judgment in a contest of a claim of exemption is admissible in evidence in an action on a forthcoming bond given by the plaintiff in such contest. Troy v. Rogers, 116 Ala. 255, 22 So. 486, 67 Am. St. Rep. 110.

[7] Annotation: Ann. Cas. 1915D, 408.

[8] Crisman v. Matthews, 2 Ill. 148, 26 Am. Dec. 417.

[9] Vaughn v. Robbins, 254 Mass. 35, 149 N. E. 677, 41 A.L.R. 1488.

[10] See supra, § 925.

[11] **Evidence of property in the defendant** is admissible upon the question of damages in a suit on his promise to return the property; and if such evidence shows that the property could not have been applied to satisfy the creditor's execution, the plaintiff can recover nominal damages only. Bursley v. Hamilton, 15 Pick. (Mass.) 40, 25 Am. Dec. 423.

[12] Connor Livestock Co. v. Fisher, 32 Ariz. 80, 255 P. 996, 57 A.L.R. 196.

[13] Oliver v. Warren, 124 Ga. 549, 53 S. E. 100, 4 L.R.A.(N.S.) 1020, 110 Am. St. Rep. 188.

See Trial [Also 26 R. C. L. p. 1008].

[14] Peters v. Stewart, 45 Conn. 103, 29 Am. Rep. 663; Shelton v. Hurd, 7 R. I. 403, 84 Am. Dec. 564.

[15] **Attachment of bulky articles** is sufficient without a removal if a receiptor is left in charge and will prevail against a subsequent attachment. Hemmenway v. Wheeler, 14 Pick. (Mass.) 408, 25 Am. Dec. 411.

Levying an execution or attachment, and taking a receipt therefor, change the possession of goods in the contemplation of law without an actual removal. Phillips v. Hall, 8 Wend. (N. Y.) 610, 24 Am. Dec. 108.

[16] **Retention of the possession of property levied upon** is essential to the continuance of an attachment lien, unless the property is receipted for. Chadbourne v. Sumner, 16 N. H. 129, 41 Am. Dec. 720.

[17] Peters v. Stewart, 45 Conn. 103, 29 Am. Rep. 663; Weston v. Dorr, 25 Me. 176, 43 Am. Dec. 259.

The general rule is that although a sheriff has taken a receipt for the goods levied on, conditioned for their return on demand, he still retains in law the power to control the goods and at his pleasure may retake them into his personal custody.[21] Indeed, the sheriff himself continues alone responsible for them to both debtor and creditor.[22] He has such a special interest in them as to enable him to maintain trover for their conversion.[1] On the other hand, the receiptor also has such a special interest in the goods as to enable him to maintain trover or replevin for them.[2] If the receiptor detains them wrongfully according to the terms of the receipt or if, having delivered them over to a third person, he finds himself unable to redeliver, the officer may bring replevin or trover for the wrong according to its nature, refusal to deliver being evidence of a conversion.[3] An action also lies directly on the contract contained in the receipt, but whether the officer resorts to this or sues for the wrong rests in his election.[4]

A receipt for the redelivery of the goods or the payment of their value, containing no condition that the attaching officer can retake them on demand, gives him no right to retake them before judgment, unless the assent of the owner or receiptor is first obtained, especially if there is no suggestion that the latter is not of sufficient ability to make indemnity according to his contract. To give the officer this power, it has been said, would certainly allow him to disregard the spirit of his contract and often expose the property to a ruinous sacrifice, whereas, the promise of the receiptor being to do one of two things, the election is with him as in the case of other contracts of similar kind.[5]

The value of the articles contained in a receipt given to an officer for property attached by him has been held to be conclusive on both parties to such receipt.[6] Also, a receiptor is liable for all property represented as attached in a receipt given by him to the attaching officer if the property is returned on the writ as attached.[7] Where a distinct value is affixed to each article named in a receipt for attached property, however, a tender of a part of such property is good; and if such tender is made by the receiptor and refused by the officer, the latter cannot recover the value of the part tendered.[8]

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[18] Currier v. Currier, 2 N. H. 75, 9 Am. Dec. 43; Browning v. Hanford, 5 Hill (N. Y.) 588, 40 Am. Dec. 369.

[19] Wright v. Dawson, 147 Mass. 384, 18 N. E. 1, 9 Am. St. Rep. 724.

[20] Weston v. Dorr, 25 Me. 176, 43 Am. Dec. 259.

[21] Odiorne v. Colley, 2 N. H. 66, 9 Am. Dec. 39.

As distinguished from a naked bailment, when a sheriff or other officer delivers property to a person or to his order under a receipt, he ceases to have any further care or custody of the property as between him and the receiptor, but the receiptor is bound to return it to him on demand or pay all the damages the sheriff might sustain in consequence of his failure so to do. Peters v. Stewart, 45 Conn. 103, 29 Am. Rep. 663.

[22] Odiorne v. Colley, 2 N. H. 66, 99 Am. Dec. 39.

[1] Dezell v. Odell, 3 Hill (N. Y.) 215, 38 Am. Dec. 628; Lockwood v. Bull, 1 Cow (N. Y.) 322, 13 Am. Dec. 539.

[2] See infra, § 932.

[3] Lockwood v. Bull, 1 Cow. (N. Y.) 322, 13 Am. Dec. 539.

[4] Dezell v. Odell, 3 Hill (N. Y.) 215, 38 Am. Dec. 628.

[5] Weston v. Dorr, 25 Me. 176, 43 Am. Dec. 259.

[6] Remick v. Atkinson, 11 N. H. 256, 35 Am. Dec. 493.

[7] Harris v. Morse, 49 Me. 432, 77 Am. Dec. 269.

[8] Remick v. Atkinson, 11 N. H. 256, 35 Am. Dec. 493.

A promise to redeliver contained in a receipt is founded on a sufficient consideration and may be enforced.[9]

§ 932. Interest of Receiptor in Property Receipted for; Permitting Owner Custody Thereof.—It has been said that a receiptor, being merely the sheriff's servant, has no property in the goods receipted for.[10] The better rule, however, appears to be that the giving of a receipt therefor vests in the receiptor a special property therein, although it is, of course, subordinate to that of the sheriff.[11] Accordingly, it has been held very generally that a receiptor for goods taken either on an attachment or execution has a sufficient interest therein to maintain trover for them against one who takes them out of his possession with no color of right.[12] After taking a receipt for attached goods, the officer cannot retake them before judgment without the consent of the receiptor and owner, unless the receipt is conditioned for their retaking on demand.[13] In fact, the whole object of giving receipts for property attached is to enable the receiptor to enjoy the property during the pendency of the suit, and to save the expense attending the keeping of the property during that time.[14] But of course, if one who has receipted for attached property allows it to go back into, or to remain in, the hands of the debtor, and the latter wastes, destroys, or sells it, the receiptor is liable. Having intrusted the property to the debtor, he will be responsible to the sheriff for the debtor's acts.[15] It has been held that where property attached by a sheriff, receipted for, and left by the receiptor in the defendant's possession, is, before judgment, levied on and sold by a deputy on an execution against the defendant, without the knowledge or consent of the sheriff, the receiptor on the judgment recovered in the first suit and execution issued is liable to the sheriff in an action for the property.[16] By suffering the property to pass into the hands of the owner, however, he does not abandon his right to reclaim the possession, while it remains in such owner's hands or in the hands of a person having full knowledge of all the facts; and accordingly, he may maintain replevin therefor where the defendant takes the goods into another state to sell.[17]

§ 933. Nature of Receiptor's Liability to Redeliver.[18]—It is a general principle that a receiptor of goods seized on execution or attachment is an ordinary bailee only, and is not under an absolute liability as an insurer to redeliver the property, even though he is the debtor or friend of the debtor, unless his contract is very special and explicit.[19] Thus, it has been held that he is not liable for a casual loss of goods by fire after a seizure on execution, although he has left them with the debtor.[20]

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[9] Bursley v. Hamilton, 15 Pick. (Mass.) 40, 25 Am. Dec. 423; Phillips v. Hall, 8 Wend. (N. Y.) 610, 24 Am. Dec. 108; Lockwood v. Bull, 1 Cow. (N. Y.) 322, 13 Am. Dec. 539.

[10] Phillips v. Hall, 8 Wend. (N. Y.) 610, 24 Am. Dec. 108.

[11] Peters v. Stewart, 45 Conn. 103, 29 Am. Rep. 663.

[12] Poole v. Symonds, 1 N. H. 289, 8 Am. Dec. 71; Thayer v. Hutchinson, 13 Vt. 504, 37 Am. Dec. 607.

[13] See supra, § 931.

[14] See supra, § 931.

[15] Waitt v. Thompson, 43 N. H. 161, 80 Am. Dec. 136; Phillips v. Hall, 8 Wend. (N. Y.) 610, 24 Am. Dec. 108.

[16] Flanagan v. Hoyt, 36 Vt. 565, 86 Am. Dec. 675.

[17] Peters v. Stewart, 45 Conn. 103, 29 Am. Rep. 663.

[18] Generally as to accrual of liability on bond to dissolve or release, see supra, § 911.

[19] Wright v. Dawson, 147 Mass. 384, 18 N. E. 1, 9 Am. St. Rep. 724; Browning v. Hanford, 5 Hill (N. Y.) 588, 40 Am. Dec. 369.

Compare Stephens v. Vaughan, 4 J. J. Marsh. (Ky.) 206, 20 Am. Dec. 216, wherein it was said that the nonperformance of a covenant to deliver personalty was not excused unless such nondelivery was occasioned by the act of God, of the law, of the obligee, or of some one who had a right to take the possession.

§ 934. Defenses and Estoppels.[1]—As a general proposition, it has been stated that a receiptor is entitled to prove as an excuse for not delivering property receipted for and as a defense to an action on the receipt any state of facts which shows that the officer is not under any liability either to apply the property to the debt of the attaching creditor or to return it to the debtor or other owner.[2] However, as will appear in the discussion in the following sections, the application of this rule is limited by the recognition in many jurisdictions of various estoppels arising from the nature of an undertaking on a receipt for the redelivery of released attached property. To justify a nondelivery on the ground that the property was taken from the covenantor's possession by another officer under an execution, it must be shown that such officer had authority so to do and that the property was taken before the day for delivery.[3]

§ 935.—Lack of Title in Defendant or Title in Receiptor.[4]—The authorities are conflicting with respect to the estoppel of a receiptor for attached property to set up as a defense to liability on his receipt lack of title in the attachment defendant to the property attached. One view is that such an estoppel arises;[5] the other is that it does not.[6] According to the view that such an estoppel arises, a receiptor is estopped from denying the sheriff's right to the goods and cannot set up title in a third person, except where such goods have been taken from him by act of law or, perhaps, by force.[7] It has also been ruled that a receiptor is estopped by his receipt from claiming the property as his own where he makes no such claim at the time of the levy and does not stipulate that his receipt shall be without prejudice to his right,[8] especially where it appears that the defendant in the attachment had other property which the officer could and would have attached had the receiptor at that time asserted his claim to the property.[9] On the other hand, in the case of an ordinary receipt, given where property has been attached by an officer and in which the receiptor merely promises to redeliver it on demand, it has been held that he is not estopped from showing that the property belonged to himself, and not to the debtor.[10] The view is generally taken that the receiptor can claim title to the property where he surrenders or redelivers it to the officer.[11] Likewise, where the bond or receipt contains no admission of title in the defendant in attachment and the receiptor at the time gives notice of his claim, he is not estopped from setting up his title as a bar to an action upon the receipt.[12] Similarly, it has been held that in an action upon a receipt which, by its terms, expressly denies the right of the plaintiff to attach the property as that of the defendant in the attachment suit, "reserving the right to claim said logs as my own property," the receiptor is not estopped to set up title in himself as a defense to the action, as the terms of the receipt sufficiently guard his rights in this respect. One court, at least, has adopted the view that the receiptor, by the mere fact of having informed the officer of his claims at the time of the attachment, may show, in an action upon the receipt, that at the time of the attachment the property was his, and not that of the defendant in attachment, and that proof of ownership, coupled with such notice, entitles him to a complete discharge.[13] However, where the goods of a debtor are actually attached as his property and the receiptor, in his receipt, expressly admits that the goods are the property of such debtor and promises to return them to the attaching officer or pay the amount of the judgment recovered against the debtor, he will not, in an action on such a receipt, be permitted to give evidence to show that the goods are not the property of the debtor or that they are not attachable,[14] although it has been held that he may in such a case, after complying with his promise to return the property re-

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[20] Browning v. Hanford, 5 Hill (N. Y.) 588, 40 Am. Dec. 369.

[1] As to discharge of liability on bond to dissolve or release, see supra, §§ 913 et seq.; as to estoppels on such bond, see supra, §§ 920 et seq.

[2] Wright v. Dawson, 147 Mass. 384, 18 N. E. 1, 9 Am. St. Rep. 724.

[3] Stephens v. Vaughan, 4 J. J. Marsh. (Ky.) 206, 20 Am. Dec. 216.

[4] See also supra, § 925, as to lack of title in defendant or title in surety as defense to action on forthcoming or redelivery bond in attachment.

[5] Lathrop v. Cook, 14 Me. 414, 31 Am. Dec. 62; Dewey v. Field, 4 Met. (Mass.) 381, 38 Am. Dec. 376; Bursley v. Hamilton, 15 Pick. (Mass.) 40, 25 Am. Dec. 423; Morrison v. Blodgett, 8 N. H. 238, 29 Am. Dec. 653; Dezell v. Odell, 3 Hill (N. Y.) 215, 38 Am. Dec. 628 (seizure on execution).

Annotation: 37 A.L.R. 1402.

In Bursley v. Hamilton, 15 Pick. (Mass.) 40, 25 Am. Dec. 423, it was held that in an action upon a receipt the defendant would not be allowed to set up title in himself as a defense to the action, even though at the time the receipt was given, he gave notice of his claim to the property, but that evidence of title in himself was admissible upon the question of damages and tended to show that the plaintiff was entitled to nominal damages only, since the receiptor might have surrendered the property in discharge of his obligation and then brought suit for its recovery.

In Morrison v. Blodgett, 8 N. H. 238, 29 Am. Dec. 653, where the members of a new partnership, comprising some of the same members as did the old, the new members having assumed, as between themselves and those whose interests they had purchased, their share of the debts of the old firm, gave an accountable receipt for goods found in their possession and attached as the property of the old firm, it was held, in an action upon the receipt, that they were estopped to set up title in themselves as members of the new firm in discharge of their liability upon the receipt, or to show that the property was attached for the personal debt of one of the members of the old firm.

In Lathrop v. Cook, 14 Me. 414, 31 Am. Dec. 62, it was held that one whose goods were attached as belonging to another and who gave a receipt for them to the attaching officer, which receipt was not in the usual form and contained no admission

[6] Lester v. Ladrigan, 90 Conn. 570, 98 A. 124, L.R.A.1916F, 939.

Annotation: L.R.A.1916F, 942.

According to this view, he may show that he returned it to the true owner. Fisher v. Bartlett, 8 Me. 122, 22 Am. Dec. 225; Dewey v. Field, 4 Met. (Mass.) 381, 38 Am. Dec. 376. Annotation: 25 Am. Dec. 428.

[7] Phillips v. Hall, 8 Wend. (N. Y.) 610, 24 Am. Dec. 108.

Annotation: 25 Am. Dec. 427.

[8] Dezell v. Odell, 3 Hill (N. Y.) 215, 38 Am. Dec. 628.

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that the goods were those of the defendant in attachment, could, in an action upon the receipt, set up title in himself as a valid defense.

[9] Dewey v. Field, 4 Met. (Mass.) 381, 38 Am. Dec. 376.

[10] Lathrop v. Cook, 14 Me. 414, 31 Am. Dec. 62; Barron v. Cobleigh, 11 N. H. 557, 35 Am. Dec. 505.

Annotation: 25 Am. Dec. 428.

[11] **It has been held** that the owner does not waive his title to property attached while in the hands of another by receipting for the same where the receipt is merely a promise to deliver the property to the officer, and that a recital contained therein to the effect that the person signing the receipt is estopped to deny that the property is that of the debtor does not operate after the property is delivered to the officer. Lester v. Ladrigan, 90 Conn. 570, 98 A. 124, L.R.A.1916F, 959.

After the receiptor has delivered back the property, he is not estopped to claim it. Johns v. Church, 12 Pick. (Mass.) 557, 23 Am. Dec. 651.

In Bursley v. Hamilton, 15 Pick. (Mass.) 40, 25 Am. Dec. 423, the court said: "But if the promise had been complied with, had the defendant delivered over the goods agreeably to his contract, he might then have brought his action of replevin, trespass, or trover, to try his right of property. He would no longer be estopped by his contract and the implied admission contained in it, and upon proving title in himself, as he has proved it in the present action, he would have recovered the goods on their value. Johns v. Church, 12 Pick. (Mass.) 557, 23 Am. Dec. 651. The receiptor under such circumstances, although he may intend ultimately to assert his right of property, may well wait in the expectation that the attaching creditor will fail in his action, in which case the property will be delivered up, and all litigated questions of title avoided."

However, in Dewey v. Field, 4 Met. (Mass.) 381, 38 Am. Dec. 376, it was held that a receiptor ought not to conceal his ownership and thus induce the other party to forego making an attachment of other property belonging to the debtor which would have furnished adequate security for the debt. Under such circumstances, the giving of a receipt to an attaching officer should operate as an estoppel and be held sufficient to prevent the party from controverting the debtor's title to the property mentioned in the receipt. See also annotation: L.R.A.1916F, 944.

[12] Woods-Egan Live-Stock Commission Co. v. Hicks, 92 Kan. 922, 142 P. 276, L.R.A. 1915A, 1132.

Annotation: 37 A.L.R. 1402.

[13] Annotation: 37 A.L.R. 1406.

[14] Annotation: 25 Am. Dec. 427.

ceipted for, bring replevin, trespass, or trover to try his right of property and will not, in such action, be estopped by his receipt from proving title in himself.[15] Likewise, in such an action on the receipt, evidence of property in the defendant is admissible on the question of damages in a suit on his promise to return the property; and if such evidence shows that the property could not have been applied to satisfy the creditor's execution, the plaintiff can recover nominal damages only.[16]

§ 936. —Property Not Liable.[17]—The receiptor has been allowed to defend an action on his undertaking on the ground that the property attached is exempt from attachment and has been given up to the debtor, or that the attachment has been dissolved by the insolvency of the debtor.[18] On the other hand, it has been ruled that one who receives from an officer property levied on and covenants to redeliver at a given time and place cannot excuse nondelivery by the fact that the property is exempt from execution.[19] It has also been held that where a receiptor refused to deliver the property prior to the time when the debtor filed his petition in bankruptcy, the subsequent proceedings in bankruptcy are no defense to an action brought by the sheriff against the receiptor for the amount of the execution.[20]

§ 937. —Defects and Irregularities in Attachment.—The general rule is that a receiptor for attached property may not set up as a defense to liability on the receipt the fact that the attachment proceedings were defective, unless they were void.[1] Accordingly, in an action on a receipt given for goods attached, the defendant will not be permitted to prove that the goods were not attached, or were not even in the sheriff's possession, or delivered by him to the defendant,[2] especially where they were at that time in the possession of the receiptor.[3]

XIII. THE MAIN ACTION

A. In General

§ 938. Generally.—The main action is in essence the action by the plaintiff on his claim against the defendant. Such action must necessarily be in rem until personal jurisdiction of the defendant is secured,[4] and it is elementary that no personal jurisdiction of the defendant is secured until personal service is had upon him or until he enters a general appearance to answer to the merits of the claim against him.[5] Consequently, until such jurisdiction is secured, no judgment can be entered in the main action against him, binding upon him personally, except with respect to property validly attached or garnished.[6] The main action may be commenced as an ordinary action or, in some jurisdictions, by a writ of attachment or garnishment.[7]

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[15] Bursley v. Hamilton, 15 Pick. (Mass.) 40, 25 Am. Dec. 423.

[16] Bursley v. Hamilton, 15 Pick. (Mass.) 40, 25 Am. Dec. 423.

As to a similar holding in an action on a bond to dissolve or release, see supra, § 925.

[17] As to estoppel of surety on bond to dissolve attachment or garnishment to set up exemptions of property, see supra, § 924.

[18] Wright v. Dawson, 147 Mass. 384, 18 N. E. 1, 9 Am. St. Rep. 724.

As to effect of insolvency on liability on a bond to dissolve an attachment or garnishment or to release attached or garnished property, see supra, §§ 918, 919.

[19] Stephens v. Vaughan, 4 J. J. Marsh. (Ky.) 206, 20 Am. Dec. 216.

[20] Parks v. Sheldon, 36 Conn. 466, 4 Am. Rep. 95.

As to effect of bankruptcy on liability on bond to dissolve attachment or to release attached property, see supra, § 918.

[1] As to estoppel in an action on a bond to dissolve or release to set up defects and irregularities in the attachment, see supra, § 921.

[2] Lowry v. Cady, 4 Vt. 504, 24 Am. Dec. 628; Spencer v. Williams, 2 Vt. 209, 19 Am. Dec. 711.

[3] Pettes v. Marsh, 15 Vt. 454, 40 Am. Dec. 689.

[4] See Vol. 4, p. 556, § 10.

[5] See Vol. 4, p. 578, §§ 48 et seq.

The discussion of the main action in attachment or garnishment is limited in this article to the practice and procedure peculiar to such action by virtue of issuance, in the action, of the attachment or garnishment, and excludes for the most part discussion of matters pertaining generally to actions at law.

§ 939. **Continuance, Discontinuance, Abatement, and Revival.**—A main action in an attachment or garnishment is subject generally to the law of dismissal, discontinuance, and nonsuit,[8] continuance,[9] and abatement, survival, and revival of actions.[10] It may be noted here, however, that a court may continue a case after verdict or decision, and suspend the entry of final judgment, in order that it may determine the liability of a garnishee.[11] Statutory provision is sometimes made for the continuance of an attachment or garnishment case when a resident defendant is absent from the state at the commencement of the action and does not return or enter an appearance before the return day of the writ, and for a continuance and an order of notice by the court, by publication or otherwise, where the defendant is a nonresident and does not appear.[12] It may also be noted that it has been held that in an action at law on an attachment against a nonresident defendant, the suit does not abate on the return day of the summons, though the return discloses that the defendant is not found in the county, if it also appears that the defendant has property or debts in the county, and that the attachment has been levied thereon.[13] The dissolution of an attachment, where it constitutes the sole basis of jurisdiction of the court over the main action, as in the case of a nonresident defendant, and where no personal jurisdiction over the defendant is obtained, naturally discontinues the main action.[14] An attachment suit will abate upon a showing that the defendant is a nonresident and cannot be found, that service cannot be had upon him, and that none of his property can be found.[15] However, the failure to issue publication of process upon the sheriff's return of "not found" does not create a hiatus devitalizing the suit, where property of the nonresident has been attached within the jurisdiction of the court.[16]

§ 940. **Parties.**—The law of parties[17] applies generally to the parties in the main action in an attachment or garnishment suit. The garnishee usually is not made a party to the principal action, though under some statutes, if he fails to answer or fails to make a true and satisfactory answer, he may then be made a party defendant, a cause of action being stated against him by the plaintiff on behalf of the defendant debtor.[18]

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[6] See infra, §§ 954 et seq.

[7] See infra, § 942.

[8] See DISMISSAL, DISCONTINUANCE AND NONSUIT [Also 9 R. C. L. pp. 190 et seq.].

[9] See CONTINUANCES [Also 6 R. C. L. pp. 542 et seq.].

[10] See ABATEMENT, SURVIVAL AND REVIVAL, Vol. 1, pp. 15 et seq.

[11] Tillinghast v. Johnson, 34 R. I. 136, 82 A. 788, 41 L.R.A.(N.S.) 764, Ann. Cas. 1914A, 960.

[12] Barber v. Morgan, 84 Conn. 618, 80 A. 791, Ann. Cas. 1912D, 951.

[13] Adams v. Trepanier Lumber Co. 117 Ohio St. 298, 158 N. E. 541, 55 A.L.R. 1118.

[14] Ibid.

[15] Byrd v. Rector, 112 W. Va. 192, 163 S. E. 845, 81 A.L.R. 1213.

[16] Ibid.

[17] See PARTIES [Also 20 R. C. L. p. 660].

[18] Sanders v. Herndon, 122 Ky. 760, 93 S. W. 14, 5 L.R.A.(N.S.) 1072, 121 Am. St. Rep. 493.

In Forrester v. Forrester, 155 Ga. 722, 118 S. E. 373, 29 A.L.R. 1363, it was held that to give a court of equity jurisdiction to subject a debt within the state to payment of alimony due by a nonresident husband, his debtor must be made a party to the proceeding and the debt must be seized.

B. Process, Service, and Notice

§ 941. **Process.**—The main action may be commenced by personal service of a summons on the defendant, in which event personal jurisdiction of the defendant is at once secured, and the attachment or garnishment may then issue on mesne process, where proper grounds for such issuance exist.[19] Indeed, in many states the writ of attachment may be issued only after the commencement of an action by service of summons in the usual manner.[20] The main action may, on the other hand, be commenced by the execution of a writ of attachment or garnishment, in which event jurisdiction of the property attached or garnished is at once secured, as is jurisdiction of any garnishee who is served with process.[1] The service of a writ of attachment or garnishment on the defendant, sufficient to constitute a summons, although no property is levied upon, has the effect of the service of a writ of summons, and commences an action against the defendant, although, of course, no attachment has been effected.[2] However, no action whatsoever is commenced where there is neither a personal service upon the defendant nor a valid attachment or garnishment of his property.[3] In some states the statutes make the clause of summons an essential portion of the writ of attachment, but in effect they are regarded as two separate writs, and with separate objects,—the one directing the officer to seize property as a security for the creditor, and the other directing the officer to advise the debtor of what has been done. And while under such an act the court will not permit the property seized to be subjected to the payment of the debt unless the debtor is legally advised of the proceedings, yet the invalidity or total nullity of the summons is held not necessarily to make the attachment also a nullity.[4]

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[19] Ridenbaugh v. Sandlin, 14 Idaho, 472, 94 P. 827, 125 Am. St. Rep. 175; White v. Johnson, 27 Or. 282, 40 P. 511, 50 Am. St. Rep. 726; Cheeseman v. Fenton, 13 Wyo. 436, 80 P. 823, 110 Am. St. Rep. 1010.

[20] Cheeseman v. Fenton, 13 Wyo. 436, 80 P. 823, 110 Am. St. Rep. 1010.

Under a statute allowing the plaintiff, "at the time of issuing the summons, or at any time afterward," to have the property of the defendant attached, the summons must be issued at the time of, or prior to, the issuance of the writ of attachment. If the writ is issued before the summons, it is void. White v. Johnson, 27 Or. 282, 40 P. 511, 50 Am. St. Rep. 726. See also Ridenbaugh v. Sandlin, 14 Idaho, 472, 94 P. 827, 125 Am. St. Rep. 175.

[1] Clark v. Wells, 203 U. S. 164, 51 L. ed. 138, 27 S. Ct. 43; Courtney v. Pradt, 196 U. S. 89, 49 L. ed. 398, 25 S. Ct. 208; New York, L. E. & W. R. Co. v. Estill, 147 U. S. 591, 37 L. ed. 292, 13 S. Ct. 444; Pratt v. Law, 9 Cranch (U. S.) 456, 3 L. ed. 791; Dulion v. S. A. Lynch Enterprise Finance Corp. (C. C. A. 5th) 53 F. (2d) 568, 82 A.L.R. 509, writ of certiorari denied in 285 U. S. 540, 76 L. ed. 933, 52 S. Ct. 312; Cowart v. W. E. Caldwell Co. 134 Ga. 544, 68 S. E. 500, 30 L.R.A.(N.S.) 720; Bicknell v. Herbert, 20 Haw. 132, Ann. Cas. 1913A, 1186, affirmed in 233 U. S. 70, 58 L. ed. 854, 34 S. Ct. 562; Wagner v. Farmers' Co-op. Exch. Co. 147 Minn. 376, 180 N. W. 231, 14 A.L.R. 279; Raymond v. Leishman, 243 Pa. 64, 89 A. 791, L.R.A.1915A, 400, Ann. Cas. 1915C, 780; Tsesmelis v. Sinton State Bank (Tex. Com. App.) 53 S. W. (2d) 461, 85 A.L.R. 319.

Annotation: 82 A.L.R. 514.

An action is commenced by the levy of an attachment, and neither the action nor the attachment is abandoned thereafter by a delay in the service of summons. Wagner v. Farmers' Co-op. Exch. Co. 147 Minn. 376, 180 N. W. 231, 14 A.L.R. 279.

"Foreign attachment" is the equivalent of a summons for the commencement of a personal action. It is a process by which to commence a personal action and compel an appearance. Raymond v. Leishman, 243 Pa. 64, 89 A. 791, L.R.A.1915A, 400, Ann. Cas. 1915C, 780.

The levy of an attachment issued out of a state court on property of a nonresident defendant has been held to constitute the commencement of a suit within the meaning of the Federal statute providing for the removal of causes from state to Federal courts Tsesmelis v. Sinton State Bank (Tex. Com. App.) 53 S. W. (2d) 461, 85 A.L.R. 319.

[2] New York, L. E. W. R. Co. v. Estill, 147 U. S. 591, 57 L. ed. 292, 13 S. Ct. 444.

[3] National Bank v. Furtick, 2 Marv. (Del.) 35, 42 A. 479, 44 L.R.A. 115, 96 Am. St. Rep. 99.

A court cannot proceed in an attachment action, in the absence of personal service on the defendant within the jurisdiction, unless property of the defendant is found by the officer on which to levy the writ of attachment. Ibid.

[4] Bank of Missouri v. Matson, 26 Mo. 243, 72 Am. Dec. 208.

A plaintiff may proceed to a verdict and general judgment on his declaration, although his attachment or garnishment is dissolved or discharged because of its invalidity, if the defendant has entered a general appearance and made defense.[5]

The effect of errors or defects in the summons to the defendant, or in the writ of attachment or garnishment as a summons, depends upon the jurisdictional character of such error or defects, and in this connection it is to be observed that there is a difference of opinion among the courts upon the general matter of what errors and defects in attachment and garnishment proceedings are jurisdictional, and what are not.[6] However, it is generally true that a writ of attachment or garnishment may be defective in that capacity and still be efficient and vital as a summons to the defendant, and the vitality and efficiency of a writ of attachment cannot in all cases and at all hazards be tested by the strength of the summons to withstand a motion to quash. The fact that the clerk makes a mistake in drawing a summons, and in some respect fails to comply with the statutory requirements, will not, alone and of itself, render the process as though no summons whatever had been issued, so as to subject the writ of attachment to dissolution on the ground that no summons had been issued at the time of the issuance of the writ.[7] The view has been taken that the summons must be signed by the clerk because his signature is a matter of substance and a fundamental part of the summons, without which there can be no effectual summons.[8]

§ 942. Service of Process and Notice.—An attachment or garnishment statute may require personal service either of process or of notice on the defendant; in such case there must be compliance with the statute.[9] But the statutes

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[5] Cowart v. W. E. Caldwell Co. 134 Ga. 544, 68 S. E. 500, 30 L.R.A.(N.S.) 720.

It is provided by statute that where the defendant has appeared and made defense, judgment against him shall bind all his property and have the same force and effect as if there had been personal service, and that where notice in writing was given to the defendant of the pendency of attachment proceedings, the declaration shall not be dismissed because the attachment may have been dismissed or discontinued, but the plaintiff shall be entitled to judgment on the declaration filed, as in other cases at common law, upon the merits of the case. Cowart v. W. E. Caldwell Co. 134 Ga. 544, 68 S. E. 500, 30 L.R.A.(N.S.) 720.

[6] See Vol. 4, p. 607, §§ 85, 86.

[7] Ridenbaugh v. Sandlin, 14 Idaho, 472, 94 P. 827, 125 Am. St. Rep. 175.

[8] Sharman v. Huot, 20 Mont. 555, 52 P. 558, 63 Am. St. Rep. 645.

[9] Barber v. Morgan, 84 Conn. 618, 80 A. 791, Ann. Cas. 1912D, 951; Bicknell v. Herbert, 20 Haw. 132, Ann. Cas. 1913A, 1186, affirmed in 233 U. S. 70, 58 L. ed. 854, 34 S. Ct. 562; J. J. Smith Lumber Co. v. Scott County Garbage Reducing & Fuel Co. 149 Iowa, 272, 128 N. W. 389, 30 L.R.A.(N.S.) 1184 (statute requiring notice to defendant of garnishment proceedings); Union P. R. Co. v. Smersh, 22 Neb. 751, 36 N. W. 139, 3 Am. St. Rep. 290 (requiring notice to defendant of garnishment execution although such notice is not provided for by statute); Mares v. Schuth, 38 N. M. 101, 28 P. (2d) 527, 92 A.L.R. 567 (statute requiring notice to defendant of garnishment proceeding); Friedman v. First Nat. Bank, 39 Okla. 486, 135 P. 1069, 49 L.R.A.(N.S.) 548 (in case of resident defendants); Kevorko v. Vaitkunas, 54 R. I. 8, 168 A. 910, citing R. C. L. (writ of scire facias).

Annotation: 49 L.R.A.(N.S.) 548.

Statutory provisions relating to the form and contents of the notice to the attachment defendant should be strictly and literally observed in order that judgment shall be of legal force and validity against him. Mares v. Schuth, 38 N. M. 101, 28 P. (2d) 527, 92 A.L.R. 567.

Omission of the notice served on the principal defendant in garnishment proceedings to state, as required by statute, that his money will be applied and his effects disposed of to pay the judgment, is a jurisdictional defect which invalidates the judgment against the garnishee. Mares v. Schuth, 38 N. M. 101, 28 P. (2d) 527, 92 A.L.R. 567.

In an action brought by attachment against the defendant in the county where he had resided, in which it is charged he has absconded, process may be served on him in any county in which he may be afterward discovered, and a judgment secured upon such process cannot be disregarded as void. Gandy v. Jolly, 35 Neb. 711, 53 N. W. 658, 37 Am. St. Rep. 460.

Statutes do not always require notice to the defendant of garnishment proceedings. Such statutes contemplate garnishment proceedings on mesne, rather than original, process. See supra, § 941.

Where proceedings have been properly commenced and jurisdiction obtained by the garnishment of property of the princiof the states have provided for several kinds of service of original process short of actual service on the party brought before the court, and the nature and effect of this service, and the purpose which it answers, depend altogether upon the effect given to it by the statute.[10] However, in some jurisdictions no provision is made for notice to the defendant if he is a nonresident not within the state.[11] A corporate defendant to an attachment suit must be served with process in the manner provided by statute.[12]

§ 943. —**Leaving a Copy of Process at Usual Place of Abode.**—The form of service of a writ of attachment or garnishment on a resident defendant in the main action, as prescribed by some statutes, at least under certain circumstances, is by leaving a copy of the process at his usual place of abode.[13] However, leaving notice at the defendant's usual place of abode may fail in actually notifying him of the attachment or garnishment. Hence, provision is sometimes made for the continuance of cases when the defendant, though a resident of the state, is absent from it at the commencement of the action and does not return or enter an appearance before the return day, and for a continuance and an order of notice by the court, by publication or otherwise, where the defendant is a nonresident and does not appear.[14]

§ 944. —**Publication.**—As a rule, if the defendant is a nonresident, or absent from the state, or in concealment therein, the statute superadds publication of notice in a newspaper in order that he may have certain and speedy information concerning at whose suit his estate is taken, and where and when he may release it,[15] and it is the duty of the court to order such publication

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pal defendants in the hands of the garnishee, a defect in the notice that should subsequently be given to the principal defendant is an irregularity that will not render the judgment a nullity, although it may be a sufficient cause for reversal. Bruce v. Cloutman, 45 N. H. 37, 84 Am. Dec. 111.

As to levy of attachment on shares of stock, see Vol. 4, p. 897, § 564.

[10] Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Cooper v. Reynolds, 10 Wall. (U. S.) 308, 19 L. ed. 931; Shea v. Shea, 154 Mo. 599, 55 S. W. 869, 77 Am. St. Rep. 779; Washington v. Sanders, 13 N. C. (2 Dev. L.) 343, 21 Am. Dec. 336; White v. Johnson, 27 Or. 282, 40 P. 511, 50 Am. St. Rep. 726; Breon v. Miller Lumber Co. 83 S. C. 221, 65 S. E. 214, 24 L.R.A.(N.S.) 276, 137 Am. St. Rep. 803; McClung v. Sieg, 54 W. Va. 467, 46 S. E. 210, 66 L.R.A. 884; Cheeseman v. Fenton, 13 Wyo. 436, 80 P. 823, 110 Am. St. Rep. 1010.

[11] Barber v. Morgan, 84 Conn. 618, 80 A. 791, Ann. Cas. 1912D, 951. Bicknell v. Herbert, 20 Haw. 132, Ann. Cas. 1913A, 1186, affirmed in 233 U. S. 70, 58 L. ed. 854, 34 S. Ct. 562.

[12] In State ex rel. Ferrocarriles Nacionales v. Rutlidge, 331 Mo. 1015, 56 S. W. (2d) 28, 85 A.L.R. 1378 (writ of certiorari denied in 289 U. S. 746, 77 L. ed. 1492, 52 S. Ct. 689), a foreign railway corporation was made defendant in an attachment suit by service of process on a soliciting freight agent.

Under a statute authorizing service of process upon a foreign corporation doing business within the state, by a service upon its agent therein, the court held that jurisdiction in attachment proceedings was obtained by such service upon the local agent of a foreign corporation. Société Foncière v. Milliken, 135 U. S. 304, 34 L. ed. 208, 10 S. Ct. 823.

[13] Herbert v. Bicknell, 233 U. S. 70, 58 L. ed. 854, 34 S. Ct. 562; Barber v. Morgan, 84 Conn. 618, 80 A. 791, Ann. Cas. 1912D, 951; Kevorko v. Vaitkunas, 54 R. I. 8, 168 A. 910, citing R. C. L. (writ of scire facias).

Due process of law is not denied where the principal defendant in a garnishment suit had actual knowledge of the suit in addition to process having been served by leaving a copy of the summons at his usual residence. Herbert v. Bicknell, 233 U. S. 70, 58 L. ed. 854, 34 S. Ct. 562.

The provision sometimes is that a copy of the process shall be left with him personally or at his usual place of abode, if within the state. Barber v. Morgan, 84 Conn. 618, 80 A. 791, Ann. Cas. 1912D, 951.

[14] Barber v. Morgan, 84 Conn. 618, 80 A. 791, Ann. Cas. 1912D, 951.

[15] Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Cooper v. Reynolds, 10 Wall. (U. S.) 308, 19 L. ed. 931; Shea v. Shea, 154 Mo. 599, 55 S. W. 869, 77 Am. St. Rep. 779; Washington v. Sanders, 13 N. C. (2 Dev. L.) 343, 21 Am. Dec. 336; White v. Johnson, 27 Or. 282, 40 P. 511, 50 Am. St. Rep. 726; Breon v. Miller Lumber Co. 83 S. C. 221, 65 S. E. 214, 24 L.R.A.(N.S.) 276, 137 Am. St. Rep. 803; McClung v. Sieg, 54 W. Va. 467, 46 S. E. 210, 66 L.R.A. 884; Cheeseman v. Fenton, 13 Wyo. 436, 80 P. 823, 110 Am. St. Rep. 1010.

Annotation: 76 Am. St. Rep. 803.

as the statute prescribes, and to see that it is properly made.[16] In jurisdictions wherein attachment cannot issue in an action sounding in tort or where damages are unliquidated,[17] a nonresident cannot be summoned by publication in such an action.[18]

§ 945. **—Order and Time for Publication.**—Since the purpose of publication is to notify the defendant of the attachment, the publication should be subsequent to the attachment and should show that the attachment has been issued, or that it has been levied, or the cause for which it has been levied.[19] Consequently, proceedings for the service of the summons by publication on a nonresident before attaching his property are null and void.[20] Generally, publication may and must be made within a reasonable time after return of process.[1] Where the affidavit for attachment and other papers in a cause show that the defendants are nonresidents, and no order of publication has been taken on the return day of the process, the plaintiff is entitled to a reasonable time in which to perfect his suit by order of publication, and the suit does not abate immediately upon the return of the process and failure to take the order of publication.[2]

§ 946. **—Failure of, and Defective, Publication; Amendments.**—According to some courts, if the plaintiff has failed to publish notice of the proceedings, as required by the statute, on failure to make personal service on the defendant, the court loses jurisdiction to proceed further. The view is taken that the fact of publication of notice as required by statute must appear from the records of the court. A notice by publication is fatally defective which fails to show that the attachment has been issued or that it has been levied, or the cause for which it has been levied.[3] But in jurisdictions that take the general view that irregularities in the attachment proceedings are not fatal to the jurisdiction of the court,[4] the attachment is merely voidable, and not void, as a consequence of failure of, or defective, publication, and judgment in the action, while irregular, is not open to collateral attack.[5]

C. Appearance by Defendant

§ 947. **Generally.**—The principal defendant in an attachment or garnishment case may enter an appearance in the main action by appearing in person or by filing a plea or answer to the merits,[6] or he may enter a special appearance to attack the attachment or garnishment.[7]

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[16] Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Cooper v. Reynolds, 10 Wall. (U. S.) 308, 19 L. ed. 931.

"It is the duty of the court to order such publication and to see that it has been properly made, and, undoubtedly, if there has been no such publication, a court of errors might reverse the judgment. But when the writ has been issued, the property seized, and that property been condemned and sold, we cannot hold that the court had no jurisdiction for want of a sufficient publication of notice." Cooper v. Reynolds, 10 Wall. (U. S.) 380, 19 L. ed. 931 (a collateral attack on an attachment).

A provision of a statute requiring proof of publication in a newspaper to be made by the "affidavit of the printer, or his foreman, or his principal clerk," is satisfied when the affidavit is made by the editor of the paper. Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565.

[17] See Vol. 4, p. 622, §§ 106 et seq.

[18] Mudge v. Steinhart, 78 Cal. 34, 20 P. 147, 12 Am. St. Rep. 17.

[19] Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Breon v. Miller Lumber Co. 83 S. C. 221, 65 S. E. 214, 24 L.R.A.(N.S.) 276, 137 Am. St. Rep. 803.

Annotation: 76 Am. St. Rep. 803.

[20] Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Breon v. Miller Lumber Co. 83 S. C. 221, 65 S. E. 214, 24 L.R.A.(N.S.) 276, 137 Am. St. Rep. 803.

[1] Shea v. Shea, 154 Mo. 599, 55 S. W. 869, 77 Am. St. Rep. 779; McClung v. Sieg, 54 W. Va. 467, 46 S. E. 210, 66 L.R.A. 884.

[2] Ibid.

[3] Annotation: 76 Am. St. Rep. 803.

See Vol. 4, p. 586, § 58.

As to time for publication, see supra, § 945.

[4] See Vol. 4, p. 607, § 85.

[5] See infra, § 957.

See also infra, § 959, as to full faith and credit.

§ 948. Entering Security to Dissolve or Release Attachment or Garnishment as Constituting Appearance.—Whether or not the entry of security to dissolve an attachment or release attached property has the effect of constituting a general appearance in the main action depends upon statutory provisions and the nature and effect of such security. Generally speaking, dissolution bonds conditioned by the agreement of the defendant to appear and abide by the judgment of the court are regarded as constituting a general appearance in the main action[8] and a waiver of defects in the attachment.[9] On the other hand, forthcoming, delivery, and replevin bonds do not generally have these effects.[10] In some jurisdictions statutes have been enacted which expressly provide that the giving of bond to secure the release of attached property shall have the same force and effect as personal service.[11]

The general rule is that entry of security by a third person to dissolve or release an attachment cannot have the effect of constituting an appearance by the defendant.[12]

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[6] Maxwell v. Stewart, 21 Wall. (U. S.) 71, 22 Wall. 77, 22 L. ed. 564; McGoon v. Scales, 9 Wall. (U. S.) 23, 19 L. ed. 545; Chaffee v. Hayward, 20 How. (U. S.) 208, 15 L. ed. 804; Toland v. Sprague, 12 Pet. (U. S.) 300, 9 L. ed. 1093; Pollard v. Dwight, 4 Cranch (U. S.) 421, 2 L. ed. 666; Butcher v. Cappon & B. Leather Co. 148 Mich. 552, 112 N. W. 110, 12 Ann. Cas. 169; Rocky Mount Mills v. Wilmington & W. R. Co. 119 N. C. 693, 25 S. E. 854, 56 Am. St. Rep. 682.

[7] Davis v. Cleveland, C. C. & St. L. R. Co. 217 U. S. 157, 54 L. ed. 708, 30 S. Ct. 463, 27 L.R.A.(N.S.) 823, 18 Ann. Cas. 907; Adams v. Trepanier Lumber Co. 117 Ohio St. 298, 158 N. E. 541, 55 A.L.R. 1118.

A nonresident defendant over whom personal jurisdiction has not been obtained may appear specially in a suit in a Federal Circuit Court for the sole purpose of moving to quash the service of writs of garnishment upon his property in the district, on the ground that such property was not subject to garnishment. Davis v. Cleveland, C. C. & St. L. R. Co. 217 U. S. 157, 54 L. ed. 708, 30 S. Ct. 463, 27 L.R.A.(N.S.) 823, 18 Ann. Cas. 907.

[8] Johnson v. Chicago & P. Elevator Co. 119 U. S. 388, 30 L. ed. 447, 7 S. Ct. 254; Butcher v. Cappon & B. Leather Co. 148 Mich. 552, 112 N. W. 110, 12 Ann. Cas. 169.

Annotation: L.R.A.1916F, 587.

From the time of the execution of a release bond in attachment, the attached property disappears from the proceedings, the bond taking its place, and the action becomes one in personam. Johnson v. Chicago & P. Elevator Co. 119 U. S. 388, 30 L. ed. 447, 7 S. Ct. 254.

Statutes have been enacted in some jurisdictions which expressly provide that the giving of a bond to secure the release of attached property shall have the same force and effect as personal service. Annotation: L.R.A.1916F, 587.

[9] See Vol. 4, p. 924, § 620.

As to classification of dissolution and release bonds, and their effect, see supra, §§ 901 et seq.

[10] Wagner v. Farmers' Co-op. Exch. Co. 147 Minn. 376, 180 N. W. 231, 14 A.L.R. 279; Winder v. Penniman, 181 N. C. 7, 105 S. E. 884, 13 A.L.R. 364; American Surety Co. v. Stebbins, L. S. Co. 107 Tex. 413, 180 S. W. 101, L.R.A.1916F, 583.

Annotation: L.R.A.1916F, 588.

A bond to secure the release of attached property, which is conditioned merely to deliver the property or pay the value thereof to the sheriff to whom the execution upon the attachment obtained by the plaintiff in the action may be issued, and which requires no action of the court, it being merely an engagement to redeliver the attached property or pay the value thereof, and which does not release the lien of the attachment, does not amount to a general appearance. Annotation: L.R.A.1916F, 589.

In American Surety Co. v. Stebbins, L. S. Co. 107 Tex. 413, 180 S. W. 101, L.R.A. 1916F, 583, it was held that where a statute provided that no judgment could be obtained against a defendant except upon service, acceptance, or waiver of process, or upon appearance, the filing of a replevin bond in an attachment suit did not constitute a waiver of service of process, or an appearance, so as to justify a judgment by default against the defendant.

The giving of a replevin bond by a nonresident who came into the state to attend a trial, to recover possession of personal property which he brought with him into the state, and which was wrongfully attached while he was in the state on such errand, is not a submission to the jurisdiction of the court. Winder v. Penniman, 181 N. C. 7, 105 S. E. 884, 13 A.L.R. 364.

However, it has been held that the mere replevying of attached property renders it incumbent on the defendant to enter an appearance or be subject to the proceedings as in the case of personal service of process, although the replevy bond does not operate to dissolve the attachment, notice of the suit being acknowledged by the act of filing the bond. Likewise, the view has been taken that the execution of a redelivery bond in replevin, conditioned as required by statute to deliver the property to the plaintiff if such delivery should be adjudged, and to pay all costs and damages that should be awarded, is an appearance in the action and waives the issuance of summons. Annotation: L.R.A.1916F, 590.

[11] Annotation: L.R.A.1916F, 587.

D. PLEADINGS

§ 949. Generally.—The law of pleading[13] applies generally to the main action in an attachment or garnishment proceeding.[14] Whether or not a motion to quash or dissolve an attachment extends the time to plead in the main action depends upon local statutes and practice.[15] The effect of the appearance of the defendant or the dissolution of the attachment upon the course of pleading in the main action likewise depends upon local statutes and practice.[16]

§ 950. Relation between Complaint and Attachment Affidavit.—In some jurisdictions a verified pleading may serve both as the complaint of the plaintiff in the main action and as an affidavit to support an attachment or garnishment.[17] However, it is believed that the general practice is not to combine the complaint and the attachment affidavit in a single instrument.[18]

§ 951. Effect of Variance between Complaint and Attachment or Garnishment Affidavit.—The general rule is that a difference in substance between the declaration or complaint in the main action and the attachment affidavit is fatal,[19] but that an immaterial variance is amendable.[20] Thus, the plaintiff may not sue out an attachment for one cause of action and allege another cause in his declaration or complaint,[1] but a variance between the parties stated in the attachment affidavit and in the complaint is amendable.[2] There is no variance between the cause of action for which the attachment was sued out and that declared on, where the declaration is for breach of warranty and the ground for suing out the attachment was that the warranty so broken was fraudulently made.[3] The view has been taken that an attachment, regular upon its face, is not void because the complaint does not set up a cause of action which would warrant the issuance of an attachment.[4]

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[12] Annotation: L.R.A.1916F, 591.

[13] See PLEADING [Also 21 R. C. L. p. 431].

[14] Fresh v. Gilson, 16 Pet. (U. S.) 327, 10 L. ed. 982; Skalowski v. Joe Fisher, 152 S. C. 108, 149 S. E. 340, 65 A.L.R. 1427.

The rules applicable to assumpsit must govern proceedings commenced by attachment upon a short note in lieu of a formal declaration, where such proceedings assume the essential character of an action of assumpsit. Fresh v. Gilson, 16 Pet. (U. S,) 327, 10 L. ed. 982.

The sufficiency of the complaint in an action in which an attachment has issued must be determined, on demurrer, from its terms, unaided by affidavits and exhibits. Skalowski v. Joe Fisher, 152 S. C. 108, 149 S. E. 340, 65 A.L.R. 1427.

Only legal defenses can be made to an attachment, in the attachment suit. McLaughlin v. Swann, 18 How. (U. S.) 217, 15 L. ed. 357.

[15] Annotation: 47 L.R.A.(N.S.) 856.

Where an attachment is issued at the same time the suit is commenced by præcipe and summons, pendency of a motion to dismiss the attachment will not prevent the entering of default for failure to plead. Annotation: 47 L.R.A.(N.S.) 856.

[16] Goldsborough v. Orr, 8 Wheat. (U. S.) 217, 5 L. ed. 600.

Under the Attachment Act of Maryland of 1795, chap. 56, if the defendant appears and dissolves the attachment, a declaration and subsequent pleadings are not necessary, but the cause may be tried on a short note. Ibid.

[17] Skalowski v. Joe Fisher, 152 S. C. 108, 149 S. E. 340, 65 A.L.R. 1427.

In New York, the application for a warrant of attachment must be founded on an affidavit, but a verified pleading is regarded as an affidavit. 7 Carmody, N. Y. Prac. p. 403.

[18] McComb v. Reed, 28 Cal. 281, 87 Am. Dec. 115.

[19] Hambrick v. Wilkins, 65 Miss. 18, 3 So. 67, 7 Am. St. Rep. 631; Simmons v. Simmons, 56 W. Va. 65, 48 S. W. 833, 107 Am. St. Rep. 890, 3 Ann. Cas. 184.

Annotation: 107 Am. St. Rep. 894; 3 Ann. Cas. 186.

[20] Hambrick v. Wilkins, 65 Miss. 18, 3 So. 67, 7 Am. St. Rep. 631; Niehaus v. C. B. Barker Constr. Co. 135 Tenn. 382, 186 S. E. 461, Ann. Cas. 1918B, 23.

Annotation: 107 Am. St. Rep. 895.

[1] Hambrick v. Wilkins, 65 Miss. 18, 3 So. 67, 7 Am. St. Rep. 631; Simmons v. Simmons, 56 W. Va. 65, 48 S. W. 833, 107 Am. St. Rep. 890, 3 Ann. Cas. 184.

[2] Niehaus v. C. B. Barker Constr. Co. 135 Tenn. 382, 186 S. W. 461, Ann. Cas. 1918B, 23.

There is authority to the contrary. Annotation: 107 Am. St. Rep. 895.

[3] Hambrick v. Wilkins, 65 Miss. 18, 3 So. 67, 7 Am. St. Rep. 631.

§ 952. **Amendments.**—The general rule is that the power to amend the pleadings in the main action in an attachment or garnishment proceeding is the same as it is in other cases; at least this is the rule in the absence of statute.[5] Consequently, it may be said that the pleading in such a suit may be amendable, as in other cases generally, where the amendment does not introduce a new cause of action. This rule is aided by the liberal amendment statutes in force in many states.[6] The rule is applicable to variance or defects in parties,[7] defects in the form of declaring,[8] an amendment changing the form of action merely, or adding a new count,[9] a change in the ad damnum without changing the identity of the cause of action,[10] and to an amendment which merely sets the cause forth with greater detail.[11]

The operation of amendments in attachment or garnishment proceedings as discharging the attachment or garnishment or liability on a dissolution or release bond is elsewhere noted herein.[12]

E. Evidence and Trial

§ 953. **Generally.**—The law of evidence [13] and trial [14] applies generally to the trial of the main action in an attachment or garnishment suit. Inasmuch as the jurisdiction of the court to grant relief is based and depends upon allegations showing one of the recognized grounds for the issuance of the writ, such allegations must be sustained by admissible evidence; otherwise the court has no power to render judgment.[15] The burden of proof rests, in proceedings of this character, where it usually does, upon the party plaintiff.[16] The merits of the main action cannot be tried on a traverse filed in support of a motion to discharge the attachment, and denying the grounds thereof.[17]

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[4] McComb v. Reed, 28 Cal. 281, 87 Am. Dec. 115.

Annotation: 7 Am. St. Rep. 633.
But see 5 Texas Jur. p. 246.

[5] Rothschild v. Knight, 184 U. S. 334, 46 L. ed. 573, 22 S. Ct. 391; Tilton v. Cofield, 93 U. S. 163, 23 L. ed. 858.

[6] Tilton v. Cofield, 93 U. S. 163, 23 L. ed. 858; Blankenship v. Blackwell, 124 Ala. 355, 27 So. 551, 82 Am. St. Rep. 175 (amendment by adding new parties); Warren Bros. Co. v. Kendrick & Roberts, 113 Md. 603, 77 A. 847, 140 Am. St. Rep. 445; Aronow v. Gold, 274 Mass. 65, 174 N. E. 267, 74 A.L.R. 910; Meyer v. Brooks, 29 Or. 203, 44 P. 281, 54 Am. St. Rep. 790; Niehaus v. C. B. Barker Constr. Co. 135 Tenn. 382, 186 S. W. 461, Ann. Cas. 1918B, 23; Hare v. Marsh, 61 Wis. 435, 21 N. W. 267, 50 Am. Rep. 141.

[7] Blankenship v. Blackwell, 124 Ala. 355, 27 So. 551, 82 Am. St. Rep. 175 (amendment by adding new parties); Niehaus v. C. B. Barker Constr. Co. 135 Tenn. 382, 186 S. W. 461, Ann. Cas. 1918B, 23.

Annotation: 107 Am. St. Rep. 895.

[8] Niehaus v. C. B. Barker Constr. Co. 135 Tenn. 382, 186 S. W. 461, Ann. Cas. 1918B, 23.

Annotation: 61 Am. Dec. 125.

[9] Warren Bros. Co. v. Kendrick & Roberts, 113 Md. 603, 77 A. 847, 140 Am. St. Rep. 445; Aronow v. Gold, 274 Mass. 65, 174 N. E. 267, 74 A.L.R. 910; Niehaus v. C. B. Barker Constr. Co. 135 Tenn. 382, 186 S. W. 461, Ann. Cas. 1918B, 23.

Annotation: 74 A.L.R. 912.

[10] Tilton v. Cofield, 93 U. S. 163, 23 L. ed. 858; Warren Bros. Co. v. Kendricks & Roberts, 113 Md. 603, 77 A. 847, 140 Am. St. Rep. 445 (constituting in a common count a demand for $10,000 damages in lieu of a specific statement of an indebtedness of $7,157.53).

An amendment to include interest not originally claimed is proper. Tilton v. Cofield, 93 U. S. 163, 23 L. ed. 858.

[11] Meyer v. Brooks, 29 Or. 203, 44 P. 281, 54 Am. St. Rep. 790; Niehaus v. C. B. Barker Constr. Co. 135 Tenn. 382, 186 S. W. 461, Ann. Cas. 1918B, 23.

[12] See Vol. 4, p. 930, §§ 628 et seq.; supra, §§ 914 et seq.

[13] See Evidence [Also 10 R. C. L. p. 847].

[14] See Trial [Also 26 R. C. L. p. 1008].

[15] Stone v. Connelly, 1 Met. (Ky.) 652, 71 Am. Dec. 499.

[16] J. Cueva Co. v. R. Lancaster Williams & Co. 145 Md. 526, 125 A. 849, citing R. C. L. See Pelzer Mfg. Co. v. Pitts, 76 S. C. 349, 57 S. E. 29, 11 Ann. Cas. 665.

[17] Collins v. Stanley, 15 Wyo. 282, 88 P. 620, 123 Am. St. Rep. 1022.

In McLaughlin v. Swann, 18 How. (U. S.) 217, 15 L. ed. 357, the court holds that only legal defenses may be interposed in an attachment action, and if the defenses amount to outstanding equities, in third

F. JUDGMENT AND EXECUTION

1. IN GENERAL

§ 954. Generally.—A judgment in the main action in an attachment or garnishment suit may be entered in personam where the court has jurisdiction of the defendant,[18] and in rem where property of the defendant has been attached or garnished and is still bound by the process so that the court has jurisdiction of it.[19] No valid judgment in personam can be entered where the court has no jurisdiction of the person;[1] only a judgment in rem can be entered in such case.[2] Nor can a judgment in rem be entered where jurisdiction of the res has not been obtained, or where it has been lost,[3] as where the attachment is dissolved by the entry of security,[4] where the recovery against the defendant is on a cause of action for which no attachment could lawfully issue,[5] or where the attachment or garnishment is otherwise jurisdictionally defective.[6]

If property is attached and the defendant served by publication only, the court is deemed in some states to have jurisdiction to render a judgment personal in form, but affecting only the property attached.[7]

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person, of such a character that a court of law could not take notice of them, they must be availed of by a bill brought against the attaching creditor or by a bill of interpleader.

Generally, as to the issues triable on the traverse of an attachment affidavit, see Vol. 4, p. 865, § 503; as to issues on the traverse of a garnishment disclosure, see supra, §§ 770 et seq.

[18] Maxwell v. Stewart, 21 Wall. (U. S.) 71, 22 Wall. 77, 22 L. ed. 564; Pullman Palace Car Co. v. Harrison, 122 Ala. 149, 25 So. 697, 82 Am. St. Rep. 68; Starkey v. Lunz, 57 Or. 147, 110 P. 702, Ann. Cas. 1912D, 783.

[19] Joseph Joseph & Bros. Co. v. Hoffman & McNeill, 173 Ala. 568, 56 So. 216, 38 L.R.A. (N.S.) 924, Ann. Cas. 1914A, 718; Pullman Palace Car Co. v. Harrison, 122 Ala. 149, 25 So. 697, 82 Am. St. Rep. 68; First Nat. Bank v. Eastman, 144 Cal. 487, 77 P. 1043, 103 Am. St. Rep. 95, 1 Ann. Cas. 626; Strand v. Halverson, — Iowa, —, 264 N. W. 266, 103 A.L.R. 835; De Bearn v. De Bearn, 115 Md. 668, 81 A. 223, 36 L.R.A.(N.S.) 421, writ of error dismissed in 225 U. S. 695, 56 L. ed. 1261, 32 S. Ct 834; Capital City Bank v. Parent, 134 N. Y. 527, 31 N. E. 976, 18 L.R.A. 240; Starkey v. Lunz, 57 Or. 147, 110 P. 702, Ann. Cas. 1912D, 783; Edward F. Gerber Co. v. Thompson, 84 W. Va. 721, 100 S. E. 733, 7 A.L.R. 730.

[1] Clark v. Wells, 203 U. S. 164, 51 L. ed. 138, 27 S. Ct. 43; Caledonian Coal Co. v. Baker (New Mexico ex rel. Caledonian Coal Co. v. Baker) 196 U. S. 432, 49 L. ed. 540, 25 S. Ct. 375; Boswell v. Otis, 9 How. (U. S.) 336, 13 L. ed. 164; Joseph Joseph & Bros. Co. v. Hoffman & McNeill, 173 Ala. 568, 56 So. 216, 38 L.R.A.(N.S.) 924, Ann. Cas. 1914A, 718; Barber v. Morgan, 84 Conn. 618, 80 A. 791, Ann. Cas. 1912D, 951; Strand v. Halverson, — Iowa, —, 264 N. W. 266, 103 A.L.R. 835.

"If, without personal service, judgments in personam, obtained ex parte against nonresidents and absent parties, upon mere publication of process, which in the great majority of cases would never be seen by the parties interested, could be upheld and enforced, they would be the constant instruments of fraud and oppression." Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565.

Where a judgment has the same effect as if process had been served personally on the defendant, such a judgment is, to that extent, in personam, and necessarily implies that the court had proper jurisdiction of the defendant to support its judgment binding him personally. Doe ex dem. Skinner v. Moore, 19 N. C. (2 Dev. & B. L.) 138, 30 Am. Dec. 155.

[2] Hoffman v. McClelland, 264 U. S. 552, 68 L. ed. 845, 44 S. Ct. 407; Boswell v. Otis, 9 How. (U. S.) 336, 13 L. ed. 164; Southern R. Co. v. Ward, 123 Ala. 400, 26 So. 234, 82 Am. St. Rep. 129; Strand v. Halverson, — Iowa, —, 264 N. W. 266, 103 A.L.R. 835; De Bearn v. De Bearn, 115 Md. 668, 81 A. 223, 36 L.R.A.(N.S.) 1421, writ of error dismissed in 225 U. S. 695, 56 L. ed. 1261, 32 S. Ct. 834; Capital City Bank v. Parent, 134 N. Y. 527, 31 N. E. 976, 18 L.R.A. 240; Johnson v. Whilden, 166 N. C. 104, 81 S. E. 1057, Ann. Cas. 1916C, 783, affirmed on rehearing in 171 N. C. 153, 88 S. E. 223, 225; Hartzell v. Vigen, 6 N. D. 117, 69 N. W. 203, 35 L.R.A. 451, 66 Am. St. Rep. 589; Edward F. Gerber Co. v. Thompson, 84 W. Va. 721, 100 S. E. 733, 7 A.L.R. 730.

Upon attachment of bonds of a nonresident corporation in the hands of custodians, to reach the debt of a nonresident owner of the bonds which are registered in the name of his children, the judgment must be one of condemnation against the specific bonds, and not in personam against the custodians. De Bearn v. De Bearn, 115 Md. 668, 81 A. 223, 36 L.R.A.(N.S.) 421, writ of error dismissed in 225 U. S. 695, 56 L. ed. 1261, 32 S. Ct. 834.

[3] Mudge v. Steinhart, 78 Cal. 34, 20 P. 147, 12 Am. St. Rep. 17; Starkey v. Lunz, 57 Or. 147, 110 P. 702, Ann. Cas. 1912D, 783.

[4] Truax v. Title Guaranty & S. Co. 94 Wash. 472, 162 P. 586, citing R. C. L.

[5] Mudge v. Steinhart, 78 Cal. 34, 20 P. 147, 12 Am. St. Rep. 17.

[6] See Vol. 4, p. 608, § 86.

[7] Neufelder v. German American Ins. Co.

Where an interpleader to settle title to the property is filed in an attachment proceeding, judgment may be rendered in the attachment suit before the matter involved in the interpleader is decided.[8]

Where the garnishee is summoned to appear in the main action and defaults, a judgment may sometimes be entered against him, conclusive upon him with respect to the defendant's ownership of specific property attached or garnished in his possession,[9] or when on the trial the court finds that he is indebted to the defendant.[10] That a garnishee was not made a party to the principal action and no relief was demanded against him therein does not prevent the court from rendering judgment against him where the writ of garnishment was served on him, if by statute it is not necessary to commence an action against the garnishee in order to authorize the court to render judgment against him.[11]

§ 955. Amount of Judgment.—The general rule is that a judgment in the principal action in an attachment or garnishment suit must ascertain and declare the amount of the claim, debt, or demand sought to be enforced by the attachment or garnishment.[12] However, where no personal jurisdiction of the defendant is acquired and only a judgment in rem can be entered,[13] such judgment cannot, of course, embrace more, or be for a greater amount, than the res which has been attached or garnished.[14] In some states the rule is that the entering of judgment for a greater sum than the debt sworn to and named in the attachment is error for the excess only; [15] in others, however, it is a fatal error for the plaintiff to take judgment for more than the sum claimed in the affidavit, with subsequently accruing interest.[16]

2. OPERATION AND EFFECT

§ 956. Generally.—Judgments rendered in attachment and garnishment suits have, in general, the same operation and effect as those rendered in other actions.[17] The entry of a judgment in personam, such as a simple money judgment, without any order or direction for enforcement against attached property, has been held to have the effect of releasing such property from the attachment.[18] Sometimes such a judgment is the proper practice, and the effect of the attachment or garnishment is merely to secure its enforcement.[19] In no event, however, does the judgment for the plaintiff operate to prejudice or diminish pre-existing rights of third persons, superior to the attachment lien, with respect to the attached property.[20] On the other hand, judgment for the plaintiff or a reversal on appeal in his favor operates to invest him with sufficient title to the property to enable him to maintain an action for recovery of its proceeds surrendered or paid by the sheriff to claimants whose rights to the same are subordinate to the attachment lien.[21] Never-

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6 Wash. 336, 33 P. 870, 22 L.R.A. 287, 36 Am. St. Rep. 166.
Annotation: 50 L.R.A. 583.

[8] Cermak v. Schaaf, 308 Ill. 61, 139 N. E. 39, 37 A.L.R. 1398.

[9] See Standard Pa. Prac. Vol. 10.
As to the entry of judgment against the defendant and the surety on the bond to dissolve or release the attachment or garnishment, see supra, § 926.

[10] Tiger v. Rogers Cotton Cleaner & Gin Co. 96 Ark. 1, 130 S. W. 585, 30 L.R.A.(N.S.) 694, Ann. Cas. 1912B, 488.

[11] Ibid.

[12] Pullman Palace Car Co. v. Harrison, 122 Ala. 149, 25 So. 697, 82 Am. St. Rep. 68.

[13] See supra, § 954.

[14] Joseph Joseph & Bros. Co. v. Hoffman & McNeill, 173 Ala. 568, 56 So. 216, 38 L.R.A. (N.S.) 924, Ann. Cas. 1914A, 718.

[15] Den ex dem. Skinner v. Moore, 19 N. C. (2 Dev. & B. L.) 138, 30 Am. Dec. 155.

[16] Annotation: 76 Am. St. Rep. 802.

[17] Den ex dem. Skinner v. Moore, 19 N. C. (2 Dev. & B. L.) 138, 30 Am. Dec. 155.

[18] Smith v. Dwight, 80 Or. 1, 148 P. 477, 156 P. 573, Ann. Cas. 1918D, 563.

[19] Den ex dem. Skinner v. Moore, 19 N. C. (2 Dev. & B. L.) 138, 30 Am. Dec. 155.

[20] Columbia Bank v. Jacobs, 10 Mich. 349, 81 Am. Dec. 792.

[21] The action of assumpsit for money had

theless, under statutes providing that an attachment shall be dissolved or discharged by a judgment for the defendant in the main action, a plaintiff appealing from such a judgment, without taking steps to preserve the attachment lien, cannot, upon a reversal of the judgment, assert any claim to the property in the hands of one to whom it had been sold pending the appeal.[22]

§ 957. Conclusiveness and Collateral Attack.—The record and judgment in the main action in an attachment or garnishment proceeding is conclusive to the extent that other judicial records and judgments are conclusive. Such a judgment is not open to collateral attack unless it is void for lack of jurisdiction in the court rendering it,[23] or was fraudulently secured.[1] Defects and irregularities in the attachment suit are not open to inquiry in a collateral suit unless they were of such character as to void the attachment or garnishment and deprive the court of jurisdiction in the proceedings.[2]

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and received can be maintained against persons who, with knowledge that the property has been attached, cause the sheriff to sell it and pay the proceeds over to them, where they refuse to surrender such proceeds on demand and where the attaching plaintiff has recovered judgment for his debt and kept his attachment alive (Finch v. Park, 12 S. D. 63, 80 N. W. 155, 76 Am. St. Rep. 588). It may also be maintained where money obtained by an attachment levy is paid over by the sheriff before judgment to subsequent lienors who have procured a vacation of the attachment, if the attachment is afterwards held valid on appeal and the plaintiffs have obtained judgment and issued execution which is returned unsatisfied (Haebler v. Myers, 132 N. Y. 363, 30 N. E. 963, 15 L.R.A. 588, 28 Am. St. Rep. 589).

[22] Maxwell v. Bank of New Richmond, 101 Wis. 286, 77 N. W. 149, 70 Am. St. Rep. 926.

Annotation: 36 A.L.R. 424; Ann. Cas. 1913B, 184.

[23] Matthews v. Densmore, 109 U. S. 216, 27 L. ed. 912, 3 S. Ct. 126; Cooper v. Reynolds, 10 Wall. (U. S.) 308, 19 L. ed. 931; McGoon v. Scales, 9 Wall. (U. S.) 23, 19 L. ed. 545; Huff v. Hutchinson, 14 How. (U. S.) 586, 14 L. ed. 553; Joseph Joseph & Bros. Co. v. Hoffman, 173 Ala. 568, 56 So. 216, 38 L.R.A.(N.S.) 924, Ann. Cas. 1914A, 718; Albie v. Jones, 82 Ark. 414, 102 S. W. 222, 12 Ann Cas. 433; Mudge v. Steinhart, 78 Cal. 34, 20 P. 147, 12 Am. St. Rep. 17; Marquis v. Ireland, 86 Kan. 416, 121 P. 486, Ann. Cas. 1913C, 144; Toth v. Toth, 242 Mich. 23, 217 N. W. 913, 56 A.L.R. 839; Union Nat. Bank v. State Nat. Bank, 155 Mo. 95, 55 S. W. 989, 78 Am. St. Rep. 560; Tourville v. Wabash R. Co. 148 Mo. 614, 50 S. W. 300, 71 Am. St. Rep. 650, affirmed in 179 U. S. 322, 45 L. ed. 210, 21 S. Ct. 113; German Nat. Bank v. Kautter, 55 Neb. 103, 75 N. W. 566, 70 Am. St. Rep. 371; Union P. R. Co. v. Smersh, 22 Neb. 751, 36 N. W. 139, 3 Am. St. Rep. 290; Johnson v. Whilden, 166 N. C. 104, 81 S. E. 1057, Ann. Cas. 1916C, 783, affirmed on rehearing in 171 N. C. 153, 88 S. E. 223, 225; Harrison v. Pender, 44 N. C. (Busbee, L.) 78, 57 Am. Dec. 573; Atwood v. Tucker (Atwood v. Roan) 26 N. D. 622, 145 N. W. 587, 51 L.R.A. (N.S.) 597; Davies v. Thompson, 61 Okla. 21, 160 P. 75, L.R.A.1917B, 395; Edward F. Gerber Co. v. Thompson, 84 W. Va. 721, 100 S. E. 733, 7 A.L.R. 730.

Annotation: 51 L.R.A.(N.S.) 597; L.R.A. 1917B, 400; Ann. Cas. 1913C, 146.

If a plaintiff in attachment seizes a resident's property as that of a nonresident, and sells it under a judgment rendered upon constructive service, the judgment defendant may, in the absence of an appearance in that suit, attack such judgment in a subsquent suit by him, wherein the attachment plaintiff invokes such judgment as a defense, and show that it is void for the reason that at the time of the inception of the attachment suit and judgment, he was a resident of the state and present therein. German Nat. Bank v. Kautter, 55 Neb. 103, 75 N. W. 566, 70 Am. St. Rep. 371.

[1] Union Nat. Bank v. State Nat. Bank, 155 Mo. 95, 55 S. W. 989, 78 Am. St. Rep. 560; Holmes v. Remsen, 20 Johns. (N. Y.) 229, 11 Am. Dec. 269.

Annotation: 46 A.L.R. 449.

[2] Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565 (publication notice); Cooper v. Reynolds, 10 Wall. (U. S.) 308, 19 L. ed. 931 (attachment affidavit); McGoon v. Scales, 9 Wall. (U. S.) 23, 19 L. ed. 545; Mitchell v. St. Maxent, 4 Wall. (U. S.) 237, 18 L. ed. 326; Huft v. Hutchinson, 14 How. (U. S.) 586, 14 L. ed. 553; Mudge v. Steinhart, 78 Cal. 34, 20 P. 147, 12 Am. St. Rep. 17; Hogue v. Corbit, 156 Ill. 540, 41 N. E. 219, 47 Am. St. Rep. 232 (sheriff's return); Marquis v. Ireland, 86 Kan. 416, 121 P. 486, Ann. Cas. 1913C, 144 (levy of attachment); Wagner v. Farmers Co-op Exch. Co. 147 Minn. 376, 180 N. W. 231, 14 A.L.R. 279; Stone v. Myers, 9 Minn. 303, 86 Am. Dec. 104; Union Nat. Bank v. State Nat. Bank, 155 Mo. 95, 55 S. W. 989, 78 Am. St. Rep. 560; German Nat. Bank v. Kautter, 55 Neb. 103, 75 N. W. 566, 70 Am. St. Rep. 371; Harrison v. Pender, 44 N. C. (Busbee, L.) 78, 57 Am. Dec. 573; Friedman v. First Nat. Bank, 39 Okla. 486, 135 P. 1069, 49 L.R.A.(N.S.) 548; Bank of Colfax v. Richardson, 34 Or. 518, 54 P. 359, 75 Am. St. Rep. 664; Billings v. Russell, 23 Pa. 189, 62 Am. Dec. 330; Sutherland v. De Leon, 1 Tex. 250, 46 Am. Dec. 100.

Annotation: 75 Am. St. Rep. 683; Ann. Cas. 1913C, 146.

Irregularities that make a judgment voidable merely can be taken advantage of only in the court where the judgment was rendered. Wagner v. Farmers Co-op. Exch. Co. 147 Minn. 376, 180 N. W. 231, 14 A.L.R. 279.

A judgment in personam may be attacked by the defendant in so far as it

§ 958. —As to Persons Not Parties to Proceedings.—Third persons cannot collaterally attack attachment or garnishment proceedings with respect to irregularities not depriving the court of jurisdiction and not depriving them of their property without due course of law.[3] However, a judgment cannot conclude a person, not privy to the proceedings, from claiming the attached or garnished property,[4] unless he has waived his claim by failure to interfere and protect his claim when he was properly summoned to do so, in which case, however, he is, strictly speaking, privy to the proceedings.[5]

§ 959. Full Faith and Credit.—The record and judgment of an attachment or garnishment suit are entitled to full faith and credit in so far as they are not void for want of jurisdiction or for fraud.[6] It is, however, established that jurisdiction to render a judgment in personam cannot, consistently with due process of law, rest upon the attachment or garnishment of property within the state, at least if the defendant is a nonresident.[7] Nor is a judgment in rem in a proceeding by attachment in which the defendant was not served with process and did not appear entitled to full faith and credit in another state, unless the res was seized or at least was within the jurisdiction of the court rendering the judgment.[8]

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binds him generally, where the court rendering it had attached or garnished his property but had not secured personal jurisdiction over him. Joseph Joseph & Bros. Co. v. Hoffman, 173 Ala. 568, 56 So. 216, 38 L.R.A.(N.S.) 924, Ann. Cas. 1914A, 718; Johnson v. Whilden, 166 N. C. 104, 81 S. E. 1057, Ann. Cas. 1916C, 783, affirmed on rehearing in 171 N. C. 153, 88 S. E. 223, 225.

The defense that a foreign corporation, defendant in an attachment suit, has its chief place of business within the state, and that ordinary legal process could have been served upon it therein, cannot be raised in a collateral proceeding unless fraud is pleaded and proved. Union Nat. Bank v. State Nat. Bank, 155 Mo. 95, 55 S. W. 989, 78 Am. St. Rep. 560.

The judgment cannot be collaterally impeached by showing that the plaintiff at the time of the issuing of the attachment was not a creditor of the defendants. Harrison v. Pender, 44 N. C. (Busbee, L.) 78, 57 Am. Dec. 573.

[3] Walter v. Bickham, 122 U. S. 320, 30 L. ed. 1185, 7 S. Ct. 1197.

[4] Albie v. Jones, 82 Ark. 414, 102 S. W. 222, 12 Ann. Cas. 433; Davies v. Thompson, 61 Okla. 21, 160 P. 75, L.R.A.1917B, 395; Edward F. Gerber Co. v. Thompson, 84 W Va. 721, 100 S. E. 733, 7 A.L.R. 730; Adams v. Filer, 7 Wis. 306, 73 Am. Dec. 410.

Annotation: L.R.A.1917B, 400.

[5] See supra, § 688; infra, § 964.

[6] Sanders v. Armour Fertilizer Works, 292 U. S. 190, 78 L. ed. 1206, 54 S. Ct. 677, 91 A.L.R. 950, rehearing denied in 292 U. S. 612, 78 L. ed. 1472, 54 S. Ct. 855; Stephenson v. Kirtley, 269 U. S. 163, 70 L. ed. 213, 46 S. Ct. 50; Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023, 25 S. Ct. 625, 3 Ann. Cas. 1084; King v. Cross, 175 U. S. 396, 44 L. ed. 211, 20 S. Ct. 131; Chicago, R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 43 L. ed. 1144, 19 S. Ct. 797; Matthews v. Densmore, 109 U. S. 216, 27 L. ed. 912, 3 S. Ct. 126; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565, Cooper v. Reynolds, 10 Wall. (U. S.) 308, 19 L. ed. 931; Green v. Van Buskirk, 7 Wall. (U. S.) 139, 19 L. ed. 109; Voorhees v. Jackson, 10 Pet. (U. S.) 449, 9 L. ed. 490; Hartford F. Ins. Co. v. Citizens' Bank, 166 Ark. 551, 266 S. W. 675, 39 A.L.R. 1458; Tourville v. Wabash R. Co. 148 Mo. 614, 50 S. W. 300, 71 Am. St. Rep. 650, affirmed in 179 U. S. 322, 45 L. ed. 210, 21 S. Ct. 113; Chicago, B. & Q. R. Co. v. Moore, 31 Neb. 629, 48 N. W. 475, 28 Am. St. Rep. 534.

Annotation: 28 Am. St. Rep. 538.

A title acquired under the attachment or garnishment laws of a state, which is valid there, is to be held valid in every other state. Green v. Van Buskirk, 7 Wall. (U. S.) 139, 19 L. ed. 109.

[7] Joseph Joseph & Bros. Co. v. Hoffman, 173 Ala. 568, 56 So. 216, 38 L.R.A.(N.S.) 924, Ann. Cas. 1914A, 718.

Annotation: 50 L.R.A. 577; 47 L.R.A. (N.S.) 1127.

[8] Ward v. Boyce, 152 N. Y. 191, 46 N. E. 180, 36 L.R.A. 549.

National comity is not extended to a judgment against a nonresident who was not personally served with process and did not appear in the action, where the court acquired no jurisdiction over the subject of the action by an attachment of property within the state; a judgment so rendered is not entitled to full faith and credit in another state. Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565.

It is a fundamental principle that no man is to be deprived of his property without his consent, or without due process of law, and to constitute due process of law and make it effectual to change the title to property, there must be jurisdiction over the person of the owner or over his property. Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Joseph Joseph and Bros. Co. v. Hoffman, 173 Ala. 568, 56 So. 216, 38 L.R.A. (N.S.) 924, Ann. Cas. 1914A, 718; Griffith v. Milwaukee Harvester Co. 92 Iowa, 634, 61 N. W. 243, 54 Am. St. Rep. 573; National Broadway Bank v. Sampson, 179 N. Y. 213, 71 N. E. 766, 66 L.R.A. 606, 103 Am. St. Rep. 851; Owen v. Miller, 10 Ohio St. 136, 75 Am. Dec. 502; Bank of Colfax v. Richardson, 34 Or. 518, 54 P. 359, 75 Am. St. Rep. 664.

3. Execution

§ 960. **Of Judgment in Personam.**—A judgment in personam in the main action in an attachment or garnishment suit is enforced by execution as in other cases generally.[9] Of course, unless the attachment or garnishment has been dissolved, the judgment is secured to the extent of the attached or garnished property,[10] in which case the attached property may be taken and sold on the execution,[11] or the garnished property may be proceeded against to a final conclusion in the garnishment.[12]

§ 961. **Of Judgment in Rem.**—The general rule is that in the absence of personal service, a judgment in the main suit in an attachment or garnishment can only be enforced against the res.[13] The usual method of enforcing such a judgment is by a sale of the attached property in execution,[14] or, as to garnished property, by proceeding in the garnishment to a final conclusion.[15] No general execution can be issued under such a judgment for any balance unpaid after the attached property is exhausted, and no suit can be maintained on such a judgment in the same court or in any other, nor can it be used as evidence in any other proceeding not affecting the attached property, nor can the cost in such a proceeding be collected from the defendants out of any other property than that attached in the suit.[16] In case there is no appearance, in some jurisdictions, execution cannot issue until the plaintiff files a bond to refund the whole or such part of the judgment as the defendant may, within a time permitted by statute, come into court and disprove,[17] or in case the judgment is reversed in whole or in part.[18]

4. Right to, and Form of, Special Judgment against Bankrupt

§ 962. **Right to Judgment.**—A special judgment may be entered against one discharged in bankruptcy, to be enforced against property attached or garnished, where the lien of the attachment or garnishment is saved by the operation of the Bankruptcy Act.[19] Such a judgment may be entered in order to charge a garnishee[1] or to establish the right to levy on attachable property of the bankrupt, the title to which may not have passed to the trustee in bankruptcy.[2]

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[9] Myers v. Mott, 29 Cal. 359, 89 Am. Dec. 49; Starkey v. Lunz, 57 Or. 147, 110 P. 702, Ann. Cas. 1912D, 783.

[10] **If personal service of summons in attachment has been made on the defendant within the state,** or if he has appeared or answered, personal judgment may go against him and general execution issue thereon, but, when otherwise, power to render judgment is limited to property brought before the court by valid attachment. Barber v. Morgan, 84 Conn. 618, 80 A. 791, Ann. Cas. 1912D, 951; Starkey v. Lunz, 57 Or. 147, 110 P. 702, Ann. Cas. 1912D, 783.

[11] Myers v. Mott, 29 Cal. 359, 89 Am. Dec. 49; Chrisman v. Dorsey, 12 Colo. 567, 21 P. 920, 4 L.R.A. 664.

Where the defendant in attachment dies after levy of the writ, but before judgment, and his administrator is substituted and the case continued against him, judgment cannot be rendered enforcing the attachment lien by ordering a sale of the attached property to satisfy the demand. Myers v. Mott, 29 Cal. 359, 89 Am. Dec. 49.

[12] Generally, as to judgment and execution in the garnishment, see supra, §§ 789 et seq.

[13] Clark v. Wells, 203 U. S. 164, 51 L. ed. 138, 27 S. Ct. 43; Central Loan & T. Co. v. Campbell Commission Co. 173 U. S. 84, 43 L. ed. 623, 19 S. Ct. 346; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Cooper v. Reynolds, 10 Wall. (U. S.) 308, 19 L. ed. 931; Eastman v. Wadleigh, 65 Me. 251, 20 Am. Rep. 695; Douglass v. Phenix Ins. Co. 138 N. Y. 209, 33 N. E. 938, 20 L.R.A. 118, 34 Am. St. Rep. 448; Johnson v. Whilden, 166 N. C. 104, 81 S. E. 1057, Ann. Cas. 1916C. 783, affirmed on rehearing in 171 N. C. 153, 88 S. E. 223, 225; Starkey v. Lunz, 57 Or. 147, 110 P. 702, Ann. Cas. 1912D, 783; Edward F. Gerber Co. v. Thompson, 84 W. Va. 721, 100 S. E. 733, 7 A.L.R. 730.

In Johnson v. Whilden, 166 N. C. 104, 81 S. E. 1057, Ann. Cas. 1916C, 783, affirmed on rehearing in 171 N. C. 153, 88 S. E. 223, 225, the court holds that where, in an action duly instituted and on attachment issued, there has been a valid levy of property of the defendant in the jurisdiction, bringing the same within the custody of the court, the question of indebtedness may be considered and determined in so far only as the value of the property may be made available in satisfaction of the claim by sale under final process or further decree in the cause; beyond this value, no judgment in personam may be entered or enforced.

[14] Barber v. Morgan, 84 Conn. 618, 80 A. 791, Ann. Cas. 1912D, 951.

[15] Generally, as to judgment and execution against the garnishee, see supra, §§ 789 et seq.

[16] Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Cooper v. Reynolds, 10 Wall. (U. S.) 308, 19 L. ed. 931.

[17] See Standard Pa. Prac. Vol. 10.

[18] Barber v. Morgan, 84 Conn. 618, 80 A. 791, Ann. Cas. 1912D, 951.

The power to issue a qualified judgment with a perpetual stay of execution against the defendant debtor, notwithstanding his discharge in bankruptcy, so as to enable the plaintiff creditor to proceed against the sureties on a bond given to release an attachment or garnishment lien, and conditioned to pay such judgment as the plaintiff may recover in the action, has been consistently affirmed and held where the lien of such attachment or garnishment was saved from the dissolving operation of the Bankruptcy Act, and in such jurisdictions as maintain that the liability of the sureties on such a bond given to dissolve an attachment invalidated by the bankruptcy law is not affected by such invalidation.[3] A qualified judgment has been permitted against a discharged bankrupt to reach the sureties on a forthcoming bond given to release an attachment made more than four months before the commencement of the proceedings in bankruptcy.[4]

A qualified judgment, with a perpetual stay of execution against a discharged bankrupt, to enable the creditor to reach the sureties on his dissolving bond, has been refused on various grounds, as that the bond was considered as falling with the lien which it was given to dissolve, lack of power to render judgment against a discharged bankrupt, or failure to prove a sufficient reason founded in right and equity for such a judgment.[5]

§ 963. Form of Judgment.—The form of the special judgment which may be entered against a discharged bankrupt in an action on a claim to which the discharge is a bar depends on the facts of the particular case. If the purpose is to perfect a right against a garnishee or one secondarily liable, such as a surety, judgment may be entered against the bankrupt with a perpetual stay of execution. If there is an attachment of property good against the trustee in bankruptcy, or of property which he does not claim, judgment may be entered against the bankrupt, to be levied only on the property attached.[6]

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[19] Hill v. Harding, 130 U. S. 699, 32 L. ed. 1083, 9 S. Ct. 725; Hill v. Harding, 107 U. S. 631, 27 L. ed. 493, 2 S. Ct. 404 (dictum); Doe ex dem. Vaillant v. Childress, 21 Wall. (U. S.) 642, 22 L. ed. 549; Peck v. Jenness, 7 How. (U. S.) 612, 12 L. ed. 841; American Woolen Co. v. Maaget, 86 Conn. 234, 85 A. 583, Ann. Cas. 1913E, 889; Smith v. Davis, 131 Me. 9, 158 A. 359, 81 A.L.R. 78; Stickney & B. Coal Co. v. Goodwin, 95 Me. 246, 49 A. 1039, 85 Am. St. Rep. 408; Rosenthal v. Nove, 175 Mass. 559, 56 N. E. 884, 78 Am. St. Rep. 512; Munson v. Boston, H. & E. R. Co. 120 Mass. 81, 21 Am. Rep. 499; Powers Dry Goods Co. v. Nelson, 10 N. D. 580, 88 N. W. 703, 58 L.R.A. 770; Elliott v. Booth, 44 Tex. 180, 23 Am. Rep. 593; Stoddard v. Locke, 43 Vt. 574, 5 Am. Rep. 308.

Annotation: 81 A.L.R. 81.

In Elliott v. Booth, 44 Tex. 180, 23 Am. Rep. 593, involving a vendor's lien, the court held that although a discharge in bankruptcy would prevent a personal judgment against the bankrupt, the state courts would still have jurisdiction to enforce such a lien or one acquired by attachment or otherwise, and that judgment should have been entered for the plaintiff, to be enforced against the land, but not to be enforced as a personal judgment against the bankrupt or any other property.

[1] Smith v. Davis, 131 Me. 9, 158 A. 359, 81 A.L.R. 78.

[2] **The fact that the defendant receives a discharge in bankruptcy** does not affect the right of the plaintiff to enforce his lien, when no trustee in bankruptcy claims the property. Smith v. Davis, 131 Me. 9, 158 A. 359, 81 A.L.R. 78.

[3] Hill v. Harding, 130 U. S. 699, 32 L. ed. 1083, 9 S. Ct. 725; Hill v. Harding, 107 U. S. 631, 27 L. ed. 493, 2 S. Ct. 404 (dictum); American Woolen Co. v. Maaget, 86 Conn. 234, 85 A. 583, Ann. Cas. 1913E, 889 (dictum, discharge being denied); Smith v. Davis, 131 Me. 9, 158 A. 359, 81 A.L.R. 78.

Annotation: 81 A.L.R. 88.

[4] Smith v. Lacey, 86 Miss. 295, 38 So. 311, 109 Am. St. Rep. 707, relying on Hill v. Harding, 130 U. S. 699, 32 L. ed. 1083, 9 S. Ct. 725.

Annotation: 81 A.L.R. 87.

[5] Payne v. Able, 7 Bush (Ky.) 344, 3 Am. Rep. 316; Keyes v. Shannon, 8 Rob. (La.) 172, 41 Am. Dec. 299; Crook v. Horner Co. v. Gilpin, 112 Md. 1, 75 A. 1049, 28 L.R.A. (N.S.) 233, 136 Am. St. Rep. 376.

Annotation: 81 A.L.R. 94.

In Crook Horner Co. v. Gilpin, 112 Md. 1, 75 A. 1049, 28 L.R.A.(N.S.) 233, 136 Am. St. Rep. 376, such a judgment was refused where the attachment and the bond to dissolve it had been taken within four months of bankruptcy, the court holding that under such circumstances the surety was released.

XIV. CLAIM, INTERVENTION, AND INTERPLEADER

A. Remedies of Garnishee for Protection against Adverse Claimants

§ 964. Disclosing, Interpleading, and Citing or Notifying Adverse Claimant to Defend.—Interpleading, citing, or notifying adverse claimants to defend garnishment proceedings is a common practice.[7] In some jurisdictions the practice is to disclose the adverse claim, whereupon the adverse claimant is cited to appear and defend his claim.[8] In others, the garnishee is permitted to notify any claimant of the fund garnished to appear, if he sees fit, and to defend against the action; and where this has been done, the judgment against the garnishee is made a bar to any subsequent claim against him by such claimants.[9] For failure to interplead the rival claimants to the property, the garnishee may make himself liable to both or all of them.[10] On the other hand, the third party may lose his rights by failure to appear when properly cited or interpleaded.[11]

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[6] Smith v. Davis, 131 Me. 9, 158 A. 359, 81 A.L.R. 78.

Annotation: 81 A.L.R. 85.

[7] Sanders v. Armour Fertilizer Works, 292 U. S. 190, 78 L. ed. 1206, 54 S. Ct. 677, 91 A.L.R. 950, rehearing denied in 292 U. S. 612, 78 L. ed. 1472, 54 S. Ct. 855 (interpleader by insurer against insured and garnishing creditor under Act of Congress of May 8, 1926, 28 U. S. C. A. § 41 (26)); Payne v. Mobile, 4 Ala. 333, 37 Am. Dec. 744; Hartford F. Ins. Co. v. Citizens' Bank, 166 Ark. 551, 266 S. W. 675, 39 A.L.R. 1458; Hardy v. Hunt, 11 Cal. 343, 70 Am. Dec. 787; Coit v. Sistare, 85 Conn. 573, 84 A. 119, Ann. Cas. 1913C, 248 (on a writ of scire facias); Jax Ice & Cold Storage Co. v. South Florida Farms Co. 91 Fla. 593, 109 So. 212, 48 A.L.R. 957; Central Mercantile Co. v. Oklahoma State Bank, 83 Kan. 504, 112 P. 114, 33 L.R.A.(N.S.) 954; Metz Mfg. Co. v. Holbeck, 247 Mich. 241, 225 N. W. 536, citing R. C. L.; Levy v. Miller, 38 Minn. 526, 38 N. W. 700, 8 Am. St. Rep. 691; Yarborough v. Thompson, 3 Smedes & M. (Miss.) 291, 4 Am. Dec. 626; Farrington v. F. E. Fleming Commission Co. 94 Neb. 108, 142 N. W. 297, 47 L.R.A.(N.S.) 742; Hambley v. White, 192 N. C. 31, 133 S. E. 399, citing R. C. L.; Henderson v. Hooper Sugar Co. 65 Utah, 241, 236 P. 239, 45 A.L.R. 637 (statute authorizing garnishee to serve an interpleader on claimant); Marx v. Parker, 9 Wash. 473, 37 P. 675, 43 Am. St. Rep. 849; Adams v. Filer, 7 Wis. 306, 73 Am. Dec. 410.

Annotation: 45 A.L.R. 658; 66 A.L.R. 908; L.R.A.1918B, 1069.

Interpleader will not lie when the garnishee defends against two suits and has subjected himself to double liability; hence, where he has defended both against a garnishing creditor and an assignee of a note and is unsuccessful in both suits, the bill will not lie. Yarborough v. Thompson, 3 Smedes & M. (Miss.) 291, 41 Am. Dec. 626.

A garnishee is not bound at its peril to ask that all claimants be made parties to the proceeding or defend the rights of claimants to be fully protected by the judgment. Henderson v. Hooper Sugar Co. 65 Utah, 241, 236 P. 239, 45 A.L.R. 637.

The courts of a state in which garnishment proceedings are instituted against a corporation doing business within its limits to reach a fund due a nonresident have jurisdiction to determine the rights of a nonresident third person, claimant of the fund, who is brought into the cause by interpleader and given notice according to the laws of the state. Hartford F. Ins. Co. v. Citizens' Bank, 166 Ark. 551, 266 S. W. 675, 39 A.L.R. 1458.

The lien acquired by a pending garnishment proceeding in another state to subject the proceeds of fire insurance to the payment of a debt of the insured must be given effect, as against the insured's claim that the proceeds are exempt from execution by the laws of the state of his residence, in an interpleader proceeding instituted by the insurers against the insured and the garnishing creditor, under Act of Congress of May 8, 1926, in a Federal District Court of the state of the insured's residence, since the purpose of the act was not to permit insurers by interpleader to change the positions of defendants or to interfere with existing equities. Sanders v. Armour Fertilizer Works, 292 U. S. 190, 78 L. ed. 1206, 54 S. Ct. 677, 91 A.L.R. 950, rehearing denied in 292 U. S. 612, 78 L. ed. 1472, 54 S. Ct. 855.

Generally, see Interpleader [Also 15 R. C. L. p. 220].

[8] Payne v. Mobile, 4 Ala. 333, 37 Am. Dec. 744; Central Mercantile Co. v. Oklahoma State Bank, 83 Kan. 504, 112 P. 114, 33 L.R.A.(N.S.) 954; Metz Mfg. Co. v. Holbeck, 247 Mich. 241, 225 N. W. 536, citing R. C. L.; Farrington v. F. E. Fleming Commission Co. 94 Neb. 108, 142 N. W. 297, 47 L.R.A.(N.S.) 742; Central Mercantile Co. v. Oklahoma State Bank, 83 Kan. 504, 112 P. 114, 33 L.R.A.(N.S.) 954; Marx v. Parker, 9 Wash. 473, 37 P. 675, 43 Am. St. Rep. 849.

Under such practice, it is error for the court to order judgment against the garnishee until the claimant is duly cited and made a party; unless this is done, the rights of such claimant cannot be barred or affected by the judgment. Metz Mfg. Co. v. Holbeck, 247 Mich. 241, 225 N. W. 536, citing R. C. L.; Levy v. Miller, 38 Minn. 526, 38 N. W. 700, 8 Am. St. Rep. 691.

The court should not act of its own motion in ordering the claimant to be made a party, but the garnishee should act to secure an interpleader. Marx v. Parker, 9 Wash. 473, 37 P. 675, 43 Am. St. Rep. 849.

A garnishee's duty to bring an adverse claimant into court is discharged where he fully complies with the governing statutory provision[12] or where the adverse claimant has actual notice of the garnishment or makes appearance and intervenes in the suit.[13] Nor is interpleader necessary if the rival claimants are both parties to the action.[14]

There are decisions holding that the maker of a negotiable promissory note who has been charged upon it as garnishee of the payee when he has been sued upon it by one who claims ownership of the paper as an indorsee before maturity is entitled to have the garnishment creditor brought into the action to litigate the question whether he or the plaintiff is entitled to the proceeds of the note and to enjoin the collection until that question is determined. Furthermore, legislation has been enacted making provision in case of attachment of debts due by commercial negotiable paper for bringing into the trustee proceeding persons who claim to own and hold the paper by transfers from the defendants. The right of the garnishee of a debt due upon negotiable promissory notes known to be held under a claim of ownership by another than the defendant in the garnishment to go into chancery and file a bill of interpleader against the garnishor and the claimant has been recognized and upheld.[15]

§ 965. Election between Interpleader and Delivering of Garnished Property into Court.—Where, by statute, a garnishee might secure full protection by delivering custody of the property into court or to the officer serving the writ, the judgment will protect him against claimants having notice of the proceeding, though not made parties to it, notwithstanding the statute also authorizes the garnishee to serve an interpleader on the claimant so as to bind him by the judgment.[16]

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[9] Hartford F. Ins. Co. v. Citizens' Bank, 166 Ark. 551, 266 S. W. 675, 39 A.L.R. 1458; Parker, Peebles & Knox v. National F. Ins. Co. 111 Conn. 383, 150 A. 313, 69 A.L.R. 599; Coit v. Sistare, 85 Conn. 573, 84 A. 119, Ann. Cas. 1913C, 248 (on a writ of scire facias); Adams v. Filer, 7 Wis. 306, 73 Am. Dec. 410.

Annotation: L.R.A.1918B, 1069.

In order to conclude an adverse claimant and relieve the garnishee from liability, it is not sufficient that the latter merely notify such claimant of the pendency of the garnishment suit; he must request him to defend and tender to him the conduct of the defense of the suit. Adams v. Filer, 7 Wis. 306, 73 Am. Dec. 410.

[10] Hardy v. Hunt, 11 Cal. 343, 70 Am. Dec. 787.

[11] Coit v. Sistare, 85 Conn. 573, 84 A. 119, Ann. Cas. 1913C, 248.

[12] Annotation: L.R.A.1918B, 1069.

[13] Schenbeck v. First Nat. Bank, 69 Okla. 21, 169 P. 619, L.R.A.1918B, 1066; Henderson v. Hooper Sugar Co. 65 Utah, 241, 236 P. 239, 45 A.L.R. 637.

Where, by statute, a garnishee might secure full protection by delivering custody of the property into court or to the officer serving the writ, the judgment will protect him aganist claimants having notice of the proceeding, though not made parties to it, notwithstanding the statute also authorizes the garnishee to serve an interpleader upon the claimant so as to bind him by the judgment. Henderson v. Hooper Sugar Co. 65 Utah, 241, 236 P. 239, 45 A.L.R. 637.

A mere bailee for hire who becomes garnishee in a proceeding to reach the property bailed is protected from claims of a subsequent assignee of the property, who has knowledge from any reliable source that the proceedings are pending and fails to assert his claim, although he is not made a party to the proceeding. Ibid.

[14] Eau Claire Nat. Bank v. Chippewa Valley Bank, 124 Wis. 520, 102 N. W. 1068, 109 Am. St. Rep. 966.

[15] Annotation: L.R.A.1918C, 731, 758.

Generally as to duties and rights of garnishee on negotiable paper, see Vol. 4, p. 721, §§ 259 et seq.

[16] Henderson v. Hooper Sugar Co. 65 Utah, 241, 236 P. 239, 45 A.L.R. 637.

Generally as to delivery of garnished property into court, see supra, § 719.

B. Remedies of Attaching Creditor

§ 966. Generally.—An attaching or garnishing creditor generally may interplead or join as parties defendant adverse claimants to the attached or garnished property.[17]

C. Remedies of Adverse Claimants

§ 967. Relief in Equity.—Where the practice of claim and intervention has not been adopted, either under statutory regulation or by the courts on their own initiative, or where it constitutes an inadequate remedy at law, it seems that claimants of the property may maintain a bill in equity to contest an attachment.[18] Where a subsequent attachment has been first levied by the sheriff or his deputies, the fund attached is under the control of the court, and the parties are all before the court, the chancellor should distribute the fund among the attaching creditors in the order in which the attachments came into the sheriff's office.[19]

§ 968. Notice of Claim.—A common practice under statutory provision is for a claimant to attached property to give notice of claim to the attaching officer. If the plaintiff contests the rights of a person giving such notice, he must execute a bond of indemnity to him in case he loses his contest. An issue is then made up to try the title or claim of such person. If the plaintiff fails to give the bond, he concedes the right of the claimant to the property.[20] If the plaintiff files a bond to contest the issue, the claimant must file a claim bond to have the possession of the property.[1]

It is not necessary for one who claims to be the owner of attached property to serve a notice of such claim before commencing an action to recover such property if a delivery bond has already been executed by which the officer levying the writ is amply protected.[2]

§ 969. Statement of Amount Due Claimant.—Some statutes require that a statement of the amount due to one having a special or limited interest in attached property be furnished to an attaching officer upon such officer's request. A claimant has a reasonable time, after receiving such demand, within which to deliver his statement of account.[3] Under such a statute, a mortgagee, pledgee, or lienor of property, in his demand for the money due him after its attachment, must state a just and true account of the debt or demand for which the property is liable to him, even though such property is found to be worth less than the true and just amount due.[4] Such a statute is highly penal and should not be extended by construction to cases not clearly within its provisions.[5] It applies only to process out of a state court, not to process issued out of a United States court.[6]

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[17] Baird v. Meyer, 55 N. D. 930, 215 N. W. 542, 56 A.L.R. 175.

[18] Arkadelphia Lumber Co. v. McNutt, 68 Ark. 417, 59 S. W. 761, 82 Am. St. Rep. 299; Henderson v. Thornton, 37 Miss. 448, 75 Am. Dec. 70.

Annotation: 35 L.R.A. 771.

A court of equity may, at the suit of a creditor, annul a judgment in attachment rendered against his debtor in favor of a plaintiff who was not a creditor at the time the attachment issued where the debtor's property is not sufficient to satisfy that and the attachments of other creditors founded on valid debts then subsisting. Henderson v. Thornton, 37 Miss. 448, 75 Am. Dec. 70.

No one has a right to complain of an attachment lien which does not injuriously affect him; and he is not injuriously affected unless the prior attachment is invalid and he cannot institute an action to have the judgment thereon set aside on the ground that the defendant had defenses which he might have asserted or that, in the transaction between the plaintiff and the defendant out of which the judgment grew, the former overreached the latter. Arkadelphia Lumber Co. v. McNutt, 68 Ark. 417, 59 S. W. 761, 82 Am. St. Rep. 299.

[19] Kennon v. Ficklin, 6 B. Mon. (Ky.) 414, 44 Am. Dec. 776.

Annotation: 62 Am. St. Rep. 606.

The general rule is that the attachment writ first in the hands of the sheriff has priority. It is his duty to levy it first. See supra, § 839.

[20] Ayres, W. & R. Co. v. Dorsey Produce Co. 101 Iowa, 141, 70 N. W. 111, 63 Am. St. Rep. 376; First Nat. Bank v. McSwain, 93 S. C. 30, 75 S. E. 1106, Ann. Cas. 1914D, 809.

The North Dakota statute makes provision for the release of the levy of attachment upon the demand of a third person claiming title or right to the possession of the attached property if the plaintiff fails to indemnify the sheriff. Kelly v. Stockgrowers Credit Corp. — N. D. —, 263 N. W. 717, 103 A.L.R. 460.

[1] See infra, § 974.

[2] Ayres, W. & R. Co. v. Dorsey Produce Co. 101 Iowa, 141, 70 N. W. 111, 63 Am. St. Rep. 376.

There appears to be no general rule as to when a statement is sufficient or insufficient; the conclusion in each case depends on its own peculiar facts and surrounding circumstances.[7] The description of the amount due must, of course, be definite or certain.[8] However, an overstatement of the amount due does not render the statement insufficient where the mistake is unintentional and where the true amount due exceeds the value of the property.[9]

§ 970. Intervention Generally.—For the purpose of enabling persons to protect their rights when they are in danger of being injuriously affected by attachment or garnishment proceedings, statutes of a number of states permit what is termed an "intervention."[10] This remedy was not known at common

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[3] Harding v. Coburn, 12 Met. (Mass.) 333, 46 Am. Dec. 680; Magnifico v. Nicholson, 264 Mass. 519, 163 N. E. 156, 63 A.L.R. 572.

Annotation: 63 A.L.R. 575, 588.

The statement of account might be made after the sale of the property under the attachment. Annotation: 63 A.L.R. 588.

The value of the property attached is the test not of whether the holder of a prior encumbrance thereon is excused from failing to state the just and true amount due him in his demand therefor, but of whether the attaching creditor has had an opportunity to reach a fair determination whether to pay off the encumbrance and hold the goods or to abandon his attachment and return them. Magnifico v. Nicholson, 264 Mass. 519, 163 N. E. 156, 63 A.L.R. 572.

[4] Magnifico v. Nicholson, 264 Mass. 519, 163 N. E. 156, 63 A.L.R. 572.

[5] Annotation: 63 A.L.R. 576.

[6] Annotation: 63 A.L.R. 588.

[7] Harding v. Coburn, 12 Met. (Mass.) 333, 340, 46 Am. Dec. 680.

Annotation: 63 A.L.R. 576.

[8] Annotation: 63 A.L.R. 582, 583.

[9] Magnifico v. Nicholson, 264 Mass. 519, 163 N. E. 156, 63 A.L.R. 572; Harding v. Coburn, 12 Met. (Mass.) 333, 46 Am. Dec. 680.

[10] Johnson v. Chicago & P. Elevator Co. 119 U. S. 388, 30 L. ed. 447, 7 S. Ct. 254 (construing Illinois statute); Doe ex dem. Vaillant v. Childress, 21 Wall. (U. S.) 642, 22 L. ed. 549; De Loach Mill Mfg. Co. v. Little Rock Mill & Elevator Co. 65 Ark. 467, 47 S. W. 118, 67 Am. St. Rep. 942; Berghauser v. Golden State Orchards, 208 Cal. 550, 282 P. 950, citing R. C. L.; Speyer v. Ihmels, 21 Cal. 280, 81 Am. Dec. 157; Davis v. Eppinger, 18 Cal. 378, 79 Am. Dec. 184; Horn v. Volcano Water Co. 13 Cal. 62, 73 Am. Dec. 569; Carter v. Garetson, 56 Cal. App. 238, 204 P. 1090, citing R. C. L.; Bankers' Mortg. Co. v. Sohland, 33 Del. 331, 138 A. 361, citing R. C. L.; Forrester v. Forrester, 155 Ga. 722, 118 S. E. 373, 29 A.L.R. 1363; Potlatch Lumber Co. v. Runkel, 16 Idaho, 192, 101 P. 396, 23 L.R.A. (N.S.) 536, 18 Ann. Cas. 591; Cermak v. Schaaf, 308 Ill. 61, 139 N. E. 39, 37 A.L.R. 1398; Strawberry Growers' Selling Co. v. Lewellyn, 158 La. 303, 103 So. 823, 39 A.L.R. 1502; New Orleans Canal & Bkg. Co. v. Beard, 16 La. Ann. 345, 79 Am. Dec. 582; McDowell, P. & Co. v. Hopfield, 148 Md. 84, 128 A. 742, 52 A.L.R. 105; Wilde v. Mahoney, 183 Mass. 455, 67 N. E. 337, 62 L.R.A. 813; Cummins v. Christie, 179 Mass. 74, 60 N. E. 396, 88 Am. St. Rep. 357; State ex rel. Myersick v. District Ct. 53 Mont. 450, 164 P. 546, citing R. C. L.; McKinney v. Sutphin, 196 N. C. 318, 145 S. E. 621, citing R. C. L.; Baird v. Meyer, 55 N. D. 930, 215 N. W. 542, 56 A.L.R. 175; Dawson Produce Co. v. Cohn, 172 Okla. 28, 43 P. (2d) 1034, citing R. C. L.; Farmers State Bank v. Hess, 138 Okla. 190, 280 P. 305, 66 A.L.R. 894; Schenbeck v. First Nat. Bank, 69 Okla. 21, 169 P. 619, L.R.A.1918B, 1066; Ballew v. Young, 24 Okla. 182, 103 P. 623, 23 L.R.A.(N.S.) 1084; First Nat. Bank v. McSwain, 93 S. C. 30, 75 S. E. 1106, Ann. Cas. 1914D, 809; George D. Shore & Bro. v. Baltimore & O. R. Co. 76 S. C. 472, 57 S. E. 526, 11 Ann. Cas. 909; Harris v. Tenney, 85 Tex. 254, 20 S. W. 82, 34 Am. St. Rep. 796; Miller v. White, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791.

Annotation: 39 A.L.R. 1505; 85 A.L.R. 672; 35 L.R.A. 772; 23 L.R.A.(N.S.) 536; 123 Am. St. Rep. 308; 18 Ann. Cas. 594.

For the purpose of preventing circuity and multiplicity of litigation and as a speedy and convenient mode of determining questions of preference between different attachment and execution creditors and, indeed, all questions as to the ownership in, and right to, avails of property seized under legal process, the procedure by claim and intervention must recommend itself. In its broadest sense, an intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons by joining the plaintiff in claiming what is sought by the complaint, by uniting with the defendant in resisting the claims of the law, but seems to be a product of the civil law. It had its origin in this country in Louisiana, whence it was first carried to California, and up to the present time has been adopted principally by the middle and western states of the Union.[11] In the absence of any statutory provision, third persons claiming an interest in the attached property or a lien thereon are permitted, in some jurisdictions, to intervene in the attachment proceeding and contest the right to the property attached or defend the same on the ground of fraud between the plaintiff and the defendant therein, or raise jurisdictional objections to the sufficiency of the proceedings. In other jurisdictions, in the absence of any statute permitting it, the right is denied a claimant to property attached or persons having a lien thereon to intervene in the attachment proceeding and defend the same or to try title to the property attached.[12]

In some jurisdictions the right to file an intervening petition rests in the sound discretion of the court.[13]

The claimant may enforce his rights in the garnishment proceedings, leaving the plaintiff any balance which may remain.[14]

§ 971. Election between Intervention and Other Remedies Generally. The fact that the intervener has another remedy and may not be barred by a judgment in the action is no reason for denying him the right to intervene.[15] Nor does intervention on his part constitute a waiver of rights or compatible remedies.[16] It has been held that a statute providing for a trial of the right of property in the action in which the attachment was issued does not prevent the maintenance of an independent action for damages by the owner of property seized under an attachment against the property of another.[17] Indeed, there is authority to the effect that the remedy by claim and intervention may be pursued concurrently with the prosecution of an independent action for the same cause.[18] One who, after a sale under attachment, but before payment of the proceeds, files an interplea claiming title to the property sold or the proceeds thereof is not estopped to prosecute his claim by independent suit because of the judgment in the original suit, to which he was not a party, discharging the attachment and giving the defendant therein damages.[19] Likewise, under a statute providing for the trial of an issue on a notice of claim to attached property,[20] the owner of the property attached and sold as the property of the defendant is not precluded from recovering against the plaintiff by having notified the sheriff and the plaintiff that he owned the property or by having accepted the proceeds of the sale.[1]

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plaintiff, or by demanding anything adversely to both the plaintiff and the defendant. Potlatch Lumber Co. v. Runkel, 16 Idaho, 192, 101 P. 396, 23 L.R.A.(N.S.) 536, 18 Ann. Cas. 591.

[11] Bankers Mortg. Co. v. Sohland, 33 Del. 331, 138 A. 361, citing R. C. L.; Potlatch Lumber Co. v. Runkel, 16 Idaho, 192, 101 P. 396, 23 L.R.A.(N.S.) 536, 18 Ann. Cas. 591; Farmers State Bank v. Hess, 138 Okla. 190, 280 P. 305, 66 A.L.R. 894.

Annotation: 123 Am. St. Rep. 280.

The admiralty courts have recognized this salutary practice since very early times, having acquired it, together with the bulk of their rules of procedure, from the civil law. See ADMIRALTY, Vol. 1, p. 600, §§ 98 et seq.

[12] Annotation: 23 L.R.A.(N.S.) 540, 541.

[13] Jump v. McClurg, 35 Mo. 193, 86 Am. Dec. 146.

Annotation: 123 Am. St. Rep. 310.

As to persons entitled to intervene, see infra, § 975.

As to time for intervention, see infra, § 977.

[14] Cummins v. Christie, 179 Mass. 74, 60 N. E. 306, 88 Am. St. Rep. 357.

[15] Potlatch Lumber Co. v. Runkel, 16 Idaho, 192, 101 P. 396, 23 L.R.A.(N.S.) 536, 18 Ann. Cas. 591.

[16] Central Mercantile Co. v. Oklahoma State Bank, 83 Kan. 504, 112 P. 114, 33 L.R.A.(N.S.) 954.

[17] Annotation: 85 A.L.R. 673.

[18] Hall v. Richardson, 16 Md. 396, 77 Am. Dec. 303.

[19] De Loach Mill Mfg. Co. v. Little Rock Mill & Elevator Co. 65 Ark. 467, 47 S. W. 118, 67 Am. St. Rep. 942.

[20] See supra, § 968.

[1] First Nat. Bank v. McSwain, 93 S. C. 30, 75 S. E. 1106, Ann. Cas. 1914D, 809.

§ 972. Right of Indorsee to Recover Amount Collected by Garnishment of Note. There is difficulty in allowing an assignee or indorsee in good faith and for value of a negotiable instrument to recover from a garnishor money which he has collected in an action against a previous holder by garnishment of the person liable on the note. Some courts have taken the view that such recovery could be had in an action for money had and received, while others have denied this.[2] Assuming that the indorsee-holder has some right to recover from the garnishor an amount thus paid on the note, he may, nevertheless, lose that right by failure to intervene in the garnishment.[3]

D. Practice and Procedure on Intervention

§ 973. Generally.—Practice and procedure on intervention in attachment or garnishment suits are governed by the law of intervention in suits generally.[4] A common provision of intervention statutes, applicable to attachment and garnishment cases, is that an intervention shall be tried as like issues between plaintiff and defendant.[5] An intervention is but an accessory to the main action.[6]

§ 974. Necessity of Bond and Affidavit of Just Claim to Intervene.—The intervener may [7] or may not [8] be required to give bond as prerequisite to intervention. By some attachment statutes the right to bond the attached property is limited to the original parties in the action, and not extended to interveners.[9] By executing the bond and taking possession of the property the claimant renders himself liable for whatever sum the plaintiff in the action may show himself entitled to against the defendant, in the event that the claim is not well founded.[10]

Sometimes an affidavit of a just claim is prerequisite to intervention. A claim bond unaccompanied by the required affidavit does not authorize the officer to deliver the property to the claimant.[11]

§ 975. Who May Intervene.—The right of a person to file a petition in intervention in an attachment or garnishment is to be determined primarily from an examination of the statute which authorizes the practice. An examination of the cases discloses that the right to intervene is generally limited to the purposes expressly provided for by the statute, and to the persons to whom it is apparent that the act was intended to apply.[12] Under such statutes the right is usually denied to a general creditor of the defendant [13] but extended to the owner of the attached or garnished property, to one having some interest therein [14] or lien thereon,[15] or to an adverse claimant of it. The interest in the attached or garnished property entitling one to intervene in the attachment or garnishment must be a direct legal interest.[16] However, the right of intervention is not confined to persons who may establish the legal title to the property in themselves. The object of the statute, it has been held, is not merely to allow an intervention by one in possession of the property claiming absolute ownership in his own right, but also by one in possession claiming a right to such possession, a special property interest affected by the attachment.[17] The practice acts in several jurisdictions provide in general terms that any person who has an interest in the matter of litigation, in the success of either of the parties, or an interest against both, may intervene in the action. Under such statutes it is generally held that a claimant of attached property may in-

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[2] Annotation: L.R.A.1918C, 764.

[3] Herndon v. Swearingen, 1 Port. (Ala.) 192, 26 Am. Dec. 359.

[4] Dawson Produce Co. v. Cohn, 172 Okla. 28, 43 P. (2d) 1034, citing R. C. L.
See Parties [Also 20 R. C. L. p. 688, §§ 27 et seq.].

[5] Clapp v. Phelps, 19 La. Ann. 461, 92 Am. Dec. 545; Farmers State Bank v. Hess, 138 Okla. 190, 280 P. 305, 66 A.L.R. 894.

[6] Clapp v. Phelps, 19 La. Ann. 461, 92 Am. Dec. 545.

[7] Smith v. Heineman, 118 Ala. 195, 24 So. 364, 72 Am. St. Rep. 150.

[8] Cermak v. Schaaf, 308 Ill. 61, 139 N. E. 39, 37 A.L.R. 1398.

[9] Clapp v. Phelps, 19 La. Ann. 461, 92 Am. Dec. 545.

[10] Halbert v. McCulloch, 3 Met. (Ky.) 456, 79 Am. Dec. 556.

[11] Smith v. Heineman, 118 Ala. 195, 24 So. 364, 72 Am. St. Rep. 150.

[12] Farmers State Bank v. Hess, 138 Okla. 190, 280 P. 305, 66 A.L.R. 894.
Annotation: 23 L.R.A.(N.S.) 536; 18 Ann. Cas. 596.

[13] Horn v. Volcano Water Co. 13 Cal. 62, 73 Am. Dec. 569; Miller v. White, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791.

[14] Berghauser v. Golden State Orchards, 208 Cal. 550, 282 P. 950, citing R. C. L.; Potlatch Lumber Co. v. Runkel, 16 Idaho, 192, 101 P. 396, 23 L.R.A.(N.S.) 536, 18 Ann. Cas. 591; Fleming v. Shields, 21 La. Ann. 118, 99 Am. Dec. 719; McDowell, P. & Co. v. Hopfield, 148 Md. 84, 128 A. 742,

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52 A.L.R. 105; Wilde v. Mahoney, 183 Mass. 455, 67 N. E. 337, 62 L.R.A. 813; Farmers State Bank v. Hess, 138 Okla. 190, 280 P. 305, 66 A.L.R. 894; Ballew v. Young, 24 Okla. 182, 103 P. 623, 23 L.R.A.(N.S.) 1084; Miller v. White, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791.

Annotation: 23 L.R.A.(N.S.) 536; 18 Ann. Cas. 594.

Express statutory provision secures the right in many jurisdictions. Annotation: 23 L.R.A.(N.S.) 536.

The owner or claimant of property attached as that of another in an action for debt has such an interest as against both parties to the main action as entitles him to intervene, irrespective of other and adequate remedies, for the purpose of asserting his right and title to the attached property, under a statute authorizing the intervention of third parties who have an interest in the matter in litigation, an interest in the success of either of the parties, or an interest against both. Potlatch Lumber Co. v. Runkel, 16 Idaho, 192, 101 P. 396, 23 L.R.A.(N.S.) 536, 18 Ann. Cas. 591.

An assignee of the principal debtor may appear in a proceeding to reach a fund by trustee process and raise the objection that the fund is not subject to such process. McDowell, P. & Co. v. Hopfield, 148 Md. 84, 128 A. 742, 52 A.L.R. 105; Wilde v. Mahaney, 183 Mass. 455, 67 N. E. 337, 62 L.R.A. 813.

An assignee of a chose in action may be permitted to intervene in a subsequent garnishment proceeding. McDowell, P. & Co. v. Hopfield, 148 Md. 84, 128 A. 742, 52 A.L.R. 105.

An insured, claiming the proceeds of policies, as exempt from execution under the laws of the state of his residence, and his creditor, claiming the proceeds under foreign attachment proceedings in another state in which the insurers were garnished, are adverse claimants of the proceeds for the purposes of an interpleader proceeding instituted by the insurers against the insured and the creditors in a Federal District Court in the state of the insured's residence, under the Act of Congress of May 8, 1926. Sanders v. Armour Fertilizer Works, 292 U. S. 190, 78 L. ed. 1206, 54 S. Ct. 677, 91 A.L.R. 950, rehearing denied in 292 U. S. 612, 78 L. ed. 1472, 54 S. Ct. 855.

There are, however, some decisions denying the right of the owner or claimant of property attached to intervene, which seem to hold that although a third party may be the owner or claimant of the property attached, he may not intervene in the main case for the purpose of asserting his right. See discussion of Texas cases in Potlatch Lumber Co. v. Runkel, 16 Idaho, 192, 101 P. 396, 23 L.R.A.(N.S.) 536, 18 Ann. Cas. 591. See also Harris v. Tenney, 85 Tex. 254, 20 S. W. 82, 34 Am. St. Rep. 796.

In some jurisdictions, in the absence of statutory provision, the view has been taken that such a claimant has no such right to intervention and must enforce his rights, if any he has, in an independent proceeding. Annotation: 23 L.R.A.(N.S.) 540; 18 Ann. Cas. 594.

In other jurisdictions, however, the courts, without basing the right of intervention on any statute, have permitted the claimants of attached property to intervene in the attachment suit. Gumbel v. Pitkin, 124 U. S. 131, 31 L. ed. 374, 8 S. Ct. 379; Hall v. Richardson, 16 Md. 396, 77 Am. Dec. 303.

Annotation: 18 Ann. Cas. 594.

Such intervention has been allowed on the ground of fraud between the plaintiff and the defendant in the attachment suit, or to raise jurisdictional objections to the sufficiency of the proceedings. Ranahan v. O'Neale, 6 Gill & J. 298, 26 Am. Dec. 576; Stone v. Magruder, 10 Gill. & J. 383, 32 Am. Dec. 177. Annotation: 23 L.R.A.(N.S.) 540.

[15] Speyer v. Ihmels, 21 Cal. 280, 81 Am. Dec. 157; Davis v. Eppinger, 18 Cal. 378, 79 Am. Dec. 184; Bankers' Mortg. Co. v. Sohland, 33 Del. 331, 138 A. 361, citing R. C. L.; Potlatch Lumber Co. v. Runkel, 16 Idaho, 192, 101 P. 396, 23 L.R.A.(N.S.) 536, 18 Ann. Cas. 591; Miller v. White, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791.

The ground upon which such interveners are allowed to become parties to the action is that by reason of their lien upon the property attached, they are interested in preventing the plaintiff from recovering a judgment. Speyer v. Ihmels, 21 Cal. 280, 81 Am. Dec. 157.

[16] New Orleans Canal & Bkg. Co. v. Beard, 16 La. Ann. 345, 79 Am. Dec. 582; Farmers State Bank v. Hess, 138 Okla. 190, 280 P. 305, 66 A.L.R. 894.

The right which will authorize an intervention is said to be that created by a claim to the demand, or some part thereof, in suit, or claim to, or lien upon, the property, or some part thereof, which is the subject of litigation. Horn v. Volcano Water Co. 13 Cal. 62, 73 Am. Dec. 569; Potlatch Lumber Co. v. Runkel, 16 Idaho, 192, 101 P. 396, 23 L.R.A.(N.S.) 536, 18 Ann. Cas. 591.

[17] George D. Shore & Bro. v. Baltimore & O. R. Co. 76 S. C. 472, 57 S. E. 526, 11 Ann. Cas. 909.

tervene.[18] However, in some jurisdictions, under similar statutes, it is held that the interest which entitles a third party to intervene in an attachment suit is an interest in the subject-matter of the original suit, and not an interest in the property attached, and therefore that a claimant of the attached property who has no other interest in the litigation cannot intervene.[19] A claimant to attached property is not entitled to intervene by virtue of statutory provisions concerning the parties to actions which provide generally that any person may be a defendant who has, or claims, an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved.[20]

It has been held that an assignee in bankruptcy may on his own motion be made a party to an attachment pending in a state court, if for no other reason than to have it properly known by the court that the defendant is bankrupt.[1]

§ 976. —Junior Attaching Creditor.—The right of an attaching creditor to intervene in the suit of a prior attachment creditor appears to be wholly statutory. The result is that the right of intervention, where it exists, is subject to various qualifications, depending on the statute of the particular state in which the question arises.[2] Generally an attaching creditor may intervene in a suit of a prior attachment creditor to show that the senior attachment was fraudulently obtained, or obtained through collusion with the common debtor,[3] or to show that the prior attachment was based on an indebtedness not yet due,[4] although he has no right to intervene for the purpose of dissolving the senior attachment because of alleged defects in the procedure, with the end in view of making himself the first attaching creditor.[5] Such intervener must produce all the papers on which his own attachment is founded, and affirmatively show that there were no irregularities in his own proceedings.[6] Various other restrictions may also be imposed on the right to intervene in the suit of a prior attachment creditor.[7]

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[18] Gumbel v. Pitkin, 124 U. S. 131, 31 L. ed. 374, 8 S. Ct. 379 (recognizing and applying the Louisiana doctrine); Speyer v. Ihmels, 21 Cal. 280, 81 Am. Dec. 157; Davis v. Eppinger, 18 Cal. 378, 79 Am. Dec. 184; Potlatch Lumber Co. v. Runkel, 16 Idaho, 192, 101 P. 396, 23 L.R.A.(N.S.) 536, 18 Ann. Cas. 591; New Orleans Canal & Bkg. Co. v. Beard, 16 La. Ann. 345, 79 Am. Dec. 582; Perkins v. Bailey, 38 Wash. 46, 80 P. 177, 107 Am. St. Rep. 831.

Annotation: 23 L.R.A.(N.S.) 536; 18 Ann. Cas. 595.

[19] Annotation: 18 Ann. Cas. 595.

[20] Ibid.

[1] Doe ex dem. Vaillant v. Childress, 21 Wall. (U. S.) 642, 22 L. ed. 549.

[2] Davis v. H. B. Claflin Co. 63 Ark. 157, 38 S. W. 662, 1117, 41 S. W. 996, 35 L.R.A. 776, 58 Am. St. Rep. 102; Caruth-Byrnes Hardware Co. v. Deere, 53 Ark. 140, 13 S. W. 517, 7 L.R.A. 405; McComb v. Reed, 28 Cal. 281, 87 Am. Dec. 115; Speyer v. Ihmels, 21 Cal. 280, 81 Am. Dec. 157; Davis v. Eppinger, 18 Cal. 378, 79 Am. Dec. 184 (intervention by judgment creditor); Potlatch Lumber Co. v. Runkel, 16 Idaho, 192, 101 P. 396, 23 L.R.A.(N.S.) 536, 18 Ann. Cas. 591; Strawberry Growers' Selling Co. v. Lewellyn, 158 La. 303, 103 So. 823, 39 A.L.R. 1502; Henderson v. Thornton, 37 Miss. 448, 75 Am. Dec. 70; Miller v. White, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791.

Annotation: 39 A.L.R. 1505; 35 L.R.A. 773; 18 Ann. Cas. 597.

Under some statutes permission to subsequent attaching creditors to appear and defend a prior attachment is within the sound discretion of the court; the refusal of permission to such creditors to plead in abatement is not error where there is nothing to show that the court exercised its discretion unsoundly. Jump v. McClurg, 35 Mo. 193, 86 Am. Dec. 146.

[3] Annotation: 39 A.L.R. 1509.

In Texas it has been held that an attaching creditor may intervene in a suit of a prior attachment creditor to show that the senior attachment was fraudulently obtained or obtained through collusion with the common debtor. It seems also to have been held in this state that a subsequent lien creditor may intervene and have the prior attachment vacated where the creditor suing it out knew his affidavit to be false when he made it. Annotation: 39 A.L.R. 1505, 1509, 1510.

[4] Davis v. H. B. Claflin Co. 63 Ark. 157, 38 S. W. 662, 1117, 41 S. W. 996, 35 L.R.A. 776, 58 Am. St. Rep. 102.

[5] Davis v. H. B. Claflin Co. 63 Ark. 157, 38 S. W. 662, 1117, 41 S. W. 996, 35 L.R.A. 776, 58 Am. St. Rep. 102; Caruth-Byrnes Hardware Co. v. Deere, 53 Ark. 140, 13 S. W. 517, 7 L.R.A. 405; Strawberry Growers' Selling Co. v. Lewellyn, 158 La. 303, 103 So. 823, 39 A.L.R. 1502; Clamageran v. Bucks, 4 Mart. N. S. (La.) 487, 16 Am. Dec. 185.

Annotation: 39 A.L.R. 1507.

The formality and regularity of attachment proceedings, in the absence of fraud and collusion between the plaintiffs and defendants, are matters pertaining exclusively to the defendants. Clamageran v. Bucks, 4 Mart. N. S. (La.) 487, 16 Am. Dec. 185.

§ 977. **Time for Intervention.**—The general rule is that an attachment or garnishment suit is subject to intervention while it is pending, or at least while the attached or garnished property, or the proceeds from the same, continue under the control of the court.[8]

§ 978. **Pleadings.**—The pleadings in intervention in an attachment or garnishment are governed by the rules of practice which apply to pleadings generally.[9] The first pleading is the petition, interplea, or intervening complaint of the claimant.[10] This should not be filed until leave of the court has been granted. It should contain appropriate allegations setting forth the ground upon which the intervention is rested and should raise a proper issue;[11] it should, under the statutory requirements in most states, be verified.[12]

The original parties may answer or demur to the intervening petition or complaint as though it were an original complaint.[13]

An attachment suit may be amended so as to embrace the same cause of action against persons who have intervened to claim the property as was set up against the original defendant.[14]

§ 979. **Service, Process, and Notice.**—The intervening petition, as the practice is prescribed ordinarily, must be served upon the parties to the action or proceeding who have not appeared, and upon the attorneys of the parties who have appeared.[15] After appearing in the case, the intervener is entitled to notice of all proceedings thereafter taken.[16]

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[6] Annotation: 39 A.L.R. 1508.

[7] Annotation: 39 A.L.R. 1509, 1510.

[8] **A claimant to attached or garnished property may intervene** in the attachment or garnishment suit at any time until judgment. Speyer v. Ihmels, 21 Cal. 281, 81 Am. Dec. 157.

Annotation: 39 A.L.R. 1510; 35 L.R.A. 783.

The entry of judgment in an attachment suit does not prevent the court from protecting the interests of the true owner of the property which have been presented by intervention. Cermak v. Schaaf, 308 Ill. 61, 139 N. E. 39, 37 A.L.R. 1398.

In Johnson v. Chicago & P. Elevator Co. 119 U. S. 388, 30 L. ed. 447, 7 S. Ct. 254, in construing an Illinois statute the court held that the denial of a hearing to a third party claiming the ownership of attached water craft was proper where a release bond had been given, which took the place of the property attached, and the subsequent judgment could only be against the defendants in personam.

[9] Clapp v. Phelps, 19 La. Ann. 461, 92 Am. Dec. 545; Dawson Produce Co. v. Cohn, 172 Okla. 28, 43 P. (2d) 1034, citing R. C. L.; Farmers State Bank v. Hess, 138 Okla. 190, 280 P. 305, 66 A.L.R. 894.

[10] Smith v. Heineman, 118 Ala. 195, 24 So. 364, 72 Am. St. Rep. 150; Home Land & Loan Co. v. Routh, 123 Ark. 360, 185 S. W. 467, Ann. Cas. 1917C, 1142; Speyer v. Ihmels, 21 Cal. 280, 81 Am. Dec. 157.

Annotation: 35 L.R.A. 774.

This pleading is sometimes termed an "interplea." Annotation: 35 L.R.A. 774.

[11] Home Land & Loan Co. v. Routh, 123 Ark. 360, 185 S. W. 467, Ann. Cas. 1917C, 1142.

Annotation: 35 L.R.A. 774.

An intervener's plea which states that the funds held by the garnishee are not the property of the debtor but are the property of the intervener, is sufficiently definite concerning the ownership of the property. It is unnecessary to set out the evidence on which the intervener's claim of ownership is based. The statement that the funds are his property is a statement of fact and not of a legal conclusion. Home Land & Loan Co. v. Routh, 123 Ark. 360, 185 S. W. 467, Ann. Cas. 1917C, 1142.

A nonresident intervening in an attachment suit to contest the jurisdiction of the court cannot raise the question that the garnishee is a necessary party and has not been brought in, or that there has been no actual seizure of the res, since he would thereby waive lack of jurisdiction. Forrester v. Forrester, 155 Ga. 722, 118 S. E. 373, 29 A.L.R. 1363.

[12] Annotation: 35 L.R.A. 774.

[13] Smith v. Heineman, 118 Ala. 195, 24 So. 364, 72 Am. St. Rep. 150. Compare Clapp v. Phelps, 19 La. Ann. 461, 92 Am. Dec. 545.

[14] Finch v. Gregg, 126 N. C. 176, 35 S. E. 251, 49 L.R.A. 679.

[15] Smith v. Heineman, 118 Ala. 195, 24 So. 364, 72 Am. St. Rep. 150. Compare Clapp v. Phelps, 19 La. Ann. 461, 92 Am Dec. 545.

[16] Perkins v. Bailey, 38 Wash. 46, 80 P. 177, 107 Am. St. Rep. 831.

§ 980. Issues and Defenses.—Generally speaking, one who files an intervening petition in attachment or garnishment is confined to claiming the property in his own right and showing fundamental invalidity to his own injury. He does not stand in the position of an original party, and his attack is limited to such matters as might be taken advantage of in a collateral proceeding.[17] He cannot contest the plaintiff's claim against the defendant[18] or interpose a defense that is personal to the defendant.[19] Whether the plaintiff, the court, and the officer who served the writ have been acting legally does not concern him.[20] The attachment plaintiff, to defeat the claim of an intervener, need only show that the title to the property attached is not in the intervener.[1] The assignee of a garnished debt stands in place of the principal debtor and can make any defense to the judgment which the latter could make, and none which he could not make.[2]

It has been held that while it is proper to entertain a motion for the immediate discharge of property seized in attachment proceedings as that of defendant when it is claimed by another who interpleads, if the showing upon the motion discloses a substantial question as to the ownership between defendant and interpleader, the motion should be overruled where the hearing is upon ex parte affidavits.[3]

§ 981. Evidence and Trial.—The trial and proof of issues on an intervention is governed by the law of trial and evidence generally.[4] The intervener stands in the character of plaintiff before the court as to the nature of his title and the object of his demand, and is governed in his pleadings by the rules of practice which apply to plaintiffs in principal demands.[5] He generally has the burden of proving title or right to possession of the attached or garnished property, and the bona fides of his claim,[6] although under some statutes the trial judge has the discretion to require the attachment plaintiff to bear the burden of proving that the ownership of the property is in the defendant rather than in the claimant.[7] By the production of evidence showing fraud on the part of the defendant in transferring his property to the claimant, the plaintiff makes a prima facie case, and the burden rests upon the claimant to show that he was a bona fide purchaser.[8]

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[17] Home Land & Loan Co. v. Routh, 123 Ark. 360, 185 S. W. 467, Ann. Cas. 1917C, 1142; Potlatch Lumber Co. v. Runkel, 16 Idaho, 192, 101 P. 396, 23 L.R.A.(N.S.) 536, 18 Ann. Cas. 591; Strawberry Growers' Selling Co. v. Lewellyn, 158 La. 303, 103 So. 823, 39 A.L.R. 1502; Farmers State Bank v. Hess, 138 Okla. 190, 280 P. 305, 66 A.L.R. 894; Millus v. Lowrey Bros. 63 Okla. 261, 164 P. 663, L.R.A.1918B, 336; Ballew v. Young, 24 Okla. 182, 103 P. 623, 23 L.R.A. (N.S.) 1084.

Annotation: 35 L.R.A. 773, 775; 18 Ann. Cas. 594.

The right of one who files an interplea in attachment claiming title to, and the right in, immediate possession of the property attached, without attacking the grounds of attachment or any of the proceedings had therein prior to the levy, is analogous to the right of a petitioner in replevin. Millus v. Lowrey Bros. 63 Okla. 261, 164 P. 663, L.R.A.1918B, 336.

One who intervenes in an attachment proceeding wherein the service, which was by publication, was so defective as to be void, and claims the real estate attached, may attack such service before the rendition of judgment, by motion to set it aside. Ballew v. Young, 24 Okla. 182, 103 P. 623, 23 L.R.A.(N.S.) 1084.

Allegations of fraud in an affidavit for attachment may be disproved by a judgment creditor who intervenes, and it has been held that other creditors may intervene and show fraud when their interest in the property has suffered or is likely to suffer from a fraudulent transaction between the plaintiff and the defendant. Annotation: 35 L.R.A. 773.

[18] Fleming v. Shields, 21 La. Ann. 118, 99 Am. Dec. 719.

[19] Potlatch Lumber Co. v. Runkel, 16 Idaho, 192, 101 P. 396, 23 L.R.A.(N.S.) 536, 18 Ann. Cas. 591; Fleming v. Shields, 21 La. Ann. 118, 99 Am. Dec. 719.

Annotation: 35 L.R.A. 775.

Questions of the admissibility of testimony and the formality and regularity of the pleadings, in so far as they do not pertain to the claim of the intervener, are matters for the consideration of the defendant, and if he sees fit to waive them, he may. Fleming v. Shields, 21 La. Ann. 118, 99 Am. Dec. 719.

[20] Potlatch Lumber Co. v. Runkel, 16 Idaho, 192, 101 P. 396, 23 L.R.A.(N.S.) 536, 18 Ann. Cas. 591; Strawberry Growers' Selling Co. v. Lewellyn, 158 La. 303, 103 So. 823, 39 A.L.R. 1502; Fleming v. Shields, 21 La. Ann. 118, 99 Am. Dec. 719; Clamageran v. Bucks, 4 Mart. N. S. (La.) 487, 16 Am. Dec. 185.

Annotation: 23 L.R.A.(N.S.) 1084.

[1] Slocomb v. Breedlove, 8 La. 143, 28 Am. Dec. 135.

[2] Coit v. Haven, 30 Conn. 190, 79 Am. Dec. 244.

The assignee may object that the debt is not liable to the process. Wilde v. Mahaney, 183 Mass. 455, 67 N. E. 337, 62 L.R.A. 813.

[3] Western Grocer Co. v. Alleman, 81 Kan. 543, 106 P. 460, 27 L.R.A.(N.S.) 620, 135 Am. St. Rep. 398.

[4] See EVIDENCE [Also 10 R. C. L. p. 847]; TRIAL [Also 26 R. C. L. p. 1008].

[5] Clapp v. Phelps, 19 La. Ann. 461, 92 Am. Dec. 545; Farmers State Bank v.

The answer of the garnishee is not evidence of the facts therein stated against the interveners in a contest between them and the garnishors.[9]

Where one is sought to be charged as the garnishee of the payee of a promissory note, and a third party intervenes claiming property in the note, the presumption is that it came into the latter's possession before its maturity, and the plaintiff must show affirmatively not only that he did not acquire it before maturity, but that it was in fact the property of the payee at the time of service of the writ of garnishment.[10]

§ 982. **Judgment and Right to Proceeds after Sale.**—Where the property in controversy has not been sold, a successful intervener or interpleader in attachment is entitled to have the same returned to him, or, if replevied, to be adjudged the owner thereof, or, if the intervener or interpleader claims a lien on or an interest in the property, to have the same adjudged superior to the claim of the attaching creditor.[11] Where the property has been sold by order of court, and the proceeds are held by the person making such sale, or have been paid into court, such interpleader or intervener is entitled to the proceeds of the sale,[12] and it is generally held to be error to give judgment to him against the plaintiff for the value of the goods, instead of for the amount in court.[13] A few jurisdictions have, however, adopted the rule that damages are allowable to a successful intervener or interpleader in attachment.[14] It is not always necessary to settle the matter of interpleader before rendering judgment on the attachment suit.[15]

In case judgment is rendered against the intervener, he is entitled to an order suspending execution pending an appeal.[16]

§ 983. **Right of Intervener to Recover Counsel Fees.**—On the question of the right of a successful intervener or claimant of property attached as that of another to recover attorneys' fees for securing the release of the property from the attachment, the authorities are conflicting. In a number of deci-

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Hess, 138 Okla. 190, 280 P. 305, 66 A.L.R. 894; Commercial Invest. Trust v. William Frankfurth Hardware Co. 179 Wis. 21, 190 N. W. 1004, citing R. C. L.

[6] Williams v. Hill, 19 How. (U. S.) 246, 15 L. ed. 570; Richards v. Vaccaro, 67 Miss. 516, 7 So. 506, 19 Am. St. Rep. 322.

However, in Speyer v. Ihmels, 21 Cal. 280, 81 Am. Dec. 157, it was held that where a subsequent attaching creditor intervenes on the ground that the prior attachment was fraudulently taken out, he occupies the position of a defendant, and the burden of proof is upon the plaintiff.

[7] Pelzer Mfg. Co. v. Pitts, 76 S. C. 349, 57 S. E. 29, 11 Ann. Cas. 665.

[8] Richards v. Vaccaro, 67 Miss. 516, 7 So. 506, 19 Am. St. Rep. 322.

[9] Bassett v. Garthwaite, 22 Tex. 230, 73 Am. Dec. 257.

[10] Ibid.

[11] Annotation: 66 A.L.R. 912.

[12] Hall v. Richardson, 16 Md. 396, 77 Am. Dec. 303.

Annotation: 66 A.L.R. 908.

A sale, in attachment proceedings, of goods which were subject to a vendor's lien or right of stoppage will not operate to the prejudice of the vendor so as to defeat his prior right, but he will be entitled, by intervening in the attachment proceedings, to have the proceeds applied to the satisfaction of his debt in preference to the attaching creditors. Hepp v. Glover, 15 La. 461, 35 Am. Dec. 206.

[13] Annotation: 66 A.L.R. 909.

[14] Farmers State Bank v. Hess, 138 Okla. 190, 280 P. 305, 66 A.L.R. 894.

Annotation: 66 A.L.R. 911.

[15] Cermak v. Schaaf, 308 Ill. 61, 139 N. E. 39, 37 A.L.R. 1398.

[16] Annotation: Ann. Cas. 1913B, 181.

sions the right to an allowance of such fees is denied, but in some cases attorneys' fees have been allowed to a successful claimant of property so attached.[17]

XV. WRONGFUL OR MALICIOUS ATTACHMENT OR GARNISHMENT

A. The Cause of Action

1. In General

§ 984. Generally.—At the outset of this discussion of liability for wrongful attachment or garnishment, the distinction must be observed between an action at common law and an action under statutes.[18] At common law, the mere fact that one person institutes a civil action against another does not give rise to a cause of action in favor of the person sued. Whatever the injury resulting from the issuance of the judicial process, the person procuring its issuance incurs no responsibility, provided he acts upon an honest conviction that the remedy is necessary to the enforcement of a legal right.[19] However, at an early stage of the common law's growth, it was perceived that the institution of criminal proceedings upon a false accusation led to gross abuses, injustice, and oppression, and that to correct this it was necessary to give to the accused a right of action against the prosecutor. Accordingly, the action denominated malicious prosecution came into existence.[20] This action had been recognized and its elements had become fixed long before the statutes permitting attachments made their appearance on the statute books. The motive consists in malice, which may be fraud, oppression, or gross negligence, a great variety of terms being used to describe the mental attitude of the party.

Although in some states the rule is, independent of statute, that the mere fact that an attachment was wrongfully issued and levied gives rise to a cause of action for damages, even though the plaintiff was not actuated by malice or had probable cause for the belief that ground for attachment existed,[21] in the majority of cases, malice and a want of probable cause are required. Acting upon the principle of the common law which guarantees a remedy for the enforcement of every right, "ubi jus, ibi remedium," the judges declared that the malicious suing out of the writ of attachment, without probable cause, should give rise to a cause of action equally with, and analogous to, the malicious prosecution of a criminal prosecution.[1] Thus, it has become established that generally the principles governing a common-law action for the wrongful issuance of an attachment are those common-law principles applicable to actions for malicious prosecution.[2] An action lies for maliciously suing out an attachment and seizing the goods of the defendant, even though there was at the time some indebtedness, especially if the indebtedness claimed exceeds the actual indebtedness by a large amount, thus resulting in a grossly excessive levy.[3] In the absence of indebtedness, attachment is wrongful, within the contemplation of such a statute, although otherwise statutory grounds for attachment exist.[4]

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[17] Annotation: 25 A.L.R. 604, s. 71 A.L.R. 1464.

[18] While the statutes are by no means uniform in their terminology, and the interpretations put upon their language disclose the usual differences of opinion found throughout the construction of American statute law, yet it is generally recognized that there is a radical difference between an action at common law for the malicious prosecution of an attachment and an action under statute for an attachment that is merely wrongful. Annotation: 38 L.R.A. (N.S.) 120.

[19] Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 59.

Annotation: 38 L.R.A.(N.S.) 121.

See also Abuse of Process, Vol. 1, pp. 176 et seq.

[20] See Malicious Prosecution [Also 18 R. C. L. p. 9].

[21] Dickinson v. Maynard, 20 La. Ann. 66, 96 Am. Dec. 379; Reed v. Samuels, 22 Tex. 114, 73 Am. Dec. 253, 5 Tex. Jur. 261.

[1] Vesper v. Crane Co. 165 Cal. 36, 130 P. 876, L.R.A.1915A, 541; Snydacker v. Brosse, 51 Ill. 357, 99 Am. Dec. 551; Ames v. Chirurg, 152 Iowa, 278, 132 N. W. 427, 38 L.R.A. (N.S.) 120; International Harvester Co. v. Iowa Hardware Co. 146 Iowa, 172, 122 N. W. 951, 29 L.R.A.(N.S.) 272; Malone v. Belcher, 216 Mass. 209, 103 N. E. 637, 49 L.R.A.(N.S.) 753, Ann. Cas. 1915A, 830; Keller v. Butler, 246 N. Y. 249, 158 N. E. 510, 55 A.L.R. 349 (dictum); Overton v. Sigmon Furniture Mfg. Co. 50 Okla. 531, 151 P. 215, citing R. C. L.; Floyd v. Anderson, 36 Okla. 308, 128 P. 249, 43 L.R.A.(N.S.) 788, Ann. Cas. 1915A, 348; Abbott v. Kimball, 19 Vt. 551, 47 Am. Dec. 708; Ailstock v. Moore Lime Co. 104 Va. 565, 52 S. E. 213, 2 L.R.A. (N.S.) 1100, 113 Am. St. Rep. 1060, 7 Ann.

An attachment or garnishment defendant may also, of course, bring an action against the attaching or garnishing officer where the attachment or garnishment was wrongful or malicious on his part,[5] but since the writ, if lawful on its face, constitutes a defense to the attaching officer,[6] he will generally be liable only where he levies upon property not liable to the process,[7] or where he abuses the process in some other manner, such as by misusing the attached or garnished property.[8]

The principles governing abuse of process, rather than those governing malicious prosecution,[9] apply to any misuse of an attachment or garnishment

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Cas. 545; Commercial Invest. Trust v. William Frankfurth Hardware Co. 179 Wis. 21, 190 N. W. 1004, citing R. C. L.; Veitch v. Cebell, 105 Wis. 260, 81 N. W. 411, 76 Am. St. Rep. 914.

See also Nix v. Goodhill, 95 Iowa, 282, 63 N. W. 701, 58 Am. St. Rep. 434; Savage v. Brewer, 16 Pick. (Mass.) 453, 28 Am. Dec. 255; Barnett v. Reed, 51 Pa. 190, 88 Am. Dec. 574; Hazard v. Israel, 1 Binn. (Pa.) 240, 2 Am. Dec. 428.

Annotation: 85 A.L.R. 662; 29 L.R.A. (N.S.) 274; 38 L.R.A.(N.S.) 120, s. L.R.A. 1915A, 541; 81 Am. Dec. 476; 7 Ann. Cas. 547.

The elements of abuse of process, as distinguished from malicious prosecution, are the existence of an ulterior motive and an act in the use of process other than such as would be proper in the prosecution of the charge. There is a difference of opinion as to whether or not malice and want of probable cause are necessary elements of such a cause of action. See ABUSE OF PROCESS, Vol. 1, p. 178, § 6 and p. 179, § 8.

Taking out an invalid writ of attachment, knowing it to be such, and attaching property not subject to levy, for the purpose of gaining information or evidence upon which to base a proper writ, constitute a cause of action for malicious attachment. The second writ cannot be sustained in that way. Rosenthal v. Dickerman (Rosenthal v. Circuit Judge) 98 Mich. 208, 57 N. W. 112, 22 L.R.A. 693, 39 Am. St. Rep. 535.

If the plaintiff in garnishment proceedings had no right to the remedy of garnishment, he may be held liable for resorting to garnishment proceedings by the debtor whose rights have thus been interfered with. However, it has been held that malice must be shown by the injured party to warrant recovery. An action for malicious prosecution is his sole remedy, and although a principal defendant has been injured by having his funds tied up in a bank by garnishment proceedings, he is not, after the dismissal of the complaint and upon the trial of the garnishee action, entitled to a judgment for damages against the plaintiff, by reason of the garnishment, where the statute does not authorize such a judgment. Veitch v. Cebell, 105 Wis. 260, 81 N. W. 411, 76 Am. St. Rep. 914.

However, the mere attachment of property for a debt not yet due does not in itself constitute such a cause of action. Humphreys v. Sutcliffe, 192 Pa. 336, 43 A. 954, 73 Am. St. Rep. 819.

As to advice of counsel as a defense to an action for malicious attachment, see infra, § 998.

[2] Malone v. Belcher, 216 Mass. 209, 103 N. E. 637, 49 L.R.A.(N.S.) 753, Ann. Cas. 1915A, 830; Williams v. Hunter, 10 N. C. (3 Hawks) 545, 14 Am. Dec. 597; Commercial Invest. Trust v. William Frankfurth Hardware Co. 179 Wis. 21, 190 N. W. 1004, citing R. C. L.

Annotation: 29 L.R.A.(N.S.) 273; 68 Am. St. Rep. 267.

An attachment for the purpose of preventing a conveyance of certain property to an intended purchaser constitutes an actionable abuse of process. Malone v. Belcher, 216 Mass. 209, 103 N. E. 637, 49 L.R.A. (N.S.) 753, Ann. Cas. 1915A, 830. The court held the action analogous to an action for malicious prosecution.

[3] Spaids v. Barrett, 57 Ill. 289, 11 Am. Rep. 10.

[4] Allith-Prouty Co. v. Wallace, 32 Wyo. 392, 233 P. 144, 234 P. 504, 39 A.L.R. 513.

[5] Rice v. Chase, 9 N. H. 178, 32 Am. Dec. 346.

See SHERIFFS [Also 24 R. C. L. p. 933, § 25].

As to actions on indemnity bond, see SHERIFFS [Also 24 R. C. L. p. 977, § 71].

[6] See infra, § 1002.

[7] Rice v. Chase, 9 N. H. 178, 32 Am. Dec. 346.

[8] See infra, this section.

[9] **The distinctive nature of an action for abuse of process,** as distinguished from an action for malicious prosecution, is that the former lies for the improper use of process after it has been issued, not for maliciously causing process to issue. See ABUSE OF PROCESS, Vol. 1, p. 176, § 3.

after it has issued,[10] such as the levy of the writ on exempt property,[11] or any misuse or injury of the property after it is attached or garnished.[12] However, it has not been considered an actionable abuse of process for one intentionally to discontinue an action in which property has been attached, and to begin a new suit for the same cause of action and attach either the same or other property.[13] The indispensable elements of abuse of the process, as distinguished from malicious prosecution, are the existence of an ulterior motive and the use of process other than such as would be proper in the prosecution of the charge. There is a difference of opinion as to whether or not malice and want of probable cause are necessary elements to such a cause of action.[14]

§ 985. Statutory Modifications.—The remedy accorded for wrongful attachment or garnishment to suitors by the courts pursuant to their common-law powers[15] has appeared to be insufficient in the eyes of the legislatures of many states, the element of malice being regarded as a stumbling block to the accomplishment of justice. Therefore, one may find in the statute books numerous acts which are designed to enlarge the common-law remedy by extending the right of action to the wrongful suing out of the writ of attachment in cases wherein the ingredient of malice[16] and usually want of probable cause are lacking. Under most of these statutes a "wrongful" suing out of the writ, such as will sustain the action, is no more than a failure to prosecute the attachment with effect.[17] However, some statutes make want of probable cause an element of a cause of action for wrongful attachment.[18]

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[10] Grimestad v. Lofgren, 105 Minn 286, 117 N. W. 515, 17 L.R.A.(N.S.) 990, 127 Am. St. Rep. 566.

[11] Ibid.

[12] Snydacker v. Brosse, 51 Ill. 357, 99 Am. Dec. 551; Bradshaw v. Frazier, 113 Iowa, 579, 85 N. W. 752, 55 L.R.A. 258, 86 Am. St. Rep. 394; Barrett v. White, 3 N. H. 210, 14 Am. Dec. 352.

Annotation: 86 Am. St. Rep. 402.

A bailee who has charge of attached property has no right to use it for his own benefit, as where a horse taken under attachment is cruelly worked. Annotation: 86 Am. St. Rep. 402.

An officer who unnecessarily or wantonly removes hay which has been attached is liable as a trespasser for abuse of process. Barrett v. White, 3 N. H. 210, 14 Am. Dec. 352.

It is an abuse of process to break open outer doors for the purpose of executing civil process. Snydacker v. Brosse, 51 Ill. 357, 99 Am. Dec. 551.

However, where, upon the attachment of a horse or wagon of a debtor, such horse and wagon are used to haul away other personal property attached, this is not an abuse of process. Paul v. Slason, 22 Vt. 231, 54 Am. Dec. 75.

Where an attaching creditor consents to a sale by the garnishee of the property attached, he is liable to his debtor for any loss resulting from such sale. Brashear v. West, 7 Pet. (U. S.) 608, 8 L. ed. 801.

See also Vol. 4, p. 893, § 558.

[13] Annotation: 86 Am. St. Rep. 401.

[14] See Abuse of Process, Vol. 1, p. 178, § 6 and p. 179, § 8.

[15] See supra, § 984.

[16] Pollock v. Gantt, 69 Ala. 373, 44 Am. Rep. 519; Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 59; Grimestad v. Lofgren, 105 Minn. 286, 117 N. W. 515, 17 L.R.A.(N.S.) 990, 127 Am. St. Rep. 566; Oklahoma State Bank v. Reed, 143 Okla. 131, 288 P. 281, 85 A.L.R. 635; Gordon v. Kentucky Midland Coal Co. 152 Tenn. 367, 278 S. W. 68, 42 A.L.R. 1052; Lamb v. Day, 8 Vt. 407, 30 Am. Dec. 479; Commercial Invest. Trust v. William Frankfurth Hardware Co. 179 Wis. 21, 190 N. W. 1004, citing R. C. L.; Allith-Prouty Co. v. Wallace, 32 Wyo. 392, 233 P. 144, 234 P. 504, 39 A.L.R. 513.

Annotation: 85 A.L.R. 659; 29 L.R.A. (N.S.) 273; 38 L.R.A.(N.S.) 120, s, L.R.A. 1915A, 541; 81 Am. Dec. 467.

In Puerto Rico a comprehensive system is specially provided by the Code of Civil Procedure governing the issuing of attachments and the recovery of damages for wrongful attachment; it has been held that an action to recover for the wrongful suing out of a writ of attachment must be brought within these provisions of the Code, and not under general provisions relating to injuries based upon a careless act or omission. Perez v. Fernandez, 202 U. S. 80, 50 L. ed. 942, 26 S. Ct. 561.

[17] See infra, § 991.

[18] Ames v. Chirurg, 152 Iowa, 278, 132 N. W. 427, 38 L.R.A.(N.S.) 120; Burton v. Knapp, 14 Iowa, 196, 81 Am. Dec. 465; Raver v. Webster, 3 Iowa, 502, 66 Am. Dec. 96; Seattle Crockery Co. v. Haley, 6 Wash. 302, 33 P. 650, 36 Am. St. Rep. 156.

Annotation: 38 L.R.A.(N.S.) 121, 123; 68 Am. St. Rep. 268.

In an early case in North Carolina, Williams v. Hunter, 10 N. C. (3 Hawks) 545, 14 Am. Dec. 597, it was held that an action for unlawfully suing out an attachment

Wherever the question has arisen, it has generally been held that the attachment debtor's right of action against his attachment creditor, for maliciously, and without probable cause, suing out a writ of attachment, is not superseded or limited by the statutes authorizing and regulating the writ, but that the statutory protection is in addition to that afforded at common law.[19] If the action is brought at common law and not on the attachment bond, malice is still a necessary element of a cause of action.[20]

In many states, an attachment or garnishment is a proper practice to follow to enforce claims arising under bulk sales laws.[1] In others, such an attachment is wrongful.[2]

The giving of a redelivery bond in attachment does not waive the right to recover the actual damages which were caused by wrongfully attaching the property, although the statute provides for a motion for discharge of the attachment because improperly issued.[3]

§ 986. Malice and Probable Cause.—The malice required to sustain an action for malicious attachment has been defined as consisting in an improper motive, not necessarily any positive malignity or corruption, but a wilful disregard of the rights of others, whether it is to compass some unlawful end, or some lawful end by unlawful means, or to do a wrong and unlawful act, knowing it to be such.[4] Probable cause is said to consist in a reasonable belief in the existence of facts necessary to sustain an attachment, such belief being founded on circumstances which would be sufficient to produce such a belief in a man of ordinary caution, that is, founded on reasonable grounds.[5] Accordingly, the proof of malice and probable cause must correspond to these tests.[6]

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could not be maintained unless it was sued out with malice and without probable cause. The later North Carolina rule is that want of probable cause, but not malice, is an element of the cause of action. Annotation: 38 L.R.A.(N.S.) 121.

[19] See infra, § 1019.

[20] Fortman v. Rottier, 8 Ohio St. 548, 72 Am. Dec. 606.

Annotation: 38 L.R.A.(N.S.) 126.

[1] See Vol. 4, p. 618, § 100.

[2] Newman v. Garfield, 93 Vt. 16, 104 A. 881, 5 A.L.R. 1507.

An officer levying an attachment in such a case is liable in damages as for a conversion. Ibid.

[3] St. Joseph Stock Yards Co. v. Love, 57 Utah, 450, 195 P. 305, 25 A.L.R. 569.

The giving of an undertaking for the release of attached property does not preclude the defendant from maintaining an action on the attachment bond for damage sustained by the attachment. Annotation: 32 L.R.A.(N.S.) 408.

[4] Alexander v. Harrison, 38 Mo. 258, 90 Am. Dec. 431.

[5] Long v. Burley State Bank, 30 Idaho, 392, 165 P. 1119, citing R. C. L.; Ames v. Chirurg, 152 Iowa, 278, 132 N. W. 427, 38 L.R.A.(N.S.) 120; Raver v. Webster, 3 Iowa, 502, 66 Am. Dec. 96.

Annotation: 68 Am. St. Rep. 268; 81 Am. Dec. 477.

In other words, if the attachment plaintiff honestly believed that he had probable cause, the mere fact that there was not in realty any probable cause does not render him liable. Brand v. Hinchman, 68 Mich. 590, 36 N. W. 664, 13 Am. St. Rep 362.

The intention and real object of the plaintiff must have been to injure, vex, and harass the defendant, under pretense of the action in attachment. Raver v. Webster, 3 Iowa, 502, 66 Am. Dec. 96; Alexander v. Harrison, 38 Mo. 258, 90 Am. Dec. 431.

When an attachment is sued out by a person who knows he has no cause of action, he may be deemed to have intended thereby to vex, harass, and injure the party sued; and this will be malice enough. Alexander v. Harrison, 38 Mo. 258, 90 Am Dec. 431.

Where there was no debt there can be no good faith in swearing to the contrary, and therefore no reasonable ground to believe what one must have known not to be true. Pittsburg, J. E. & E. R. Co. v. Wakefield Hardware Co. 138 N. C. 174, 50 S. E. 571. 3 Ann. Cas. 720. Annotation: 86 Am. St. Rep. 401; 81 Am. Dec. 478.

[6] **If the plaintiff, though having a cause of action, alleges facts as ground for the attachment, knowing them to be false,** this is evidence of malice. The fact that judgment in the original suit on the merits went against the plaintiff has been held to be conclusive evidence against him on the question of probable cause in an action for malicious attachment, although there is good authority to the contrary. Raver v. Webster, 3 Iowa, 502, 66 Am. Dec. 96. Annotation: 81 Am. Dec. 471, 478.

Any evidence going to show the justice of the plaintiff's demand, though it does not prove probable cause, tends to do so and is admissible for that purpose. Forrest v.

However, it has been held that the probable cause must exist as a fact, and not merely as a belief in the mind of the attaching creditor,[7] and undoubtedly it may be, and ordinarily is, inferred from other facts, such as the falsity of the affidavit, that the debt was not due, etc.[8]

§ 987. —Under Wrongful Attachment or Garnishment Statutes.—Under a statute making want of probable cause an element of a cause of action for wrongful attachment, the view has been taken that the want of probable cause is the want of reasonable cause to believe the grounds stated for the writ to be true.[9] However, it has been held that the want of probable cause under such a statute must exist as a fact, and not merely in the mind of the attaching creditor, to be available to him as a defense to such an action.[10]

§ 988. When Cause of Action Arises.[11]—Generally speaking, if the plaintiff in the action in which the attachment or garnishment is issued succeeds in maintaining his main action, and also the attachment or garnishment, there is no cause of action for wrongful attachment or garnishment. To this general rule, however, there are some seeming exceptions.[12]

Where the basis of the action for wrongful attachment or garnishment is that the plaintiff in the action in which the attachment or garnishment issued had no cause of action, the action for wrongful attachment or garnishment must await the termination of that action; in other words, it must be judicially determined that no cause of action existed, or the action must have been dismissed.

Where the action is based on some impropriety in the attachment or garnishment, as, for example, that there was no ground for the issuance of the process or that it was irregularly issued or that the attachment was mali-

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Collier, 20 Ala. 175, 56 Am. Dec. 190. Annotation: 81 Am. Dec. 478.

Mere representations by a third person, without further inquiry by the plaintiff, are not sufficient to justify such belief on the plaintiff's part so as to be a defense to an action for malicious attachment. Annotation: 81 Am. Dec. 478.

The declarations of the debtor that he was about to leave the state, made just prior to the attachment, have been held not admissible for the attachment plaintiff, if they did not come to him until after the attachment, as then they could not have influenced his belief; and on the same principle, a subsequent fraudulent assignment is no justification. However, evidence that other attachments had been issued prior to his own has been held admissible as evidence for the attachment plaintiff, tending to rebut the presumption of malice, in that it strengthened his belief in his grounds for attachment. Donnell v. Jones, 17 Ala. 689, 52 Am. Dec. 194. Annotation: 81 Am. Dec. 478.

Words spoken or declarations made by the attachment plaintiff long after the issuance of the attachment, without evidence to show that such declarations related directly to the act of suing out the writ, are inadmissible as tending to prove malice in procuring the writ. Burton v. Knapp, 14 Iowa, 196, 81 Am. Dec. 465.

[7] Seattle Crockery Co. v. Haley, 6 Wash. 302, 33 P. 650, 36 Am. St. Rep. 156.

[8] Annotation: 81 Am. Dec. 477, 478.

[9] Ames v. Chirurg, 152 Iowa, 278, 132 N. W. 427, 38 L.R.A.(N.S.) 120; Burton v. Knapp, 14 Iowa, 196, 81 Am. Dec. 465; Raver v. Webster, 3 Iowa, 502, 66 Am. Dec. 96.

Annotation: 38 L.R.A.(N.S.) 124.

[10] Seattle Crockery Co. v. Haley, 6 Wash. 302, 33 P. 650, 36 Am. St. Rep. 156.

In criticizing the Iowa cases (see preceding note) the court, in Seattle Crockery Co. v. Haley, 6 Wash. 302, 33 P. 650, 36 Am. St. Rep. 156, said: "To say that a debtor may be deprived of the use of his property, not for any fault of his own, but because his creditor believes that he has been in fault, is to make his rights depend upon a matter which the law cannot and does not pretend to regulate, viz., the nature and condition of the creditor's mind, and is to put him, upon the trial of his suit for damages, to proof of facts which he can get positively from no other source but the creditor himself, which would be entirely unreasonable." The court pointed out that the Iowa and Washington statutes were precisely similar.

[11] As to when statute of limitations begins to run against action, see infra, § 1004.

[12] **There is obiter,** in Harris v. Bickerton, 24 Ont. L. Rep. 41, Ann. Cas. 1912A, 443, to the effect that the action for wrongful attachment may be maintained even though the attachment defendant was unsuccessful in the attachment proceeding, failing to have the process complained of set aside, if the use of the attachment was harsh or oppressive.

It is recognized in certain cases, in which the decision of an inferior court is not reviewable, that a determination of the wrongfulness of the attachment or garnishcious,[13] it is not necessary to await the determination of the main action before beginning an action for wrongful attachment. The harsh and oppressive use of the attachment or garnishment process may furnish the basis of an action for wrongful attachment or garnishment, even though it is a case in which the plaintiff in the principal action has a valid claim which is sustained therein.[14]

According to the general rule, however, no action lies until the attachment or garnishment proceedings proper, as distinguished from the main action, have terminated.[15] At least, the particular property seized must be discharged from the process.[16] However, it has been held that where the gist of the action for wrongful attachment or garnishment is malice, the determination of the attachment or garnishment proceedings is not a condition prerequisite to the maintenance of the action.[17] At least, this is the rule where the termination of the attachment or garnishment is not necessary to any adjudication upon its wrongfulness.[18] It has also been held that under a statute which inhibits the defendant in attachment from putting in issue the grounds upon which it is sued out, he is not bound to wait until the attachment suit is determined.[19]

The effect of giving a bond which discharges the attachment varies in the different jurisdictions. In some, in which the giving of such bond prevents a determination of the regularity of the attachment or garnishment, no action lies for wrongful attachment or garnishment,[20] while in others such action does lie.[1]

§ 989. Necessity of Actual Levy and Interference.—There is a difference of opinion as to the necessity of actual levy and interference to sustain an action for wrongful or malicious attachment or garnishment. One view is that this is necessary.[2] Another view is that the action is maintainable without

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ment is not necessary; in fact, a sustaining of the attachment by such inferior court does not prevent the action for wrongful attachment. Nation v. Savely, 127 Okla. 117, 260 P. 32, citing R. C. L.

[13] Malone v. Belcher, 216 Mass. 209, 103 N. E. 637, 49 L.R.A.(N.S.) 753, Ann. Cas. 1915A, 830; Grimestad v. Lofgren, 105 Minn. 286, 117 N. W. 515, 17 L.R.A.(N.S.) 990.

Where an attachment was obtained for the purpose of preventing a sale of property by the defendant and to enable the moving party to buy it, the court held that the purpose of obtaining the attachment was a perversion of the object which the writ was intended by law to effect. Malone v. Belcher, 216 Mass. 209, 103 N. E. 637, 49 L.R.A.(N.S.) 753, Ann. Cas. 1915A, 830.

[14] Harris v. Bickerton, 24 Ont. L. Rep. 41, Ann. Cas. 1912A, 443.

[15] Wade v. Ray, 67 Okla. 39, 168 P. 447, L.R.A.1918B, 796; Reliable Mut. Hail Ins. Co. v. Rogers, 61 Okla. 226, 160 P. 914, L.R.A.1917B, 350.

Annotation: 2 L.R.A.(N.S.) 950; 68 Am. St. Rep. 267, 81 Am. Dec. 479, Ann. Cas. 1912A, 445.

The dissolution of the attachment proceedings gives a right of action, and it is not necessary to wait until the termination of the main action before instituting proceedings for redress. Reliable Mut. Hail Ins. Co. v. Rogers, 61 Okla. 226, 160 P. 914, L.R.A.1917B, 350.

An order of the court reducing the ad damnum in the writ is a sufficient termination to support an action for maliciously making an excessive attachment; it is not necessary to wait until the end of the main action. Zinn v. Rice, 154 Mass. 1, 27 N. E. 772, 12 L.R.A. 288.

In Spaids v. Barrett, 57 Ill. 289, 11 Am. Rep. 10, an averment in a declaration that money claimed in a writ of attachment was paid to save the property from total ruin was held equivalent to an averment of the termination of the proceeding in attachment in an action for maliciously suing out the writ.

[16] Grimestad v. Lofgren, 105 Minn. 286, 117 N. W. 515, 17 L.R.A.(N.S.) 990, 127 Am. St. Rep. 566 (seizure of exempt property which was discharged).

[17] Brand v. Hinchman, 68 Mich. 590, 36 N. W. 664, 13 Am. St. Rep. 362.

In Forrest v. Collier, 20 Ala. 175, 56 Am. Dec. 190, it was held that an averment that the attachment suit was ended was unnecessary where the gist of the action for malicious attachment was a false representation on the part of the defendant that he was the agent of the plaintiff.

[18] Fortman v. Rottier, 8 Ohio St. 548, 72 Am. Dec. 606.

[19] Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 59.

[20] Annotation: 2 L.R.A.(N.S.) 950.

[1] Nation v. Savely, 127 Okla. 117, 260 P. 32, citing R. C. L.

[2] Annotation: 7 Ann. Cas. 548.

any arrest or seizure of property,[3] at least for nominal damages;[4] and this rule is defended on the ground that it accords with right and justice. It is said that the common law declares that for every injury there is a remedy. Especially is this so where the injury is malicious. If a man is injured in his credit and reputation, and his business lessened or broken up, it can make no difference, in his right to recover for such injury, that his person or property has not been manually seized or disturbed.[5]

§ 990. Successive Attachments and Garnishments.—Successive attachments and garnishments may, under certain circumstances, constitute a cause of action for abuse of process.[6] For example, successive attachments and garnishments of property not liable to the process constitute such a cause of action.[7]

§ 991. Attachment and Garnishment of Property Not Liable to Process.—The attachment or garnishment of property not liable to the process may, under certain circumstances, constitute wrongful[8] or malicious[9] attachment or garnishment.[10]

The question whether the mere attachment or garnishment of exempt property in the first instance constitutes a trespass, where no claim of exemption has been made, is clearly dependent upon the construction placed upon the exemption statute to which the levy is subject. But where the character of property as exempt is established, the generally recognized rule is that the repeated seizure of it for the same debt will support an action for the abuse of process, at least where such seizure may not be justified as incidental to a conveniently effective levy on other property.[11]

An attaching or garnishing creditor or officer levying upon property taken from a prisoner who has not been arrested in good faith, or who has been illegally arrested,[12] or upon property subjected to the process by trickery or fraud,[13] is liable in damages for wrongful or malicious attachment or garnishment.[14]

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[3] Brand v. Hinchman, 68 Mich. 590, 36 N. W. 664, 13 Am. St. Rep. 362; Rice v. Miller, 70 Tex. 613, 8 S. W. 317, 8 Am. St. Rep. 630.

[4] Dorr Cattle Co. v. Des Moines Nat. Bank, 127 Iowa, 153, 98 N. W. 918, 4 Ann. Cas. 519.

[5] Brand v. Hinchman, 68 Mich. 590, 36 N. W. 664, 13 Am. St. Rep. 362.

[6] Rock v. Abrashin, 154 Wash. 51, 280 P. 740, 65 A.L.R. 1280.

Annotation: 65 A.L.R. 1283.

[7] See infra, § 991.

[8] Kelly v. Stockgrowers Credit Corp. — N. D. —, 263 N. W. 717, 103 A.L.R. 460.

[9] Grimestad v. Lofgren, 105 Minn. 286, 117 N. W. 515, 17 L.R.A.(N.S.) 990, 127 Am. St. Rep. 566.

[10] Rice v. Chase, 9 N. H. 178, 32 Am. Dec. 346.

Annotation: 85 A.L.R. 662.

[11] Baxley v. Laster, 82 Ark. 236, 101 S. W. 755, 10 L.R.A.(N.S.) 983, 118 Am. St. Rep. 64, 12 Ann. Cas. 332; Rustad v. Bishop, 80 Minn. 497, 83 N. W. 449, 50 L.R.A. 168, 81 Am. St. Rep. 282; Sturges v. Jackson, 88 Miss. 508, 40 So. 547, 6 L.R.A.(N.S.) 491, 117 Am. St. Rep. 754; Rock v. Abrashin, 154 Wash. 51, 280 P. 740, 65 A.L.R. 1280.

Annotation: 65 A.L.R. 1283.

A creditor will not be permitted to initiate a series of garnishments, and thus tie up in the hands of an employer separate amounts of money which have been earned as wages by a laboring man until the thirty days prescribed by statute have expired and then, by another proceeding in garnishment, appropriate these amounts to the payment of his debt. Such proceedings are a perversion of civil process and cannot be sanctioned. Rustad v. Bishop, 80 Minn. 497, 83 N. W. 449, 50 L.R.A. 168, 81 Am. St. Rep. 282.

Generally, exemptions cannot be circumvented by successive garnishments. See supra, § 707.

Although a complaint was deemed to state a good cause of action in alleging successive fruitless and abandoned garnishments levied upon exempt property, in pursuance of a conspiracy to harass the plaintiffs by the malicious abuse of the process of the court, the facts were held not to warrant recovery, for the reasons that the claim was just, that only one fourth of the wages being earned were exempt from it, that no claims of exemptions were made, and that the facts revealed no more than a contest between a dishonest debtor seeking to avoid payment of a just claim, and his creditor employing the process in question zealously, but in the justifiable effort to secure payment out of such funds as were properly available for that purpose. Rock v. Abrashin, 154 Wash. 51, 280 P. 740, 65 A.L.R. 1280.

See also Abuse of Process, Vol. 1, p. 184, § 16.

[12] Such property is not liable to seizure

Injunctive relief against successive attachments or garnishments of this character is sometimes allowed.[15]

§ 992. Cause of Action of Third Persons.—A third person whose property has been seized in an attachment action has a cause of action for such wrongful seizure. The levying officer incurs a liability therefor.[16]

The attachment plaintiff, who has done nothing more than to cause the writ to be issued, is not liable for a wrongful levy upon a third person's property.[17] But if he has either actually participated in such levy, as by ordering or directing it to be made upon particular property, or subsequently ratifies or adopts it, then he incurs liability.[18]

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on civil process. See Vol. 4, p. 803, §§ 400 et seq.

[13] Such property is not liable to levy. See Vol. 4, p. 609, § 87.

[14] Ex parte Hurn, 92 Ala. 102, 9 So. 515, 13 L.R.A. 120, 25 Am. St. Rep. 23; Closson v. Morrison, 47 N. H. 482, 93 Am. Dec. 459.

Annotation: 25 Am. St. Rep. 34.

[15] See supra, § 717.

[16] Marks v. Shoup, 181 U. S. 562, 45 L. ed. 1002, 21 S. Ct. 724; North v. Peters, 138 U. S. 271, 34 L. ed. 936, 11 S. Ct. 346; Buck v. Colbath, 3 Wall. (U. S.) 334, 18 L. ed. 257; Lovejoy v. Murray, 3 Wall. (U. S.) 1, 18 L. ed. 129; Lundgren v. Western State Bank, 189 Minn. 476, 250 N. W. 1, 91 A.L.R. 919; Englehart v. Sage, 73 Mont. 139, 235 P. 767, 40 A.L.R. 590; Kyd v. Cook, 56 Neb. 71, 76 N. W. 524, 71 Am. St. Rep. 661; Whittler v. Sharp, 43 Utah, 419, 135 P. 112, 49 L.R.A. (N.S.) 931; Ward v. Henry, 19 Wis. 77, 88 Am. Dec. 672.

Annotation: 85 A.L.R. 668.

However, if, upon the service of a garnishment, the person garnished answers that he is indebted to the judgment debtor, and pays the amount of the debt to the officer, it having before such garnishment been assigned to another and the debtor having been notified of the assignment, the assignee cannot maintain an action against the officer to whom such payment is made. He is justified in receiving payment and applying it upon the writ, and the remedy of the assignee is against the original debtor, who remains liable notwithstanding the payment, because he cannot, after notice of the assignment, relieve himself from liability by payment to a person other than the assignee. Merchants' & M. Nat. Bank v. Barnes, 18 Mont. 335, 45 P. 218, 47 L.R.A. 737, 56 Am. St. Rep. 586.

Where an automobile belonging to the plaintiff was wrongfully seized as the property of the plaintiff's husband by the deputy sheriff under an attachment, it was held that the sheriff was liable even though the action had been brought against him in his personal, and not his official, capacity, since a sheriff is personally liable for an abuse of process committed by a deputy. Annotation: 102 A.L.R. 184.

As to liability of sheriffs and constables generally, see SHERIFFS [Also 24 R. C. L. p. 946, §§ 41 et seq.].

[17] Annotation: 91 A.L.R. 927.

An attaching creditor is not answerable for the act of the officer unless he in some manner interferes so as to make himself liable. Lovejoy v. Murray, 3 Wall. (U. S.) 1, 18 L. ed. 129.

[18] Lovejoy v. Murray, 3 Wall. (U. S.) 1, 18 L. ed. 129; Rice v. Wood, 61 Ark. 442, 33 S. W. 636, 31 L.R.A. 609; Tregre v. Carter Packet Co. 132 La. 293, 61 So. 379, 45 L.R.A. (N.S.) 189 (on individual's property as belonging to corporation); Duperron v. Van Wickle, 4 Rob. (La.) 39, 39 Am. Dec. 509 (execution); Lundgren v. Western State Bank, 189 Minn. 476, 250 N. W. 1, 91 A.L.R. 919 (execution); Dyett v. Hyman, 129 N. Y. 351, 29 N. E. 261, 26 Am. St. Rep. 533 (on property assigned); Allen v. Crary, 10 Wend. 349, 25 Am. Dec. 566; Phillips v. Hall, 8 Wend. 610, 24 Am. Dec. 108 (on property assigned); First Nat. Bank v. McSwain, 93 S. C. 30, 75 S. E. 1106, Ann Cas. 1914D, 809; Ward v. Henry, 19 Wis. 77, 88 Am. Dec. 672.

Annotation: 85 A.L.R. 667; 91 A.L.R. 922.

In Dyett v. Hyman, 129 N. Y. 351, 29 N. E. 261, 26 Am. St. Rep. 533, the court held that an owner of property attached under a writ of attachment against the property of another could maintain an action for damages against the attachment plaintiffs, who had executed a bond to indemnify the sheriff. In thus holding, the court said: "Their liability for the original trespass committed by the sheriff was presumptively established by their approval and satisfaction of his act, manifested by the execution of a bond of indemnity to him. The sale of the property was secured by this bond, and the defendants were thereby shown to have exercised a controlling authority over the action of the sheriff in procuring the consummation of the wrong complained of, and thereby made themselves liable as principals for the original unlawful taking." To the same effect, see Rice v. Wood, 61 Ark. 442, 33 S. W. 636, 31 L.R.A. 609.

One who indemnifies an attaching officer to continue to hold property wrongfully attached or garnished is liable as a joint trespasser. Lovejoy v. Murray, 3 Wall. (U. S.) 1, 18 L. ed. 129.

Ratification of a wrongful levy of attachment on a stranger's goods may be predicated upon the act of the attachment plaintiff in refusing, upon demand, to release the goods after being notified as to who owned them, or upon his buying the goods and converting them to his own use, or upon his receiving the proceeds of the sale. Lundgren v. Western State Bank, 189 Minn. 476, 250 N. W. 1, 91 A.L.R. 919.

Annotation: 91 A.L.R. 931.

There has been a sharp conflict of authority as to whether the act of an attorney in directing or participating in a levy upon a third person's property will bind his client, in the absence of express authority to do the particular act.[19]

2. Liability on Bond

§ 993. Generally.—The plaintiff in attachment incurs no liability for the attachment on the bond, or otherwise, where his cause of action against the defendant is sustained and the attachment is held rightful. If, on the other hand, either he fails to sustain his claim, or the attachment is held wrongful, then liability on the bond is incurred under the ordinary form of the statute.[20] However, under some statutes, the attachment is not wrongful and no action can be maintained on the bond unless the attachment issued without probable cause.[1] What constitutes want of probable cause under such a statute is a matter of some disagreement and is treated in a subsequent section herein.[2] Under most statutes, nevertheless, a "wrongful" suing out of the writ, such as will sustain an action on the bond, is no more than a failure to prosecute the attachment with effect,[3] and malice and want of probable cause

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The attachment plaintiff's act of causing perishable goods to be sold under the levy and receiving the proceeds has been regarded, in connection with his having notice that they were in a mortgagee's possession, as an adoption of the officer's levy. Annotation: 91 A.L.R. 931.

A plaintiff in attachment, in whose behalf a levy was made upon goods of a stranger, who gave notice that they were his and demanded their release, was held to have ratified the officer's wrongful levy by joining with the officer, when they were both sued for the trespass, in denying the stranger's ownership. Annotation: 91 A.L.R. 931.

A party commencing a suit by attachment of goods which were largely perishable and having notice that they were in a mortgagee's possession was held liable for their wrongful conversion where he caused them to be sold under the levy and received the proceeds, the court remarking that he adopted the officer's action as his own. Annotation: 91 A.L.R. 926.

However, failure by a third party to make a claim under § 9340, Mason's Stat. (Minn.) 1927, does not relieve the judgment creditor from liability for conversion in the levy of an execution. Lundgren v. Western State Bank, 189 Minn. 476, 250 N. W. 1, 91 A.L.R. 919.

[19] Annotation: 91 A.L.R. 929.

The mere presence of the attorney for the creditor at the time when property not belonging to the debtor was taken and sold was held not to make the creditor liable for the officer's tortious act where it was said that in the absence of proof of special authority to an attorney, his acts in directing the levy upon goods or the taking of them upon process were in excess of his general powers as an attorney and did not affect his client's liability or subject him thereto. Welsh v. Cochran, 63 N. Y. 181, 20 Am. Rep. 519.

[20] National Surety Co. v. Jean (C. C. A. 6th) 36 F. (2d) 468, 68 A.L.R. 1326; Trapnall v. McAfee, 3 Met. (Ky.) 34, 77 Am. Dec. 152; Gordon v. Kentucky Midland Coal Co. 152 Tenn. 367, 278 S. W. 68, 42 A.L.R. 1052; Allith-Prouty Co. v. Wallace, 32 Wyo. 392, 233 P. 144, 234 P. 504, 39 A.L.R. 513.

An attachment is "wrongful and oppressive" within the condition of an attachment bond for payment of damages that may be sustained by the defendant in the event that the proceedings of the plaintiff are wrongful and oppressive if the defendant is not indebted or the statutory grounds for attachment do not exist. National Surety Co. v. Jean (C. C. A. 6th) 36 F. (2d) 468, 68 A.L.R. 1326.

In Trapnall v. McAfee, 3 Met. (Ky.) 34, 77 Am. Dec. 152, attorneys' fees were recovered by an attachment defendant for defending a wrongful attachment although he had no defense to the attachment suit on its merits, defaulted, and satisfied the plaintiff's claim.

[1] Ames v. Chirurg, 152 Iowa, 278, 132 N. W. 427, 38 L.R.A.(N.S.) 120; Burton v. Knapp, 14 Iowa, 196, 81 Am. Dec. 465; Raver v. Webster, 3 Iowa, 502, 66 Am. Dec. 96; Seattle Crockery Co. v. Haley, 6 Wash. 302, 33 P. 650, 36 Am. St. Rep. 156.

Annotation: 38 L.R.A.(N.S.) 121, 123, s. L.R.A.1915A, 541.

The fact that no indebtedness is in fact due at the time an attachment is sued out in a suit to recover a pretended indebtedness does not show that the attachment was wrongful so as to support an action on the bond, where the statute requires, as a basis for such action, not only that the attachment was wrongful, but that there was no reasonable cause to believe that the ground upon which the same was issued was true. Ames v. Chirurg, 152 Iowa, 278, 132 N. W. 427, 38 L.R.A.(N.S.) 120.

[2] See infra, § 999.

[3] National Surety Co. v. Jean (C. C. A. 6th) 36 F. (2d) 468, 68 A.L.R. 1326; Gordon v. Kentucky Midland Coal Co. 152 Tenn. 367, 278 S. W. 68, 42 A.L.R. 1052; Allith-Prouty Co. v. Wallace, 32 Wyo. 392, 233 P. 144, 234 P. 504, 39 A.L.R. 513.

Annotation: 85 A.L.R. 658; 29 L.R.A. (N.S.) 276; 68 Am. St. Rep. 268.

It is an abuse of garnishment process to garnish property in the possession of in suing out the attachment are not essential elements to such cause of action.[4]

More specifically, the condition of the bond is ordinarily such [5] that a judgment for the defendant,[6] the dismissal of the attachment,[7] the discontinuance of the attachment or garnishment suit,[8] or the abandonment of the suit by the plaintiff [9] will entitle the attachment or garnishment defendant to sue upon it. However, the condition of an attachment or garnishment bond is not always such that these results will follow.[10]

It is generally held that a recovery of damages in a distinct action is not a prerequisite to an action on the bond. In some states, however, from the peculiar wording of the statutes, or because of the form of the bond required, it has been held otherwise.[11]

§ 994. Liability of Surety.[12]—The liability of the surety is fixed by the terms and conditions of the contract and may not be extended by implication to matters not fairly covered thereby.[13] However, the condition of the ordinary attachment or garnishment bond is such that the sureties are liable thereon for damages in the first instance; and, in the absence of any statute to the contrary, it is not necessary for the obligee to make any demand on the

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a common carrier in enforcing a judgment against a debtor where an execution was returned unsatisfied, but the property was in the carrier's warehouse and where the statute provided for garnishment only in case of execution unsatisfied; the creditor should have issued another execution. Madden v. Union P. R. Co. 89 Kan. 282, 131 P. 552, Ann. Cas. 1914D, 78.

[4] Vesper v. Crane Co. 165 Cal. 36, 130 P. 876, L.R.A.1915A, 541 (implied); Seattle Crockery Co. v. Haley, 6 Wash. 302, 33 P. 650, 36 Am. St. Rep. 156.

Annotation: 38 L.R.A.(N.S.) 121, s. L.R.A. 1915A 541; 81 Am. Dec. 467.

The court, in Seattle Crockery Co. v. Haley, 6 Wash. 302, 33 P. 650, 36 Am. St. Rep. 156, in answering the argument that the "unreasonable cause to believe the ground" upon which the attachment issued meant a state of mind produced in the attaching party by information which he believes to be true, said: "But the plain reading of the statute is not that way. It does not depend upon the state of mind of anybody, but upon the true facts of the case."

[5] See supra, § 896.

[6] Annotation: 85 A.L.R. 658; 81 Am. Dec. 468.

A judgment against a sheriff is conclusive against the sureties on an attachment indemnity bond. Lovejoy v. Murray, 3 Wall. (U. S.) 1, 18 L. ed. 129.

[7] Gordon v. Kentucky Midland Coal Co. 152 Tenn. 367, 278 S. W. 68, 42 A.L.R. 1052.

[8] Annotation: 85 A.L.R. 658.

The discontinuance of an attachment suit on the plaintiff's motion without the defendant's consent entitles the defendant to maintain an action on the attachment bond for the damages sustained. Annotation: 85 A.L.R. 658.

[9] Annotation: 81 Am. Dec. 469.

[10] **It has been intimated that a judgment on the merits** against the plaintiff is not conclusive evidence that the attachment was wrongfully sued out. Annotation: 81 Am. Dec. 468.

It has been held that mere voluntary dismissal of a suit in which an attachment was issued does not give an attachment defendant the right to sue on the attachment bond. Annotation: 85 A.L.R. 658.

Where the bond is to pay in case of failure to recover, final recovery is meant thereby. Annotation: 81 Am. Dec. 469.

The liability on a bond extends only to wrongful attachment on the writ to sustain the issuance of which it was given; and therefore, if the attachment proceedings are commenced, a bond given, and the attachment then abandoned, and another attachment on the same property levied, it is held that the bond will not avail as security on the second proceeding. Annotation: 81 Am. Dec. 469.

Where the condition of an attachment bond is that the obligors shall pay to the defendant in attachment all damages that he may sustain by reason of the wrongful suing out of the writ, the bond is not broken unless the attachment was wrongfully sued out, and the nonexistence of the particular ground averred in the affidavit, or of any particular ground, does not render the attachment wrongful. If any ground for attachment existed, the bond is not to be regarded as breached. Painter v. Munn, 117 Ala. 322, 23 So. 83, 67 Am. St. Rep. 170.

[11] Annotation: 81 Am. Dec. 468.

Where the bond was conditioned to pay all costs and damages which might be recovered against the obligors, it was held that the amount must first be determined by a judgment in a suit for that purpose. Annotation: 81 Am. Dec. 468.

The bond given by the plaintiff in attachment proceedings cannot be put in suit unless a suit against the plaintiff in the attachment for wrongfully suing it out has first been prosecuted to judgment. Mullen v. Sanborn, 79 Md. 364, 29 A. 522, 25 L.R.A. 721, 47 Am. St. Rep. 421.

[12] See also infra, § 1029, as to parties defendant in action on bond.

[13] Plymouth Gold Min. Co. v. United Fidelity & G. Co. 35 Mont. 23, 88 P. 565, 10 Ann. Cas. 951.

principal [14] or to institute suit against him to adjudicate the damages.[15] Thus, upon dismissal of an attachment wrongfully sued out, the defendant is entitled to recover of the sureties on his attachment bond the damages sustained as a direct result of the wrongful suing out of the attachment.[16] However, a surety may make any conditions he chooses to make in signing a bond before it is delivered; and where it is not signed by a party whose signature was required as a condition of his signing, he will not be bound.[17]

The filing of the claim of an attachment plaintiff in voluntary bankruptcy proceedings against the attachment defendant does not of itself, without regard to the question of actual indebtedness, amount to an abandonment of the attachment proceedings and establish the liability of the surety on the bond. However, the disallowance of the claim has that effect.[18]

§ 995. Discharge of Surety.—The discharge of the surety on an attachment or garnishment bond is governed by the law relating to the discharge of sureties generally.[19] They are discharged by an extension of time without their knowledge or consent [1] or by an alteration of their contract—that is, the bond.[2]

A surety is not discharged by the adjudication of the attachment defendant as a voluntary bankrupt.[3] However, it has been held that where proceedings for the dissolution of an insolvent surety company are commenced prior to the accrual of liability on the attachment bond, no recovery can be had as against the surety's receiver.[4]

Where the obligation of the bond is joint and several, the fact that one party is absolved by any other means than what the law deems a release does not impair the right to recover as to the rest.[5]

§ 996. Estoppel.—Sureties on a bond to procure,[6] as well as to dissolve,[7] an attachment or garnishment are estopped from setting up defects and irregularities in the proceedings in defense to an action on the bond. Indeed, the surety on a bond to procure an attachment may not even set up in defense to an action on the bond the fact that the attachment proceedings were void or illegal.[8]

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[14] Rice v. Wood, 61 Ark. 442, 33 S. W. 636, 31 L.R.A. 609; Gordon v. Kentucky Midland Coal Co. 152 Tenn. 367, 278 S. W. 68, 42 A.L.R. 1052; Seattle Crockery Co. v. Haley, 6 Wash. 302, 33 P. 650, 36 Am. St. Rep. 156.

Annotation: 40 L.R.A.(N.S.) 743, s. L.R.A. 1918E, 820.

Sureties on an indemnity bond to a sheriff to cause him to levy an attachment may be held liable as principals to the owners of the property attached if the attachment is wrongful. Rice v. Wood, 61 Ark. 442, 33 S. W. 636, 31 L.R.A. 609.

[15] Brown v. Tidrick, 14 S. D. 249, 85 N. W. 185, 86 Am. St. Rep. 754; Seattle Crockery Co. v. Haley, 6 Wash. 302, 33 P. 650, 36 Am. St. Rep. 156.

[16] Gordon v. Kentucky Midland Coal Co. 152 Tenn. 367, 278 S. W. 68, 42 A.L.R. 1052. See also McReady v. Rogers, 1 Neb. 124, 93 Am. Dec. 333.

[17] Hessell v. Johnson, 63 Mich. 623, 30 N. W. 209, 6 Am. St. Rep. 334.

[18] National Surety Co. v. Jean (C. C. A. 6th) 36 F. (2d) 468, 68 A.L.R. 1326.

Annotation: 68 A.L.R. 1331.

[19] See SURETYSHIP [Also PRINCIPAL AND SURETY, 21 R. C. L. p. 1000, §§ 50 et seq.].

[1] **In view of the principles of the common law,** which declared that an obligation under seal could be discharged only by force of an instrument of equal dignity or by payment and satisfaction, it was solemnly decided in the early cases that it was not any defense at law to an action on a bond against a surety that by parol agreement time had been given to the principal. But such is not the rule at the present time; it may be taken as settled that wherever, by binding contract, time has been given to the principal, the surety stands discharged. Steele v. Boyd, 6 Leigh (Va.) 547, 29 Am. Dec. 218.

[2] Hessell v. Johnson, 63 Mich. 623, 30 N. W. 209, 6 Am. St. Rep. 334.

[3] National Surety Co. v. Jean (C. C. A. 6th) 36 F. (2d) 468, 68 A.L.R. 1326.

Annotation: 68 A.L.R. 1331.

As to the effect of such adjudication in fixing the liability of surety, see supra, § 994.

Generally as to the effect of bankruptcy within four months on the liability of the surety on a bond to dissolve the attachment or garnishment or release the attached or garnished property, see supra, § 918.

[4] People v. Metropolitan Surety Co. 205 N. Y. 135, 98 N. E. 412, Ann. Cas. 1913D, 1180.

[5] Steele v. Boyd, 6 Leigh (Va.) 547, 29 Am. Dec. 218.

[6] McLean v. Wright, 137 Ala. 644, 35 So. 45, 97 Am. St. Rep. 67; Williard v. Federal Surety Co. 91 Mont. 465, 8 P. (2d) 633, citing R. C. L.; Brown v. Tidrick, 14 S. D. 249, 85 N. W. 185, 86 Am. St. Rep. 754.

[7] See supra, §§ 921 et seq.

Persons who have joined in giving a bond for the attachment of the property of a corporation cannot deny its corporate existence.[9]

3. Defenses

§ 997. Generally.—A defense to an action for wrongful or malicious attachment or garnishment is valid where it denies some necessary element of the common-law or statutory cause of action, as the case may be, set up in the complaint.[10]

Attachment by virtue of the writ is no defense to the person suing it out in an action for the taking and conversion of the property attached and the closing of the house containing the property, unless statutory grounds existed justifying the issuance of the writ.[11]

The attachment plaintiff may not set up in defense of a wrongful attachment the fact that the attached property was not the property of the defendant in attachment if he averred in his complaint that it was the defendant's.[12]

When a debtor comes into court to complain against his creditor for having sued out a writ of attachment against him, it is well for him to come with clean hands; and juries well may require clear and full proof that the creditor has violated the law when the complaining debtor in the first instance has been guilty of fraud or wrong.[13]

§ 998. Lack of Malice and Advice of Counsel.—Advice of counsel, or other proof of lack of malice, is a good defense where malice is an element of the cause of action, as in the case of the common-law action for malicious attachment,[14] but not where, as is usually the case in the statutory, as distinguished from the common-law, action, malice is not such an element.[15] Advice of counsel may always be shown to prevent a recovery of punitive damages[16] or to reduce the amount of such damages.[17]

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[8] **Why should the surety be relieved from liability** merely because the seizure of the defendant's property was illegal? It seems that such illegality is an unanswerable reason for his being held liable. McLean v. Wright, 137 Ala. 644, 35 So. 45, 97 Am. St. Rep. 67.

However, the surety on an attaching officer's bond can set up the defense to an action on the bond that the judgment against the sheriff for wrongful attachment was fraudulent, collusive, or a mistake. Charles v. Hoskins, 14 Iowa, 471, 83 Am. Dec. 378.

Such a defense may be set up on the defendant's bond to dissolve an attachment or garnishment. See supra, § 909.

[9] Seattle Crockery Co. v. Haley, 6 Wash. 302, 33 P. 650, 36 Am. St. Rep. 156.

[10] See supra, §§ 984, 985.

[11] Wellington v. Spencer, 37 Okla. 461, 132 P. 675, 46 L.R.A.(N.S.) 469.

It is no defense to an action against a landlord for entering a leased building occupied as a hotel, ejecting the tenant therefrom, destroying his business, and seizing and converting his goods, that the landlord was acting by virtue of a writ of attachment which he had sued out in an action against the tenant to recover a debt where there were no grounds for the attachment and it was dissolved. Ibid.

[12] Annotation: 81 Am. Dec. 476.

[13] Reed v. Samuels, 22 Tex. 114, 73 Am. Dec. 253.

[14] Stone v. Swift, 4 Pick. (Mass.) 389, 16 Am. Dec. 349; Alexander v. Harrison, 38 Mo. 258, 90 Am. Dec. 431.

Annotation: 29 L.R.A.(N.S.) 281; 81 Am. Dec. 475.

If the attaching creditor, doubtful of his legal rights, submitted the matter to counsel learned in the law with a view to ascertaining the liability of the party to be sued and did nothing more than to pursue the course pointed out by his legal adviser, how can he be charged with malice and want of probable cause? Malice cannot be imputed to him in such case, and it is error to instruct the jury in such a manner that they may so find. Alexander v. Harrison, 38 Mo. 258, 90 Am. Dec. 431.

It must appear, however, that the party chose a competent adviser for consultation and in good faith made a full and frank disclosure of all the facts and circumstances of the case. Annotation: 29 L.R.A. (N.S.) 281; 68 Am. St. Rep. 276.

It is a sufficient defense to such an action that the suspiciousness of the plaintiff's conduct made recourse to the attachment a measure of reasonable precaution. Humphreys v. Sutcliffe, 192 Pa. 336, 43 A. 954, 73 Am. St. Rep. 819.

Generally as to advice of attorney as defense to action for malicious prosecution, see MALICIOUS PROSECUTION [Also 18 R. C. L. p. 45, § 27].

§ 999. Probable Cause.—Probable cause, whether shown by the advice of counsel or otherwise, is not a complete defense to the statutory action for wrongful attachment or garnishment,[18] unless it is made such a defense by statute.[19] Hence, in accordance with the general rule, belief in the truth of the allegations of the affidavit, where such allegations are in fact false, is no defense to such an action.[20] However, probable cause is a defense to the common-law action for malicious attachment, in so far as its absence must be established in order that a recovery may be had;[1] and the defendant even in a statutory action for wrongful attachment is always entitled to show that he acted in good faith for the purpose of avoiding or mitigating exemplary damages.[2]

§ 1000. Merits of Claim or Grounds for Attachment or Garnishment.—It is neither a defense nor a circumstance in mitigation of damages that the claim sued on was a just one if the ground for attachment did not exist, for the claim may be just and yet the attachment be wrongful, and even maliciously wrongful.[3] The rule is fully applicable to counsel fees for defending the attachment.[4]

The fact that the attachment was irregular or void will not screen the plaintiff from liability for wrongful attachment.[5] Nor may such fact be shown in mitigation of damages.[6]

Nor is it a good defense to a recovery of such counsel fees that the effort of the defendant to secure the vacation or dissolution of the attachment was unsuccessful, for the trial court may have exercised its discretion with the intention of deferring the whole matter until final hearing and determination of the issue.[7]

Where the condition of an attachment bond is that the obligors shall pay to the defendant in the attachment all such damages as he may sustain by the wrongful or vexatious suing out of the attachment, the defendant in an action on such bond is not confined in his defense to proof of the existence of the particular ground of attachment averred in the affidavit, but may show the existence of any statutory ground. If any such ground existed, the attachment was not wrongfully sued out and there was consequently no breach of the bond.[8]

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[15] Annotation: 81 Am. Dec. 475.

[16] Annotation: 68 Am. St. Rep. 276; 81 Am. Dec. 475.

[17] Grimestad v. Lofgren, 105 Minn. 286, 117 N. W. 515, 17 L.R.A.(N.S.) 990, 127 Am. St. Rep. 566.
Annotation: 68 Am. St. Rep. 276.

[18] Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 59.
Annotation: 81 Am. Dec. 476.

[19] Ames v. Chirurg, 152 Iowa, 278, 132 N. W. 427, 38 L.R.A.(N.S.) 120; Burton v. Knapp, 14 Iowa, 196, 81 Am. Dec. 465; Raver v. Webster, 3 Iowa, 502, 66 Am. Dec. 96; Seattle Crockery Co. v. Haley, 6 Wash. 302, 33 P. 650, 36 Am. St. Rep. 156.
Annotation: 38 L.R.A.(N.S.) 126; 81 Am. Dec. 476.
As to test and proof of probable cause under such a statute, see supra, § 987.

[20] Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 59.
Annotation: 68 Am. St. Rep. 277; 81 Am. Dec. 476.

[1] See supra, § 986.

[2] Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 59; Ellis v. Bonner, 80 Tex. 198, 15 S. W. 1045, 26 Am. St. Rep. 731.
Annotation: L.R.A.1918B, 802; 68 Am. St. Rep. 279.

[3] Trapnall v. McAfee, 3 Met. (Ky.) 34, 77 Am. Dec. 152; Reliable Mut. Hail Ins. Co. v. Rogers, 61 Okla. 226, 160 P. 914, L.R.A. 1917B, 350.
Annotation: 25 A.L.R. 579, s. 71 A.L.R. 1458; 81 Am. Dec. 476.
A party may have a just cause of action, but no right to an attachment, and he cannot justify a wrongful attachment by a valid action. Reliable Mut. Hail Ins. Co. v. Rogers, 61 Okla. 226, 160 P. 914, L.R.A. 1917B, 350.

[4] Trapnall v. McAfee, 3 Met. (Ky.) 34, 77 Am. Dec. 152.
Annotation: 25 A.L.R 579, s. 71 A.L.R. 1458.

[5] McLean v. Wright, 137 Ala. 644, 35 So. 45, 97 Am. St. Rep. 67; Forrest v. Collier, 20 Ala. 175, 56 Am. Dec. 190 (insufficient affidavit); Brown v. Tidrick, 14 S. D. 249, 85 N. W. 185, 86 Am. St. Rep. 754.
See also supra, § 996, as to estoppel of obligors on bond to question validity of attachment or garnishment as defense to action on bond.

[6] Annotation: 81 Am. Dec. 476.

[7] Annotation: 25 A.L.R. 579, s. 71 A.L.R. 1458.

§ 1001. **Defenses in Mitigation of Damages.**—Certain defenses are available in mitigation of damages for wrongful or malicious attachment or garnishment.[9] Generally, the return of the attached or garnished property constitutes such a defense.[10] While it is no defense that other grounds of attachment than those on which the writ was issued and which failed to sustain it existed, such fact may be shown in mitigation of damages.[11] The same may be said where, although the attachment failed, the same property was subsequently seized and sold on another writ for the same debt which was the basis of the former attachment.[12] The defendant is also entitled to plead in mitigation of damages that the plaintiff replevied the goods levied on and afterward sold them and applied the proceeds to the payment of his debt.[13] Advice of counsel may be shown to reduce the amount of punitive damages.[14] The same is true of good faith.[15]

§ 1002. **Defenses of Attaching Officer.**[16]—A writ of attachment or garnishment valid on its face is sufficient protection to the officer who executed it when sued for seizing the property of the defendant therein, although it might have been avoided on a proper proceeding for a defect in the affidavit on which it was issued.[17] Although a writ of attachment is a valid writ, the officer is liable for wrongful seizure of property not subject to the writ[18] or for acting in excess of his authority.[19] Accordingly, he is liable for the attachment of property of a person other than the one against whom the writ is directed.[20] Nor will an invalid levy of a writ of attachment constitute a defense to the officer.[1]

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[8] Painter v. Munn, 117 Ala. 322, 23 So. 83, 67 Am. St. Rep. 170.

[9] Wade v. Ray, 67 Okla. 39, 168 P. 447, L.R.A.1918B, 796.

Where a levy upon growing crops is made in the manner prescribed by statute, the filing with the register of deeds of a notice of the abandonment of the levy does not relieve the attaching creditor from damages subsequently accruing, unless and until actual notice is given to the owner. Kelly v. Stockgrowers Credit Corp. — N. D. —, 263 N. W. 717, 103 A.L.R. 460.

[10] See infra, § 1005.

[11] Annotation: 68 Am. St. Rep. 276; 81 Am. Dec. 476, 480.

[12] Annotation: L.R.A.1918B, 801; 81 Am. Dec. 476, 480.

The right of a defendant in a prior action, whose property was wrongfully attached therein, as plaintiff in an action for damages for such wrong to treat such attachment as a conversion of such property and recover the full value of the same, with interest thereon from the date of such attachment, is not absolute, but is dependent upon his timely election to do so; and when he procures an order dissolving such attachment, and for the return of the property to himself upon the expiration of a stay and supersedeas obtained in anticipation of an appeal therefrom by the plaintiff in the attachment, who is defendant in such subsequent action for damages, and when, immediately after procuring such order, he knowingly suffers such property to be taken on execution in such prior action to satisfy a judgment for debt, obtained by the plaintiff in that action, without in any manner exercising his right of election, or manifesting his purpose to do so, especially where the attachment is not "fraudulent, malicious, or oppressive," the defendant in such latter action is entitled to show, as against the plaintiff's assertion of such right therein and in mitigation of damages, the seizure and sale of such property on such execution, and the application of the proceeds thereof on such judgment. Wade v. Ray, 67 Okla. 39, 168 P. 447, L.R.A.1918B, 796.

In New York, however, the rule is well settled that while the plaintiff in a defective attachment proceeding may show, in mitigation of damages for the wrongful attachment, that he restored the property to the defendant, who accepted the same, or that the property was seized and taken from his possession under valid levies or claims by third persons, yet he cannot show that the property was seized and sold by him under a subsequent valid levy, nor can he offset his claim, or a judgment rendered against the attachment defendant for the same, in mitigation of the damages caused by the wrongful attachment. Annotation: L.R.A.1918B, 802.

[13] Painter v. Munn, 117 Ala. 322, 23 So. 83, 67 Am. St. Rep. 170.

[14] See supra, § 998.

[15] See supra, § 999.

[16] See SHERIFFS [Also 24 R. C. L. p. 989, §§ 84 et seq.].

[17] Marks v. Shoup, 181 U. S. 562, 45 L. ed.

An attaching officer is not liable to a chattel mortgagee for the alleged conversion of the mortgaged property because, after demand by the latter, he retained possession of the property and made no payment or tender to the mortgagee, but sold the attached goods upon execution for their reasonable value, but for a sum which did not satisfy all the executions, where the demand of the mortgagee did not set out a just and true account of the amount due, and the failure to render such account was not due to accident or mistake, even though the property was found to be worth less than the true amount due.[2]

1002, 21 S. Ct. 724; Matthews v. Densmore, 109 U. S. 216, 27 L. ed. 912, 3 S. Ct. 126.

A constable is not liable to an assignee for money which he collected by garnishment and paid over to the attaching creditor with notice that the title to the fund had been assigned by the attachment debtor before the garnishment was levied, if the garnishee acknowledged that it owed the fund and paid it over as the property of the debtor. Merchants' & M. Nat. Bank v. Barnes, 18 Mont. 335, 45 P. 218, 47 L.R.A. 737, 56 Am. St. Rep. 586.

[18] Matthews v. Densmore, 109 U. S. 216, 27 L. ed. 912, 3 S. Ct. 126; Buck v. Colbath, 3 Wall. (U. S.) 334, 18 L. ed. 257; Rice v. Chase, 9 N. H. 178, 32 Am. Dec. 346.

A person having a right of action against an officer for attaching property by law exempt from seizure does not lose or waive such right by merely declaring to a third person that he did not care for the things taken by the sheriff, that the creditor might have them and welcome, but that he would take good care that he got no more, where no consideration was paid by the creditor or officer and neither of them had, at the time, any knowledge that such declaration had been made; nor does it make any difference that the creditor afterwards heard of the declaration and in consequence proceeded to sell the property attached, especially when such sale was made after the debtor brought his action. Rice v. Chase, 9 N. H. 178, 32 Am. Dec. 346.

[19] Walsh v. Brown, 194 Mass. 317, 80 N. E. 465, 120 Am. St. Rep. 556.

Where an officer having a writ of attachment against a person who owns a business establishment, such as a lunchroom, goes to such room and, in addition to attaching the chattels therein, orders the employees out of the room in the evening, it being run night and day, puts a lock and staple on the door, and leaves a keeper therein during the night, and by thus closing prevents the customers from coming in as before, such acts of expulsion and of locking up are beyond his authority under his writ. Ibid.

[20] North v. Peters, 138 U. S. 271, 34 L. ed. 936, 11 S. Ct. 346; Buck v. Colbath, 3 Wall. (U. S.) 334, 18 L. ed. 257.

A writ commanding a sheriff to levy upon and attach personal property belonging to one named in it does not authorize him to seize the property of any other person; and if he does so, he becomes a trespasser and is unprotected by the law. North v. Peters, 138 U. S. 271, 34 L. ed. 936, 11 S. Ct. 346.

An officer who is directed to levy an attachment upon the property of a person, without describing any specific property, must exercise his judgment and discretion in determining whether the property upon which he proposes to levy belongs to such person, whether it is such as to be subject to be taken under the writ, and as to the quantity to be taken. Moreover, he is legally responsible to any person injured for the consequences of any error therein. Buck v. Colbath, 3 Wall. (U. S.) 334, 18 L. ed. 257.

[1] Marks v. Shoup, 181 U. S. 562, 45 L. ed. 1002, 21 S. Ct. 724; Whittler v. Sharp, 43 Utah, 419, 135 P. 112, 49 L.R.A.(N.S.) 931.

A levy of an attachment upon goods in the hands of a third person, without leaving a certified copy of the writ and a notice specifying the property attached with the person having possession of the same, is invalid under 1 Hill's Code (Or.) 1887 ed. § 149, subsecs. 2, 3, and constitutes no defense to the officer when sued for taking the goods. Marks v. Shoup, 181 U. S. 562, 45 L. ed. 1002, 21 S. Ct. 724.

If a sheriff levies on mortgaged property without complying with a statute requiring an officer levying on such property to pay or tender the mortgagee the amount of the mortgage debt, he does not incur a legal obligation to pay such debt personally. However, the levy is unauthorized, the seizure is a trespass and the officer is liable for tort and the damages sustained by reason of it. Whittler v. Sharp, 43 Utah, 419, 135 P. 112, 49 L.R.A.(N.S.) 931.

[2] Magnifico v. Nicholson, 264 Mass. 519, 163 N. E. 156, 63 A.L.R. 572.

The seller or his assignee cannot maintain replevin against the attaching officer unless he has given such officer notice of the amount due, thus giving him an opportunity to redeem from the seller's claim by paying the balance. But where there is no right of redemption, an action may be maintained by the seller against the attaching officer without giving him notice of the plaintiff's claim. Estrich, Instalment Sales, § 485, p. 910.

Generally as to statute requiring adverse claimant of attached property to render

There is no want of good faith in levying on property subject to a chattel mortgage as that of the mortgagor if the mortgage is invalid as to the creditors.[3]

§ 1003. **Defenses in Action on Bond.**—The general rule is that the obligors on a bond to procure an attachment or garnishment can set up in defense of an action on the bond their discharge of liability thereon,[4] but they cannot set up any defense which they are estopped from making by the nature of their undertaking.[5] Advice of counsel is ordinarily no defense to an action on the bond.[6]

§ 1004. **Running of Statute of Limitations.**—There is a variation of opinion among the cases as to when the statute of limitations begins to run against an action for wrongful or malicious attachment or garnishment, some cases holding the time to be that of the consequential injury[7]—viz., the time of the attachment or garnishment,[8]—others that it is the time of the return of the writ,[9] and others that it is the time of entry of judgment[10] or the conclusion of the attachment suit—that is, when the right of the plaintiff to the attached property is conclusively adjudicated.[11] Under a statute providing that the proceeds of the sale of attached property should be paid into court or otherwise disposed of as the court or judge may order, it was held that the statute did not begin to run until the disobedience by the sheriff of such an order of the court.[12] The correct rule would seem to be that the statute would begin to run from the time when the cause of action arises, but there also is a variation among the authorities as to when it does arise.[13]

B. Damages

1. In General

§ 1005. **Generally.**—General principles of the law of damages apply fully to damages for wrongful or malicious attachment or garnishment.[14] Accordingly, the recovery of such damages is generally limited to actual damages sustained, compensatory in nature,[15] naturally and proximately resulting

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attaching officer an accounting of his claim, see supra, § 969.

[3] J. D. Best & Co. v. Wolf Co. 67 Colo. 42, 185 P. 371, 29 A.L.R. 899.

[4] As to discharge of surety, see supra, § 995.

[5] Generally as to such estoppels, see supra, § 996.

[6] Annotation: 29 L.R.A.(N.S.) 281.

[7] Annotation: 52 L.R.A.(N.S.) 707.

[8] Reliable Mut. Hail Ins. Co. v. Rogers, 61 Okla. 226, 160 P. 914, L.R.A.1917B, 350.

[9] Betts v. Norris, 21 Me. 314, 38 Am. Dec. 264.

Annotation: 52 L.R.A.(N.S.) 707.

[10] Annotation: 52 L.R.A.(N.S.) 708.

[11] State ex rel. Chatham Nat. Bank v. Finn, 98 Mo. 532, 11 S. W. 994, 14 Am. St. Rep. 654.

[12] Annotation. 52 L.R.A.(N.S.) 709.

[13] See supra, § 988.

[14] See Damages [Also 8 R. C. L. p. 414].

[15] Parish v. Van Arsdale-Osborne Brokerage Co. 92 Kan. 286, 140 P. 835, Ann. Cas. 1916B, 981; Crawford v. Staples, 184 Ky. 477, 212 S. W. 119, citing R. C. L.; Mundil v. Hutson, 33 N. M. 388, 268 P. 566, 59 A.L.R. 522; Kelly v. Stockgrowers Credit Corp. — N. D. —, 263 N. W. 717, 103 A.L.R. 460; Floyd v. Anderson, 36 Okla. 308, 128 P. 249, 43 L.R.A.(N.S.) 788, Ann. Cas. 1915A, 348; Melcher v. Clark, 145 Wash. 95, 258 P. 1032, 54 A.L.R. 448; Anderson v. Sloane, 72 Wis. 566, 40 N. W. 214, 7 Am. St. Rep. 885.

Annotation: 29 L.R.A.(N.S.) 276; 68 Am. St. Rep. 269; 81 Am. Dec. 472; Ann. Cas. 1915B, 1219.

In the absence of fraud, malice, oppression, or other aggravation, damages in an action for a wrongful levy under a writ of attachment are to be measured by the actual injuries suffered. Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 59; Palmer v. United States, 41 App. D. C. 341, Ann. Cas. 1915B, 1216. Annotation: 38 L.R.A.(N.S.) 121.

All actual damages, compensatory in their nature, such as loss or depreciation in value of property, costs, and expenses, including, under some statutes, a reasonable attorney's fee, and which naturally and proximately result from the attachment, where the order therefor was wrongfully obtained, may be recovered in a suit on the attachment bond. Parish v. Van Arsdale-Osborne Brokerage Co. 92 Kan. 286, from the wrongful attachment or garnishment.[16] Where the property wrongfully attached is not recovered by the owner, the measure of damages, in the absence of aggravating circumstances, is very generally held to be the value of the property at the time and place of seizure, with lawful interest from such time to the date of trial.[17] Where the property wrongfully levied on is afterward returned to the owner, the damages recoverable are only those caused by the detention of the property. In such a case the return of the goods, though not a bar to the action, must be considered in mitigation of damages.[18]

The above-stated rules and limitations apply to recovery on the attachment or garnishment bond, except that such recovery cannot exceed the penalty named in the bond.[19] This does not, however, mean that an attachment or

140 P. 835, Ann. Cas. 1916B, 981; Floyd v. Anderson, 36 Okla. 308, 128 P. 249, 43 L.R.A. (N.S.) 788, Ann. Cas. 1915A, 348.

The giving of a redelivery bond in attachment does not waive the right to recover the actual damages which were caused by wrongfully attaching the property, although the statute provides for a motion for discharge of the attachment because improperly issued. St. Joseph Stock Yards Co. v. Love, 57 Utah, 450, 195 P. 305, 25 A.L.R. 569.

[16] Fidelity & D. Co. v. L. Bucki & Son Lumber Co. 189 U. S. 135, 47 L. ed. 744, 23 S. Ct. 582; National Surety Co. v. Jean (C. C. A. 6th) 36 F. (2d) 468, 68 A.L.R. 1326; Goodbar v. Lindsley, 51 Ark. 380, 11 S. W. 577, 14 Am. St. Rep. 54; Crawford v. Staples, 184 Ky. 477, 212 S. W. 119, citing R. C. L.; Alexander v. Harrison, 38 Mo. 258, 90 Am. Dec. 431; State v. Thomas, 19 Mo. 613, 61 Am. Dec. 580; McReady v. Rogers, 1 Neb. 124, 93 Am. Dec. 333; Kelly v. Stockgrowers Credit Corp. — N. D. —, 263 N. W. 717, 103 A.L.R. 460; Tsesmelis v. Sinton State Bank (Tex. Com. App.) 53 S. W. (2d) 461, 85 A.L.R. 319; Anderson v. Sloane, 72 Wis. 566, 40 N. W. 214, 7 Am. St. Rep. 885.

Annotation: 54 A.L.R. 451; 29 L.R.A. (N.S.) 276; 68 Am. St. Rep. 268; 81 Am. Dec. 472; Ann. Cas. 1915B, 1219.

Because one attachment usually results in subsequent attachments by all of the defendant's creditors, it does not follow, if the first attachment is defeated, that the plaintiff in the first suit is responsible for all damages from the other attachments because of his first attack. Goodbar v. Lindsley, 51 Ark. 380, 11 S. W. 577, 14 Am. St. Rep. 54. Annotation: Ann. Cas. 1914D, 816.

Recovery may be had for the wrongful levy of an attachment on real estate if it was the proximate cause of defeating an advantageous sale or trade of the property, pending when the attachment was levied, or known to the plaintiff in attachment to be about to be made, and, in fact, consummated after the levy, without knowledge that the levy had been made, provided the land is shown to have subsequently depreciated in value. Tsesmelis v. Sinton State Bank (Tex. Com. App.) 53 S. W. (2d) 461, 85 A.L.R. 319.

Where growing crops have been attached and taken by the sheriff from the possession of the owner, and thereafter the attachment is abandoned and canceled, the attaching creditor is liable for damages to the crop which accrue because of weather conditions and marauding animals during the time the crop is held by attachment, when it is shown that at the time of the attachment, the crop was ready for harvesting and the owner was prepared for and was beginning harvesting operations. Kelly v. Stockgrowers Credit Corp. — N. D. —, 263 N. W. 717, 103 A.L.R. 460.

The attaching creditor is liable to the owner of a crop attached for loss due to the sheriff's failure to harvest it at the proper time. Ibid.

[17] Carpenter v. Dresser, 72 Me. 377, 39 Am. Rep. 337.

Annotation: Ann. Cas. 1915B, 1220.

In defining or qualifying the term "value," the courts have had recourse to various expressions: i. e., "fair cash value," "fair retail value," etc. An instruction defining the value as the value of the property in the retail market has been held error. It has been held that freight paid by the officer should be deducted from the value of the goods levied upon. Annotation: Ann Cas. 1915A, 1221.

The loss resulting from a forced sale, under assignment, is not a natural or proximate consequence of the attachment by the creditor previous to the assignment by the debtor. Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 59.

[18] Annotation: Ann. Cas. 1915B, 1223.

However, in Carpenter v. Dresser, 72 Me. 377, 39 Am. Rep. 337, it was held that in an action of trespass for wrongfully attaching and seizing goods, damages cannot be mitigated by proof of an offer to return the property in the same condition on the next day.

[19] Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 59; Bratton v. McReynolds, 125 Kan. 665, 266 P. 31, citing R. C. L.; Rogers v. Abbott, 206 Mass. 270, 92 N. E. 472, 138 Am. St. Rep. 394.

Annotation: 81 Am. Dec. 472.

By the common law, when a bond was given for the payment of money, with a defeasance to be void upon the performance of a collateral undertaking, if there was a breach of the condition, the whole penalty was forfeited and might be recovered in an action on the bond. Courts of chancery, however, whose province it was to relieve against forfeitures, would restrain the collection of the penalty and compel the plaintiff to receive such damages as he had actually sustained, and the statute of 8 and 9 Wm. III. dispensed with the necessity of resorting to chancery, by requiring the plaintiff to set out the breaches and show the damages occasioned thereby. Barnes v. Webster, 16 Mo. 258, 57 Am. Dec. 232. See BONDS [Also 4 R. C. L. p. 45].

garnishment bond limits an attaching or garnishing creditor's liability for his tort to his undertaking and liability on the bond.[20]

In order to recover on an attachment bond, it is not necessary to show that the damages sustained have been paid.[1]

The damages sustained from wrongful attachment would seem to be no different whether the action to recover them is upon the bond, or in a common-law action for wrongful attachment, or by way of counterclaim.[2]

§ 1006. Exemplary Damages.—It may be stated as the prevailing rule that if an attachment, in addition to being wrongful merely, is sued out maliciously or vexatiously and without probable cause, for the purpose of harassing and oppressing, rather than to preserve legal rights, the attachment defendant is entitled to recover exemplary or vindictive damages in addition to his actual damages;[3] if the conditions are otherwise, however, he is not thus entitled.[4] Such damages have been allowed[5] and denied[6] under a variety of circumstances. Before they can be recovered under any circumstances, however, there must be a showing of actual damages; no exemplary damages are recoverable where no actual damages are proved.[7] Mere nominal damages will not satisfy this requirement.[8]

Under the rules of common-law pleading, no other damages can be recovered if the action is brought on the bond. Alexander v. Harrison, 38 Mo. 258, 90 Am. Dec. 431; State v. Thomas, 19 Mo. 613, 61 Am. Dec. 580.

It has been held that a statute entitling the attachment defendants to recover any damage they may have sustained must be construed to mean such damage as is the natural and proximate consequence of the tortious act. No doubt if the action is one of debt or covenant upon the bond itself, the obligors should be held liable for no more than the penalty named in the instrument. Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 59.

Indeed if there is any room for construction it is difficult to see how the sureties may be held liable beyond the penalty which is always taken to be the measure and limit of their responsibility. McReady v. Rogers, 1 Neb. 124, 93 Am. Dec. 333. Annotation: 81 Am. Dec. 472.

[20] Annotation: 29 L.R.A.(N.S.) 277.

[1] Plymouth Gold Min. Co. v. United States Fidelity & G. Co. 35 Mont. 23, 88 P. 565, 10 Ann. Cas. 951; Raymond Bros. v. Green, 12 Neb. 215, 10 N. W. 709, 41 Am. Rep. 763.

Annotation: 25 A.L.R. 579, s. 71 A.L.R. 1458; 81 Am. Dec. 472; Ann. Cas. 1914D, 816.

[2] Allith-Prouty Co. v. Wallace, 32 Wyo. 392, 233 P. 144, 234 P. 504, 39 A.L.R. 513.

Annotation: 29 L.R.A.(N.S.) 275.

[3] Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 59; Burton v. Knapp, 14 Iowa, 196, 81 Am. Dec. 465; Raver v. Webster, 3 Iowa, 502, 66 Am. Dec. 96; Samuels v. Davis, 185 Ky. 177, 214 S. W. 904, citing R. C. L. (garnishment); Dickinson v. Maynard, 20 La. Ann. 66, 96 Am. Dec. 379; Alexander v. Harrison, 38 Mo. 258, 90 Am. Dec. 431; Williams v. Hunter, 10 N. C. (3 Hawks) 545, 14 Am. Dec. 597; Wade v. Ray, 67 Okla. 39, 168 P. 447, L.R.A.1918B, 796; Overton v. Sigmon Furniture Mfg. Co. 50 Okla. 531, 151 P. 215, citing R. C. L.; Ellis v. Bonner, 80 Tex. 198, 15 S. W. 1045, 26 Am. St. Rep. 731; Reed v. Samuels, 22 Tex. 114, 73 Am. Dec. 253.

Annotation: 29 L.R.A.(N.S.) 273, 274; 38 L.R.A.(N.S.) 127; 26 Am. St. Rep. 735; 28 Am. St. Rep. 879; 68 Am. St. Rep. 677; 7 Ann. Cas. 547.

Exemplary damages for malicious attachments are allowed as a matter of punishment, and when a proper case is made, the jury is permitted, in assessing the damages, to take into consideration damages too remote to be considered strictly compensatory. Annotation: 68 Am. St. Rep. 280.

[4] Ellis v. Bonner, 80 Tex. 198, 15 S. W. 1045, 26 Am. St. Rep. 731.

[5] Annotation: 29 L.R.A.(N.S.) 277.

The seizure under attachment of exempt property, with knowledge of the exemption, is sufficient to allow the recovery of exemplary damages. Cronfeldt v. Arrol, 50 Minn. 327, 52 N. W. 857, 36 Am. St. Rep. 648. Annotation: 29 L.R.A.(N.S.) 278.

Punitive damages are allowable where an attachment was sued out in a case not warranted by law, and on a pretended claim which never existed. Annotation: 29 L.R.A.(N.S.) 277.

An affidavit alleging nonresidence, sworn to without inquiry and recklessly, and executed by an excessive seizure of property, justifies the recovery of exemplary damages. Annotation: 29 L.R.A.(N.S.) 278.

[6] Annotation: 29 L.R.A.(N.S.) 277.

The mere levy of an attachment upon real estate, not being attended with any disturbance of the possession, use, or enjoyment by the owner, will not authorize a recovery of actual or exemplary damages. Tsesmelis v. Sinton State Bank (Tex. Com. App.) 53 S. W. (2d) 461, 85 A.L.R. 319.

[7] Breckenridge Ice & Cold Storage Co. v. Johnson (Tex. Civ. App.) 262 S. W. 1071, citing R. C. L.

Annotation: 29 L.R.A.(N.S.) 279; 68 Am. St. Rep. 279.

Damages for loss of credit awarded by a jury as exemplary damages cannot be allowed in the absence of a finding of actual damages. Annotation: 54 A.L.R. 451.

[8] Annotation: 29 L.R.A.(N.S.) 279; 28 Am. St. Rep. 879.

To prevent a recovery of exemplary damages, or to reduce the amount thereof, the defendant is entitled to show, if he can, a variety of matters—anything which discloses an absence of malice, as, for example, that he acted on the advice of competent counsel.[9]

If the attachment was not vexatious as against the defendant himself, the fact that the attaching creditor was actuated by malice against some third person, not a party to the process, affords no ground for the recovery of vindictive damages.[10]

§ 1007. —In Action on Bond.—Exemplary damages are not generally recoverable in an action on the attachment or garnishment bond.[11] The theory of the rule is that the ordinary attachment or garnishment bond is not intended as a mere security for the payment of what may be recovered in an action for malicious prosecution, for if so intended, it should be conditioned for the payment of damages which the defendant might sustain by reason of the attachment having been sued out maliciously and without probable cause.[12] However, in some jurisdictions it is held that exemplary damages may be recovered in an action on the attachment bond where it is shown that the writ was sued out maliciously [13] or without probable cause.[14] The view has been taken that in an action on an attachment bond, exemplary damages may be recovered against the principal in case of a malicious attachment, but not against the sureties unless they are shown to have been actuated by malice in procuring the issuance of the attachment.[15] In a few jurisdictions exemplary damages are recoverable in an action on the bond, and not in an action not on the bond.[16]

§ 1008. Duty to Minimize Damages.—The general rule is that the owner of attached or garnished property must take certain reasonable steps to reduce the damages arising from wrongful attachment.[17] In the few cases discussing the question, the courts, aided in some instances by statute, have taken the position that if the owner is financially able to do so, he must procure the return of his wrongfully attached property by giving a bond, thus reducing the damages from the wrongful attachment.[18] Likewise, it has been held, on a claim for damages by the claimant alleged to have resulted from his being prevented from selling personal property because of its attachment, that it could not truly be said that the attachment prevented its sale, for the court could and would, upon proper application, have made an order for its sale, the proceeds to await the result of the attachment.[19]

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[9] See supra, §§ 998, 1001.

[10] Wood v. Barker, 37 Ala. 60, 76 Am. Dec. 346.

[11] Floyd v. Anderson, 36 Okla. 308, 128 P. 249, 43 L.R.A.(N.S.) 788, Ann. Cas. 1915A, 348.

Annotation: 29 L.R.A.(N.S.) 275; 81 Am. Dec. 474; Ann. Cas. 1915A, 349.

Punitive damages are not recoverable against the sureties in an ordinary attachment bond in a suit brought on the bond. The damages recoverable on such bond are compensatory in their nature, for instance, damages for loss or depreciation in value of the attached property, interests, costs, and expenses, including, under the Oklahoma statute, reasonable attorneys' fees, which are the proximate results of the attachment, when the order therefor has been wrongfully obtained. Floyd v. Anderson, 36 Okla. 308, 128 P. 249, 43 L.R.A.(N.S.) 788, Ann. Cas. 1915A, 348.

[12] Annotation: 81 Am. Dec. 467.

[13] International Harvester Co. v. Iowa Hardware Co. 146 Iowa, 172, 122 N. W. 951, 29 L.R.A.(N.S.) 272; Melcher v. Clark, 145 Wash. 95, 258 P. 1032, 54 A.L.R. 448; Seattle Crockery Co. v. Haley, 6 Wash. 302, 33 P. 650, 36 Am. St. Rep. 156.

Annotation: 85 A.L.R. 644; 29 L.R.A. (N.S.) 275; L.R.A.1915A, 543.

[14] Annotation: 38 L.R.A.(N.S.) 124; 29 L.R.A.(N.S.) 282; 68 Am. St. Rep. 277; 81 Am. Dec. 474; Ann. Cas. 1915A, 350.

[15] Annotation: Ann. Cas. 1915A, 350.

[16] Reliable Mut. Hail Ins. Co. v. Rogers, 61 Okla. 226, 160 P. 914, L.R.A.1917B, 350; Melcher v. Clark, 145 Wash. 95, 258 P. 1032, 54 A.L.R. 448.

Annotation: 29 L.R.A.(N.S.) 279, 282; 28 Am. St. Rep. 879.

[17] Annotation: 33 A.L.R. 1479; Ann. Cas. 1915B, 1222.

See DAMAGES [Also 8 R. C. L. p. 442, § 14].

[18] See supra, § 902.

2. Elements

a. In General

§ 1009. Generally.—Subject to the general rules of limitation stated in the immediately preceding sections, there are numerous elements of recovery for wrongful or malicious attachment or garnishment which have been considered or rejected by the courts.

§ 1010. Loss of Use of, or Injury to, Property.—The general rule is that loss of the use of,[20] or the injury to[1] or destruction of,[2] property is an element of recovery in an action for wrongful or malicious attachment or garnishment.[3] If the value of the property depreciates on account of its seizure, this may be compensated for,[4] but an attaching creditor is not liable for the depreciation in value of real estate levied upon which occurs while the attachment is in force, provided there is no change of possession.[5]

§ 1011. Injury to Business, Credit, Loss of Profits, etc.—There is a difference of opinion as to whether injury to credit can be allowed as an element of damages for wrongful attachment or garnishment. One line of authorities has held that injury to credit is a natural and proximate result of the wrongful attachment or garnishment and therefore has allowed a recovery for such injury without qualification.[6] In other jurisdictions this element has been allowed only in case the attachment proceeding is malicious and without probable cause.[7] In still other jurisdictions the right to recovery is further limited and depends upon the form of action. In actions on the case for suing out the writ maliciously and without probable cause, injury to credit is a proper element of damages, but in actions on the attachment or garnishment bond it is not.[8]

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[19] Annotation: 33 A.L.R. 1479.

[20] Sterling v. Marine Bank, 120 Md. 396, 87 A. 697, Ann. Cas. 1915A, 1219; Reliable Mut. Hail Ins. Co. v. Rogers, 61 Okla. 226, 160 P. 914, L.R.A.1917B, 350; Tsesmelis v. Sinton State Bank (Tex. Com. App.) 53 S. W. (2d) 461, 85 A.L.R. 319; Melcher v. Clark, 145 Wash. 95, 258 P. 1032, 54 A.L.R. 448; Anderson v. Sloane, 72 Wis. 566, 40 N. W. 214, 7 Am. St. Rep. 885.

Annotation: 68 Am. St. Rep. 269; 81 Am. Dec. 474.

[1] Sterling v. Marine Bank, 120 Md. 396, 87 A. 697, Ann. Cas. 1915A, 1219; Reliable Mut. Hail Ins. Co. v. Rogers, 61 Okla. 226, 160 P. 914, L.R.A.1917B, 350; Melcher v. Clark, 145 Wash. 95, 258 P. 1032, 54 A.L.R. 448.

Annotation: 86 Am. St. Rep. 400.

The value of or damage to goods actually seized is recoverable in an action for wrongful attachment. Sterling v. Marine Bank, 120 Md. 396, 87 A. 697, Ann. Cas. 1915A, 1219.

The measure of damages, where the property is returned to the rightful owner, is not the value of the property, but the injuries resulting to the owner pending detention. Palmer v. United States, 41 App. D. C. 341, Ann. Cas. 1915B, 1216.

[2] Reliable Mut. Hail Ins. Co. v. Rogers, 61 Okla. 226, 160 P. 914, L.R.A.1917B, 350.

Annotation: 81 Am. Dec. 473.

In Reliable Mut. Hail Ins. Co. v. Rogers, 61 Okla. 226, 160 P. 914, L.R.A.1917B, 350, it was held that in an action for wrongful attachment, the plaintiffs below were entitled to have the jury instructed that they were entitled to the reasonable value of the property destroyed or taken under the attachment and of which they were ultimately deprived.

[3] **In an action to recover damages for maliciously suing out an attachment** which is not based upon the attachment bond, the measure of damages is merely the reasonable value of the use of the property during the period of its detention, and the injury to it, if any. Melcher v. Clark, 145 Wash. 95, 258 P. 1032, 54 A.L.R. 448.

Actual damages for which a recovery may be had include loss occasioned by the deprivation of use of the property pending the attachment, or by the illegal sale of it, or injury to or loss or destruction of it, as well as any depreciation in its value. Annotation: 81 Am. Dec. 472, 473.

[4] Parish v. Van Arsdale-Osborne Brokerage Co. 92 Kan. 286, 140 P. 835, Ann. Cas. 1916B, 981; Kyd v. Cook, 56 Neb. 71, 76 N. W. 524, 71 Am. St. Rep. 661; Tsesmelis v. Sinton State Bank (Tex. Com. App.) 53 S. W. (2d) 461, 85 A.L.R. 319; Anderson v. Sloane, 72 Wis. 566, 40 N. W. 214, 7 Am. St. Rep. 885.

Annotation: 81 Am. Dec. 473; Ann. Cas. 1915B, 1223.

Depreciation in the value of the property and of the prices received, which proximately resulted from the unlawful attachment of the property at a sale, is an element of damages which may be recovered by the owner. Parish v. Van Arsdale-Osborne Brokerage Co. 92 Kan. 286, 140 P. 835, Ann. Cas. 1916B, 981.

Where no contention is made that the property depreciated in value subsequent to a levy thereon, no recovery may be had upon allegations that the attachment prevented a sale of the land and the application of the proceeds to the payment of the owner's debts, or that the negotiation of a loan was prevented thereby. Tsesmelis v. Sinton State Bank (Tex. Com. App.) 53 S. W. (2d) 461, 85 A.L.R. 319.

[5] Tisdale v. Major, 106 Iowa, 1, 75 N. W. 663, 68 Am. St. Rep. 263.

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[6] National Surety Co. v. Jean (C. C. A. 6th) 36 F. (2d) 468, 68 A.L.R. 1326 (action on bond); Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 59 (action for damages); Reliable Mut. Hail Ins. Co. v. Rogers, 61 Okla. 226, 160 P. 914, L.R.A.1917B, 350 (holding, however, that the jury should at the same time be admonished that they cannot consider remote, speculative, or conjectural damages).

See also Fidelity & D. Co. v. L. Bucki & Son Lumber Co. 189 U. S. 135, 47 L. ed. 744, 23 S. Ct. 582 (action on bond); Pollock v. Gantt, 69 Ala. 378, 44 Am. Rep. 519.

Annotation: 54 A.L.R. 451; Ann. Cas. 1915A, 1221.

At common law, for such loss of credit, breaking up of business, loss of customers, and injury to reputation, etc., resort must be had, to obtain full indemnity, to an action on the case for malicious prosecution. Annotation: 7 Ann. Cas. 548.

A man's financial standing or credit may not be "property," within the technical meaning of that term, but it is something often more valuable, and if it is wrongfully injured or destroyed by another, he may recover whatever pecuniary damages he can prove, by competent testimony under proper pleadings, that he has sustained thereby. Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 59; Kyd v. Cook, 56 Neb. 71, 76 N. W. 524, 71 Am. St. Rep. 661.

Damages to credit are special, and not recoverable unless pleaded. Likewise, damages for loss of credit, awarded by a jury as exemplary damages, cannot be allowed in the absence of a finding of actual damages. The extent of damage to credit is ordinarily, it seems, a question for the jury. There can be no recovery for loss of credit for wrongful attachment where the defendant to the attachment had ceased to carry on the business for which such loss is claimed, at the time of the attachment. Likewise, there can be no recovery for loss of credit from a business that at the time of the wrongful attachment had been conveyed to, and was in the hands of, a trustee for the benefit of creditors. Similarly, there can be no recovery for wrongful attachment where the loss of credit resulted from the attachment suit and not from the attachment. Again, where it appears that an attachment reveals, but does not cause, a loss of credit, the same is not recoverable as damages for wrongful attachment. Nor can there be such recovery for a loss of credit caused by the attachment defendant's own conduct, and not by the attachment. Annotation: 54 A.L.R. 455.

In National Surety Co. v. Jean (C. C. A. 6th) 36 F. (2d) 468, 68 A.L.R. 1326, it was held that injury to credit, loss of profits, diminution of business, or other loss directly attributable to the attachment may be recovered against the surety on an attachment bond breached by reason of the nonexistence of the indebtedness, but the period for computation of such damages ends with the filing of a voluntary petition in bankruptcy by the attachment defendant.

[7] Malone v. Belcher, 216 Mass. 209, 103 N. E. 637, 49 L.R.A.(N.S.) 753, Ann. Cas. 1915A, 830; Brand v. Hinchman, 68 Mich. 590, 36 N. W. 664, 13 Am. St. Rep. 362 (action for damages).

Annotation: 54 A.L.R. 452; 68 Am. St. Rep. 279; Ann. Cas. 1915A, 1222.

[8] Fidelity & D. Co. v. L. Bucki & Son Lumber Co. 189 U. S. 135, 47 L. ed. 744, 23 S. Ct. 582; Lawrence v. Hagerman, 56 Ill. 69, 8 Am. Rep. 674 (action for damages); State use of Roe v. Thomas, 19 Mo. 613, 61 Am. Dec. 580 (action on bond).

Annotation: 54 A.L.R. 453; 29 L.R.A. (N.S.) 276; Ann. Cas. 1915A, 1223.

In Lawrence v. Hagerman, 56 Ill. 69, 8 Am. Rep. 674, the court said: "It is insisted that an action on the case for maliciously suing out a writ of attachment cannot be maintained. The objection proceeds on the ground that, inasmuch as the statute requires the plaintiff in attachment to give bond, with security, conditioned to pay all damages in case the writ is wrongfully issued, before obtaining the process, the remedy is confined to an action on the bond. We think the objection taken is not tenable, certainly not to the extent insisted upon by the counsel. The remedies by an action on the case and upon the bond may be concurrent to a certain extent. Actual damages, such as direct loss on the property attached, expenses incurred in defense of the suit, may be recovered in an action on the bond. But for loss of credit, breaking up of business, loss of customers, and injury to reputation, resort must be had, to obtain full indemnity, to an action on the case for malicious prosecution, under the common law. . . . The reputation and credit of a man in business is of great value, and is as much within the protection of the law as property or other valuable rights. And if it be true that the appellant has maliciously, by his wrongful act, destroyed the business, credit, and reputation of the appellee, the law will require him to make good the loss sustained."

The injury to a vendee's credit, resulting from the bringing of actions by his vendor for a breach of contract and for a balance due thereunder, and any loss of profits be-

A contrary rule has been followed in other jurisdictions, and the courts have refused to consider injury to credit through a wrongful attachment or garnishment as a recoverable element of damages, even though the attachment is malicious.[9]

Recovery for loss of profits or diminution of business has been held to be proper.[10] Some distinction has been based upon the form of action. Where the action is specifically for conversion of the attached goods, loss of profits or injury to business is not to be considered in estimating damages,[11] but where the action is for trespass, and it appears that the property attached was a stock of merchandise kept for sale, recovery may be had not only for the value of the goods, but for the loss of profits.[12] Again, the rule has been stated that damages are recoverable for a reasonably certain and measurable loss of profits.[13]

§ 1012. Injury to Character, Mental Suffering, Sickness, Humiliation, etc.—The cases are conflicting as to the allowability, in an action for wrongful or malicious attachment or garnishment, of damages for mental suffering, injury to feelings, humiliation, injury to character, sickness, etc.,[14] some cases allow-

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cause of the vendor's refusal to make further deliveries under the contract, are not elements of damages recoverable in a suit on the attachment bonds issued in such actions. Fidelity & D. Co. v. L. Bucki & Son Lumber Co. 189 U. S. 135, 47 L. ed. 744, 23 S. Ct. 582.

[9] Door Cattle Co. v. Des Moines Nat. Bank, 127 Iowa, 153, 98 N. W. 918, 102 N. W. 836, 4 Ann. Cas. 519 (action for damages); Sterling v. Marine Bank, 120 Md. 396, 87 A. 697, Ann. Cas. 1915A, 1219 (action for damages); Melcher v. Clark, 145 Wash. 95, 258 P. 1032, 54 A.L.R. 448 (action for damages); Seattle Crockery Co. v. Haley, 6 Wash. 302, 33 P. 650, 36 Am. St. Rep. 156 (action on bond).

Annotation: 54 A.L.R. 457; Ann. Cas. 1915A, 1225.

In Melcher v. Clark, 145 Wash. 95, 258 P. 1032, 54 A.L.R. 448, the court cites Seattle Crockery Co. v. Haley, 6 Wash. 302, 33 P. 650, 36 Am. St. Rep. 156, holding that injury to credit is not an element of damages in an action on the attachment bond, and says that it must follow that injury to commercial credit is not an element of damages for a malicious and wrongful attachment, where the action is one at law for damages.

In Sterling v. Marine Bank, 120 Md. 396, 87 A. 697, Ann. Cas. 1915A, 1219, an action against an attaching creditor to recover on his general liability for a wrongful attachment, the court held that the damage to the plaintiff's credit, if any, was too uncertain and speculative a matter to be left to the jury.

As elements of damage for the wrongful suing out of an attachment on mining property, injury to the credit and business of the attachment defendant and the loss of property through sales under judgments secured by its employees for wages due at the time of the levy are not proper elements of damage, where the defendant's possession and mining operations were not disturbed by the levy of the writ. Plymouth Gold Min. Co. v. United States Fidelity & G. Co. 35 Mont. 23, 88 P. 565, 10 Ann. Cas. 951.

A witness may testify to the extent of a merchant's business and to the rate or average of profits he may realize on sales, above expenses, if these are matters within his knowledge; but he cannot give his judgment or opinion as to the extent of loss a merchant will suffer by the breaking up of his business. Pollock v. Gantt, 69 Ala. 373, 44 Am. Rep. 519.

Proof was offered by the plaintiff, and received by the court, against the objection of the defendants, that the plaintiff was making advances to timbermen and others, and that thereby he had become interested in the handling of timber and crops; and his mercantile business being stopped, he lost these advantages, lost his advances, and lost the shipment of his timber. These matters of proof were inadmissible. There was no averment in the complaint to authorize them, and if there had been, the damages claimed on those accounts are speculative and too remote. Ibid.

[10] National Surety Co. v. Jean (C. C. A. 6th) 36 F. (2d) 468, 68 A.L.R. 1326; Sterling v. Marine Bank, 120 Md. 396, 87 A. 697, Ann. Cas. 1915A, 1219.

[11] Annotation: Ann. Cas. 1915B, 1222.

[12] Kyd v. Cook, 56 Neb. 71, 76 N. W. 524, 71 Am. St. Rep. 661. But see Anderson v. Sloane, 72 Wis. 566, 40 N. W. 214, 7 Am. St. Rep. 885.

Annotation: 52 L.R.A. 54, s. 46 L.R.A. (N.S.) 470; Ann. Cas. 1915B, 1222.

A loss of profits is a result which may be reasonably, naturally, and ordinarily expected to follow from the closing up of a merchant's place of business and the seizure of his goods. Kyd v. Cook, 56 Neb. 71, 76 N. W. 524, 71 Am. St. Rep. 661.

[13] Sterling v. Marine Bank, 120 Md. 396, 87 A. 697, Ann. Cas. 1915A, 1219; Wellington v. Spencer, 37 Okla. 461, 132 P. 675, 46 L.R.A.(N.S.) 469; State ex rel. Mundy v. Andrews, 39 W. Va. 35, 19 S. E. 385, 45 Am. St. Rep. 884.

Annotation: 52 L.R.A. 54, s. 46 L.R.A. (N.S.) 470.

[14] Foley v. Union House Furnishing Co. 228 Mo. App. 1063, 60 S. W. (2d) 725, citing R. C. L. (holding such damages allowable).

ing such damages, at least where the attaching creditor acted maliciously, on the theory that otherwise the attachment defendant does not receive full compensation for the wrong done,[15] and other cases holding the contrary, at least as to wrongful attachment or garnishment, on the theory that such damages are too remote and speculative.[16]

§ **1013. Interest.**—In actions for damages for wrongful attachment or garnishment of property, and for converting the same, the general rule is that the owner is entitled to interest on the value of the property from the time of the illegal attachment or garnishment.[17] In at least two jurisdictions, however, the allowance of interest lies in the discretion of the jury or of the court, when sitting without a jury.[18] In other jurisdictions, usually by statute, a plaintiff is entitled to interest whenever he elects to take the value at the time of the conversion, but when he elects to take a higher value as of a later time, interest is not allowed.[19] However, in a few jurisdictions a plaintiff is held

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[15] Malone v. Belcher, 216 Mass. 209, 103 N. E. 637, 49 L.R.A.(N.S.) 753, Ann. Cas. 1915A, 830 (injuries to feelings); Friel v. Plumer, 69 N. H. 498, 43 A. 618, 76 Am. St. Rep. 190.

Damages for sickness have been held recoverable. Annotation: Ann. Cas. 1915B, 1221.

[16] Tisdale v. Major, 106 Iowa, 1, 75 N. W. 663, 68 Am. St. Rep. 263; Galloway v. Morris (Tex. Civ. App.) 249 S. W. 284, citing R. C. L.; Fish v. Nethercutt, 14 Wash. 582, 45 P. 44, 53 Am. St. Rep. 892 (personal humiliation or sense of wrong, in the absence of malice or wilful oppression); Anderson v. Sloane, 72 Wis. 566, 40 N. W. 214, 7 Am. St. Rep. 885 (feelings).

Annotation: 68 Am. St. Rep. 272.

[17] Morey v. Hoyt, 62 Conn. 542, 26 A. 127, 19 L.R.A. 611 (holding, in an action to recover damages for the wrongful taking and detention of a power plant and machinery under attachments, that where the property was subsequently returned, interest upon its value during the time of the detention was not an erroneous measure of damages); Winslow v. Norton, 29 Me. 419, 50 Am. Dec. 601 (holding, where property in transit was attached as the property of the consignee after he had assigned the bills of lading therefor, that the plaintiff was entitled to interest on the value of the property, less the freight, from the time of the conversion); Sargent v. Franklin Ins. Co. 8 Pick. (Mass.) 90, 19 Am. Dec. 306 (holding, where an insurance company refused to enter a transfer of its shares to an assignee thereof, and attached and sold such shares as the property of the assignor, that the measure of damages was the value of the shares at the time when the demand for their transfer was made and refused, with interest from such time); Anderson v. Sloane, 72 Wis. 566, 40 N. W. 214, 7 Am. St. Rep. 885.

Annotation: 96 A.L.R. 109; Ann. Cas. 1915B, 1223.

[18] Winstead v. Hicks, 135 Ky. 154, 121 S. W. 1018, 135 Am. St. Rep. 446 (holding, in an action for damages for a wrongful levy upon exempt personal property, that in trover, in addition to the value of the property, the plaintiff may recover interest thereon, in the discretion of the jury, from the time of the conversion); Sanders v. Vance, 7 T. B. Mon. (Ky.) 209, 18 Am. Dec. 167 (holding, in trover for the conversion of domestic animals and other personal property by a wrongful levy, that the measure of damages was the value of the property at the time of the conversion, and, where the jury in its discretion allowed it, interest from the time of the conversion to the time of the trial, and that an instruction to the jury to allow interest as a matter of law was error).

In Missouri, by express statutory provision applicable to conversion cases, interest is allowable as part of the damages only in the discretion of the jury. It also appears that the petition must lay a foundation for the recovery of interest by praying therefor. But where the action is on an indemnity bond, interest may be recovered as a matter of legal right, the case being then one in contract rather than in tort. Annotation: 96 A.L.R. 114.

[19] Woodworth v. Gorsline, 3 Colo. 186, 69 P. 705, 58 L.R.A. 417 (holding, in an action by a mortgagee for a wrongful levy on a law library and bookcases covered by the mortgage, that an instruction that when the plaintiff recovered judgment for the value at the time of the taking, he was entitled to legal interest from the date of the taking to the date of trial, was correct); Ingram v. Rankin, 47 Wis. 406, 2 N. W. 755, 32 Am. Rep. 762 (holding, in an action to recover the value of hay and grain which had been wrongfully taken under execution, that the measure of damages was, first, the value at the time of the conversion, with interest to the date of the trial; second, where the defendant had sold the property, the plaintiff might at his election recover the amount for which it was sold, with interest from the time of the sale; third, if the chattels were still in the possession of the defendant, the plaintiff might, at his election, recover the present value of the property at the place of conversion, and in the form it was in when converted; these rules having effect to prevent the defendant from making any profit from his wrong).

In Montana, by statutory provision, a plaintiff, where he has prosecuted the action with reasonable diligence, may elect whether he will have as his damages for the conversion the value of the property at the time of the conversion, with interest from that time until trial, or the highest market value between the time of converentitled to interest no matter as of what time the value of the controverted property is assessed.[20]

Legal interest should be allowed under an attachment bond upon the amount recovered as damages for the wrongful suing out of the attachment.[1]

b. Costs and Attorneys' Fees as Elements of Recovery

§ 1014. For Defending Attachment or Garnishment.[2]—The weight of opinion is that the costs of defending a wrongful or malicious attachment or garnishment, as distinguished from the action on its merits, including reasonable attorneys' fees, constitute a proper element of damages in an action based upon the wrongful attachment or garnishment.[3] The rule is applicable whether the action is brought on the bond or in tort for the wrongful attachment or garnishment.[4] Recoverable attorneys' fees are limited to those actually paid

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sion and the trial, without interest; but he must make his election, and cannot have the jury instructed under both measures of damages. In some early cases, however, interest was denied. Annotation: 96 A.L.R. 115.

In Oklahoma ordinarily the measure of damages in cases of conversion is the value of the converted property at the time of the conversion, plus interest on such value from that time, but where the plaintiff has fulfilled the requirement of reasonable diligence in the prosecution of his suit, and elects to take the highest market value between the conversion and the trial, interest is not allowed. Annotation: 96 A.L.R. 119.

[20] Milner & K. Co. v. De Loach Mill Mfg. Co. 139 Ala. 645, 36 So. 765, 101 Am. St. Rep. 63 (holding, where an engine and boiler were attached as the property of a person who did not own them, and sold, that a charge to the jury to allow interest on the value of the property from the date of the levy until the trial was not error); Fish v. Nethercutt, 14 Wash. 582, 45 P. 44, 53 Am. St. Rep. 892 (holding, in an action for damages for a wrongful levy of execution upon certain property, that the measure of damages was the value of the property when taken, or at such time as the plaintiff might elect between the time of the taking and the bringing of the action, with interest thereon).

South Carolina follows this rule. See annotation: 96 A.L.R. 119.

[1] St. Joseph Stock Yards Co. v. Love, 57 Utah, 450, 195 P. 305, 25 A.L.R. 569.

[2] As to costs of suit for wrongful attachment or garnishment, see infra, § 1040.

[3] **Any expenses to which the plaintiff was put** in obtaining a return of the goods, including what he was obliged to pay for costs in the illegal judgments, and the alleged sheriff's fees charged for executing the illegal executions, expenses to which he had been put by way of rent of the store and clerk's hire while the defendant was in possession of the store, and money that he was compelled to expend for counsel and attorneys' fees in the proceedings to set aside the illegal judgments and executions are recoverable. Anderson v. Sloane, 72 Wis. 566, 40 N. W. 214, 7 Am. St. Rep. 885.

[4] Fidelity & D. Co. v. L. Bucki & Son Lumber Co. 189 U. S. 135, 47 L. ed. 744, 23 S. Ct. 582 (action on bond); Java Cocoanut Oil Co. v. Fidelity & D. Co. (C. C. A. 9th) 300 F. 302, 39 A.L.R. 523 (action on bond); W. B. Moses & Sons v. Lockwood, 54 App. D. C. 115, 295 F. 936, 33 A.L.R. 1467 (action for damages); Moseley v. Fidelity & D. Co. 33 Idaho, 37, 189 P. 862, 25 A.L.R. 564 (action on bond); Lawrence v. Hagerman, 56 Ill. 68, 8 Am. Rep. 674; Parish v. Van Arsdale-Osborne Brokerage Co. 92 Kan. 286, 140 P. 835, Ann. Cas. 1916B, 981 (action on bond); Trapnall v. McAfee, 3 Met. (Ky.) 34, 77 Am. Dec. 152 (action on bond); Dickinson v. Maynard, 20 La. Ann. 66, 96 Am. Dec. 379; Plymouth Gold Min. Co. v. United States Fidelity & C. Co. 35 Mont. 23, 88 P. 565, 10 Ann. Cas. 951 (action on bond); Raymond Bros. v. Green, 12 Neb. 215, 10 N. W. 709, 41 Am. Rep. 763 (action on bond); McIntosh v. Knox, 40 Nev. 403, 165 P. 337, citing R. C. L.; Thropp v. Erb, 255 N. Y. 75, 174 N. E. 67, 71 A.L.R. 1455; Reliable Mut. Hail Ins. Co. v. Rogers, 61 Okla. 226, 160 P. 914, L.R.A.1917B, 350 (action on bond); Floyd v. Anderson, 36 Okla. 308, 128 P. 249, 43 L.R.A.(N.S.) 788, Ann. Cas. 1915A, 348 (action on bond); First Nat. Bank v. McSwain, 93 S. C. 30, 75 S. E. 1106, Ann. Cas. 1914D, 809; St. Joseph Stock Yards Co. v. Love, 57 Utah, 450, 195 P. 305, 25 A.L.R. 569 (action on bond); Seattle Crockery Co. v. Haley, 6 Wash. 302, 33 P. 650, 36 Am. St. Rep. 156 (action on bond); Anderson v. Sloane, 72 Wis. 566, 40 N. W. 214, 7 Am. St. Rep. 885; Allith-Prouty Co. v. Wallace, 32 Wyo. 392, 233 P. 144, 234 P. 504, 39 A.L.R. 513.

Annotation: 25 A.L.R. 580, s. 71 A.L.R. 1459; 68 Am. St. Rep. 274; 81 Am. Dec. 473; 10 Ann. Cas. 954; Ann. Cas. 1914D, 815.

The bond required to be given on the granting of an attachment usually stipulates that the attachment plaintiff shall be liable to the defendant for such damages as are caused by the wrongful suing out of the writ; and it is held that counsel fees paid in procuring the discharge of an attachment are clearly within the meaning of such a stipulation. Annotation: 10 Ann. Cas. 954.

The premium paid for a refunding bond executed to secure the release of money wrongfully attached may be allowed as damages against the one securing the attachment. Gordon v. Kentucky Midland Coal Co. 152 Tenn. 367, 278 S. W. 68, 42 A.L.R. 1052.

In First Nat. Bank v. McSwain, 93 S. C. 30, 75 S. E. 1106, Ann. Cas. 1914D, 809, the court holds that attorneys' fees expended or contracted to be paid, and to those that are reasonable in amount.[5] A recovery of such costs is sometimes provided for by statute.[6] The right to such recovery may exist notwithstanding the plaintiff's cause of action is just, since the attachment may, nevertheless, be wrongful.[7] Within the meaning of the terms "costs" and "expenses" are included disbursements in procuring the discharge of the attachment and the return of the property, and in obtaining testimony in the principal action, and the technical costs of that action on appeal as well as in the trial court.[8]

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in procuring the dissolution of a wrongful attachment on the plaintiff's property are recoverable as an element of damage in an action for wrongful attachment; but the court expressly confined the allowance of the fees by stating: "We hold that such fees are only allowable, not for procuring a dissolution of injunction, or attachment, by a fight on the merits, but by motion, or otherwise, before a trial on the merits is had."

An undertaking to pay damages sustained by the defendant by reason of the attachment, if wrongfully obtained, was held, in Trapnall v. McAfee, 3 Met. (Ky.) 34, 77 Am. Dec. 152, to cover attorneys' fees for services in procuring a discharge of the attachment, as against the contention that the damages referred to were only such as arose from a deprivation of the use of the property, or in consequence of its removal.

In New York a motion to vacate a warrant of attachment invalid on its face, or which the defendant is entitled as a matter of law to have vacated, must be made in order to entitle the defendant in the attachment suit to recover legal expenses in defending the action, such as counsel fees, as damages sustained by reason of the attachment. Thropp v. Erb, 255 N. Y. 75, 174 N. E. 67, 71 A.L.R. 1455; 7 Carmody, N. Y. Prac. p. 599.

[5] International Harvester Co. v. Iowa Hardware Co. 146 Iowa, 172, 122 N. W. 951, 29 L.R.A.(N.S.) 272; Plymouth Gold Min. Co. v. United States Fidelity & G. Co. 35 Mont. 23, 88 P. 565, 10 Ann. Cas. 951; Raymond Bros. v. Greene, 12 Neb. 215, 10 N. W. 709, 41 Am. Rep. 763; Seattle Crockery Co. v. Haley, 6 Wash. 302, 33 P. 650, 36 Am. St. Rep. 156.

Annotation: 25 A.L.R. 583, s. 71 A.L.R. 1459.

Only a reasonable fee for procuring a dissolution of the attachment can be recovered in an action for wrongful attachment, irrespective of the amount paid counsel. Seattle Crockery Co. v. Haley, 6 Wash. 302, 33 P. 650, 36 Am. St. Rep. 156.

Although the defendant in an attachment suit may employ numerous attorneys to defend the attachment, no more should be allowed for attorneys' fees because of the wrongful attachment than the services rendered are reasonably worth, whether rendered by one or more than one attorney. Annotation: 25 A.L.R. 600, s. 71 A.L.R. 1463.

Under a statute providing that in an action on the attachment bond the court should fix the actual damages sustained, including reasonable attorneys' fees, and providing also for exemplary damages if the attachment was sued out maliciously, it was held that the reasonable attorneys' fees which the court is authorized to fix are not limited to those reasonable with reference to the actual damages sustained, but that if actual damages are shown, and the jury finds that the attachment was sued out maliciously, and allows exemplary damages on that account, attorneys' fees may be fixed with reference to the entire amount recovered as damages on the attachment bond. International Harvester Co. v. Iowa Hardware Co. 146 Iowa, 172, 122 N. W. 951, 29 L.R.A.(N.S.) 272.

There is some authority to the effect that the fees must be actually paid. Annotation: 25 A.L.R. 597, s. 71 A.L.R. 1463.

[6] Moseley v. Fidelity & D. Co. 33 Idaho, 37, 189 P. 862, 25 A.L.R. 564; Brown v. Tidrick, 14 S. D. 249, 85 N. W. 185, 86 Am. St. Rep. 754.

Under an Idaho statute, one against whom an attachment has wrongfully issued is entitled to recover as a part of his damages therefor, from the surety on the attachment bond, the necessary expenses incurred by him in defending against such attachment. Moseley v. Fidelity & D. Co. 33 Idaho, 37, 189 P. 862, 25 A.L.R. 564.

[7] Trapnall v. McAfee, 3 Met. (Ky.) 34, 77 Am. Dec. 152.

Annotation: 25 A.L.R. 583, s. 71 A.L.R. 1459.

In Trapnall v. McAfee, 3 Met. (Ky.) 34, 77 Am. Dec. 152, the attachment was levied only upon land, of which the defendant was not deprived of the use or occupation, and the only expense or damage to which he was subjected by reason of the attachment was the employment of counsel to defend the same; it was held that such attorneys' fees might be recovered notwithstanding there was no defense to the action on the merits, but judgment was rendered by default and satisfied by payment. Thus, the case apparently supports the doctrine that even though there is no defense to the action on its merits, and judgment is rendered against the defendant by default, if there is a wrongful attachment, the defendant, in an action on the bond, may recover attorneys' fees for procuring the discharge of the attachment, although it is on land, and he is not deprived of its use or occupation, and sustains no expense or damage from the attachment except for the employment of counsel to defend the same.

[8] W. B. Moses & Sons v. Lockwood, 54 App. D. C. 115, 295 F. 936, 33 A.L.R. 1467; First Nat. Bank v. McSwain, 93 S. C. 30, 75 S. E. 1106, Ann. Cas. 1914D, 809.

Annotation: 68 Am. St. Rep. 269; 81 Am. Dec. 473; Ann. Cas. 1914D, 815.

In W. B. Moses & Sons v. Lockwood, 54 App. D. C. 115, 295 F. 936, 33 A.L.R. 1467, it was held that one whose automobile is wrongfully attached must, if able, in order to reduce damages, give bond and secure

The right is not lost by a removal of the cause to a Federal court.[9] The question is one of local law, the Federal courts following the decisions of the state courts where the question has been decided.[10]

In a few cases the allowance of any attorneys' fees whatever for a wrongful attachment has been denied, the courts following the general rule by which the successful litigant is not ordinarily entitled to recover such fees, in the absence of special statute or stipulation.[11] At least, the view is taken that this is the rule where there is no proof that the attachment was sued out through malice and without probable cause.[12]

It seems that attorneys' fees or other expenses of the defendant in attachment, in defending against the attachment, cannot be recovered in an action on the attachment bond if no part of the defendant's property is seized, but the property attached belongs to another.[13]

There is a difference of opinion as to whether recovery can be had for services in the appellate court. However, if it is necessary to defend against the attachment in the appellate court, there seems to be no good reason why attorneys' fees for services rendered in relation to the attachment in that court as well as in the trial court should not be included as an item of damages for the wrongful attachment, and the authorities are to this effect.[14]

§ 1015. For Defending Main Action on Its Merits.—Although there is authority allowing a recovery,[15] as a general rule, attorneys' fees for defending the main suit on its merits cannot be recovered as an element of damages for a wrongful attachment or garnishment, whether or not such action is brought upon the bond, the recovery of such fees being limited to those for services relating to the attachment or garnishment proper,[16] at least in the absence of peculiar circumstances requiring such recovery in a particular

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its return, and, therefore, the measure of damages for the wrongful attachment is merely the cost of the bond plus the value of the use of the car during the time necessary to secure its return.

[9] Fidelity & D. Co. v. L. Bucki & Son Lumber Co. 189 U. S. 135, 47 L. ed. 744, 23 S. Ct. 582.

Annotation: 25 A.L.R. 587, s. 71 A.L.R. 1460.

[10] See Java Cocoanut Oil Co. v. Fidelity & D. Co. (C. C. A. 9th) 300 F. 302, 39 A.L.R. 523.

If there is no controlling state decision, the rule in the Federal courts seems to be that attorneys' fees are not items of damages for which a surety on an attachment bond becomes liable,—this doctrine being applied where the fees are for prosecuting a motion for an order dissolving the attachment, as well as for defending the action on the merits. Annotation: 71 A.L.R. 1459.

[11] Gordon v. Kentucky Midland Coal Co. 152 Tenn. 367, 278 S. W. 68, 42 A.L.R. 1052; Stringfield v. Hirsch, 94 Tenn. 425, 29 S. W. 609, 45 Am. St. Rep. 733.

Annotation: 25 A.L.R. 584, s. 71 A.L.R. 1460; 68 Am. St. Rep. 274; 10 Ann. Cas. 955; Ann. Cas. 1914D, 816.

[12] Annotation: 25 A.L.R. 584, s. 71 A.L.R. 1460; 10 Ann. Cas. 955; Ann. Cas. 1914D, 816.

[13] Annotation: 71 A.L.R. 1464.

However, in Thropp v. Erb, 255 N. Y. 75, 174 N. E. 67, 71 A.L.R. 1455, in which recovery of attorneys' fees was permitted, a part of the property attached consisted of securities which had been loaned to the defendant by his mother.

[14] Annotation: 25 A.L.R. 86, s. 71 A.L.R. 1460.

[15] Allith-Prouty Co. v. Wallace, 32 Wyo. 392, 233 P. 144, 234 P. 504, 39 A.L.R. 513.

[16] Java Cocoanut Oil Co. v. Fidelity & D. Co. (C. C. A. 9th) 300 F. 302, 39 A.L.R. 523; Goodbar v. Lindsley, 51 Ark. 380, 11 S. W. 577, 14 Am. St. Rep. 54; Thropp v. Erb, 255 N. Y. 75, 174 N. E. 67, 71 A.L.R. 1455 (bond); St. Joseph Stock Yards Co. v. Love, 57 Utah, 450, 195 P. 305, 25 A.L.R. 569; Seattle Crockery Co. v. Haley, 6 Wash. 302, 33 P. 650, 36 Am. St. Rep. 156 (bond).

Annotation: 25 A.L.R. 587, s. 71 A.L.R. 1460; Ann. Cas. 1914D, 816.

Attorneys' fees for defending the principal action cannot, in the absence of statute, be allowed under an attachment bond, where there was no motion to dissolve the attachment, although the statute provides for an allowance of all damages which the defendant may sustain by reason of the attachment. St. Joseph Stock Yards Co. v. Love, 57 Utah, 450, 195 P. 305, 25 A.L.R. 569.

A defendant in an attachment suit, after defeating the action upon its merits, cannot recover upon the attachment bond for attorneys' fees and expenses incurred by him in defending the main suit, where he did not own the property attached. Tebo v. Betancourt, 73 Miss. 868, 19 So. 833, 55 Am. St. Rep. 573. Annotation: Ann. Cas. 1914D, 816.

case.[17] The rule is applied with vigor where the defense of the main action was unnecessary to defeat the attachment.[18]

§ 1016. —Where Defense of Main Action Necessary to Defeat Attachment.— The majority view is that recovery of expenses for defending the attachment or garnishment suit on its merits is proper where it is necessary to defeat the main action in order to defeat the attachment.[19]

§ 1017. —Where Property Is Attached or Garnished on Ground of Nonresidence.—The cases are not in accord on the question whether attorneys' fees in the main action may be recovered as damages for wrongful attachment where property of a nonresident is attached on the ground of such nonresidence.[20] One line of cases holds that the fact that jurisdiction of an action against a foreign corporation is secured by attachment of its property does not entitle it to recover on the attachment bond the attorneys' fees for defending the principal action.[1] The majority view seems to be that attorneys' fees should be allowed for defending the attachment suit if it appears that such defense was necessary on the part of the nonresident defendant to defeat the attachment.[2] But it has been held that attorneys' fees for defending the attachment suit cannot be recovered as damages for wrongful attachment where no property of the nonresident defendant, who appeared and successfully defended the suit on its merits, was attached, the only property seized being that of his wife, since under these circumstances, he occupied merely the position and had only the rights of a defendant in an ordinary action.[3]

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[17] Ames v. Chirurg, 152 Iowa, 278, 132 N. W. 427, 38 L.R.A.(N.S.) 120.

The Iowa statute (Code, § 2961) provides that "in an action on such bond, the plaintiff therein may recover if he shows that the attachment was wrongfully sued out, and that there was no reasonable cause to believe the ground upon which the same was issued to be true, the actual damages sustained, and reasonable attorneys' fees, to be fixed by the court." But it has been held that under the statute, attorneys' fees for defending the main suit could not be recovered in an action upon the attachment bond, in the absence of peculiar circumstances requiring it in a particular case. Ames v. Chirurg, 152 Iowa, 278, 132 N. W. 427, 38 L.R.A.(N.S.) 120.

[18] Thropp v. Erb, 255 N. Y. 75, 174 N. E. 67, 71 A.L.R. 1455.

Annotation: 25 A.L.R. 592, s. 71 A.L.R. 1462.

Expenses incurred in defending on the merits a suit in which a warrant of attachment invalid on its face was levied are not recoverable as damages sustained by reason of the attachment, since the attachment might have been vacated on proper motion without incurring such expenses. Thropp v. Erb, 255 N. Y. 75, 174 N. E. 67, 71 A.L.R. 1455.

[19] Moseley v. Fidelity & D. Co. 33 Idaho, 37, 189 P. 862, 25 A.L.R. 564; Parish v. Van Arsdale-Osborne Brokerage Co. 92 Kan. 286, 140 P. 835, Ann. Cas. 1916B, 981; Thropp v. Erb, 255 N. Y. 75, 174 N. E. 67, 71 A.L.R. 1455.

Annotation: 25 A.L.R. 592, s. 71 A.L.R. 1462.

In Parish v. Van Arsdale-Osborne Brokerage Co. 92 Kan. 286, 140 P. 835, Ann. Cas. 1916B, 981, it was said: "No preliminary motion was made to dissolve the attachment, but the question of whether there was a debt which was justly due was tested on the final trial, and it was then determined that there was no indebtedness, and consequently an order was made, vacating and setting aside the attachment. To obtain the attachment, the appellant made an affidavit that it had a claim against the appellee for a certain amount which was justly due. In order to establish that there was no basis for this claim, and that the appellee was not indebted to the appellant in any amount, a trial of the merits was necessary. There might have been a preliminary motion to dissolve the attachment on the ground that the averments of the affidavit were not true and that there was no indebtedness, but the same proof would have been necessary on that motion as on the final trial that was had. Just such a trial as was had was necessary to get rid of the illegal attachment and to free the property from the apparent lien; and as the fees in question were expended in accomplishing this purpose, they were proper elements of damages."

A motion to vacate the attachment is not essential to hold the surety on the attachment bond liable for attorneys' fees for defending the action on the merits, if there is no reasonable chance of success of such a motion. Thropp v. Erb, 255 N. Y. 75, 174 N. E. 67, 71 A.L.R. 1455.

However, the rule in the Federal court, as laid down in Java Cocoanut Oil Co. v. Fidelity & D. Co. (C. C. A. 9th) 300 F. 302, 39 A.L.R. 523, is that counsel fees for defeating the principal action are not recoverable in an action on the attachment bond, even though the attachment is regular upon its face and can only be discharged by defeating the principal action by a trial upon the merits. It seems, from the division of the cases made by the court, that there is ground for a distinction where the court acquires jurisdiction by attachment without personal service of process. The case arose in California, the view being taken that there were no controlling decisions in that state.

[20] Annotation: 25 A.L.R. 594, s. 71 A.L.R. 1462.

[1] St. Joseph Stock Yards Co. v. Love, 57 Utah, 450, 195 P. 305, 25 A.L.R. 569.

[2] Moseley v. Fidelity & D. Co. 33 Idaho, 37, 189 P. 862, 25 A.L.R. 564; Thropp v. Erb, 255 N. Y. 75, 174 N. E. 67, 71 A.L.R. 1455; Allith-Prouty Co. v. Wallace, 32 Wyo.

§ 1018. Apportionment of Fees Where Same Counsel Serves in Attachment and Main Proceedings.—If, as is usual, the same attorney who renders services having for their special object the dissolution of the attachment also defends the main case on its merits, and the contract of employment is for the entire proceeding, the general rules above indicated require an apportionment of the fees according to the two kinds of services rendered; and while this may be difficult in a particular case, such apportionment seems not impracticable and has been made in a number of cases. Of course, the defendant in the attachment suit who seeks damages on the ground of the wrongful attachment must prove the value of the services relating directly to the attachment itself.[4]

C. Practice and Procedure

1. In General

§ 1019. Generally.—Practice is not uniform with respect to the recovery of damages for wrongful attachment or garnishment. Damages for merely wrongful attachment or garnishment are, according to the general rule, recoverable in an independent action on the attachment or garnishment bond.[5] The majority rule is that such an action may also be brought independently of the bond.[6] Such an action may be brought where the attachment or garnishment is malicious,[7] irrespective of any statutory requirements relating to the attachment bond.[8]

392, 233 P. 144, 234 P. 504, 39 A.L.R. 513 (counterclaim).

Annotation: 25 A.L.R. 594, s. 71 A.L.R. 1462.

Where the defendant was compelled to try the case on its merits in order that he might relieve his property of the attachment lien, the ground of the attachment being the nonresidence of the defendant, it has been held that he could recover as damages for wrongful attachment his attorneys' fees in defending the attachment suit. Moseley v. Fidelity & D. Co. 33 Idaho, 37, 189 P. 862, 25 A.L.R. 564 (action on bond); Thropp v. Erb, 255 N. Y. 75, 174 N. E. 67, 71 A.L.R. 1455 (bond).

[3] Tebo v. Betancourt, 73 Miss. 868, 19 So. 833, 55 Am. St. Rep. 573.

[4] Annotation: 25 A.L.R. 593, s. 71 A.L.R. 1462.

[5] Fidelity & D. Co. v. L. Bucki & Son Lumber Co. 189 U. S. 135, 47 L. ed. 744, 23 S. Ct. 582; National Surety Co. v. Jean (C. C. A. 6th) 36 F. (2d) 468, 68 A.L.R. 1326; Ames v. Chirurg, 152 Iowa, 278, 132 N. W. 427, 38 L.R.A.(N.S.) 120; Alexander v. Harrison, 38 Mo. 258, 90 Am. Dec. 431; State use of Roe v. Thomas, 19 Mo. 613, 61 Am. Dec. 580; Barnes v. Webster, 16 Mo. 258, 57 Am. Dec. 232 (garnishment); McReady v. Rogers, 1 Neb. 124, 93 Am. Dec. 333; Oklahoma State Bank v. Reed, 143 Okla. 131, 288 P. 281, 85 A.L.R. 635; Gordon v. Kentucky Midland Coal Co. 152 Tenn. 367, 278 S. E. 68, 42 A.L.R. 1052; Allith-Prouty Co. v. Wallace, 32 Wyo. 392, 233 P. 144, 234 P. 504, 39 A.L.R. 513.

Annotation: 85 A.L.R. 657, 659.

[6] W. J. Kelley v. Stockgrowers Credit Corp. — N. D. —, 263 N. W. 717, 103 A.L.R. 461; Oklahoma State Bank v. Reed, 143 Okla. 131, 288 P. 281, 85 A.L.R. 635; Lamb v. Day, 8 Vt. 407, 30 Am. Dec. 479; Allith-Prouty Co. v. Wallace, 32 Wyo. 392, 233 P. 144, 234 P. 504, 39 A.L.R. 513.

Annotation: 85 A.L.R. 659; 38 L.R.A. (N.S.) 122; 68 Am. St. Rep. 268; 81 Am. Dec. 467.

This is, of course, the practice where no attachment bond is required or given. See supra, § 901.

[7] Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 59; Spaids v. Barrett, 57 Ill. 289, 11 Am. Rep. 10; Lawrence v. Hagerman, 56 Ill. 68, 8 Am. Rep. 674; Ames v. Chirurg, 152 Iowa, 278, 132 N. W. 427, 38 L.R.A.(N.S.) 120; Alexander v. Harrison, 38 Mo. 258, 90 Am. Dec. 431; State use of Roe v. Thomas, 19 Mo. 613, 61 Am. Dec. 580; Marsh v. Steele, 9 Neb. 96, 1 N. W. 869, 31 Am. Rep. 406; Friel v. Plumer, 69 N. H. 498, 43 A. 618, 76 Am. St. Rep. 190; Reliable Mut. Hail Ins. Co. v. Rogers, 61 Okla. 226, 160 P. 914, L.R.A.1917B, 350; Ailstock v. Moore Lime Co. 104 Va. 565, 52 S. E. 213, 2 L.R.A.(N.S.) 1100, 113 Am. St. Rep. 1060, 7 Ann. Cas. 545; Shaver v. White, 6 Munf. (Va.) 110, 8 Am. Dec. 730; Veitch v. Cebell, 105 Wis. 260, 81 N. W. 411, 76 Am. St. Rep. 914 (garnishment).

Compare Perez v. Fernandez, 202 U. S. 80, In some jurisdictions the strict common-law rule[9] is followed, and, in order to sustain an action independently of the bond, malice and want of probable cause are required where the property seized was not exempt from seizure under attachment.[10] If the plaintiff cannot show this, he must rely upon his statutory right of action which may confine him to a recovery on the attachment bond.[11] The attachment debtor's right of action against his attachment creditor for suing out, maliciously and without probable cause, a writ of attachment is not, according to the general rule, limited or regulated by the statutes authorizing and regulating the writ; the statutory protection is in addition to that afforded at common law.[12] The matter is one of election between remedies.[13]

In some jurisdictions, largely under the provisions of statutes, damages arising from the merely wrongful, and not malicious, issuance or levy of an attachment or garnishment may be recovered in the original action in which the attachment or garnishment was issued.[14] In other jurisdictions, however, it is held that no such recovery can be had in that suit.[15]

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50 L. ed. 942, 26 S. Ct. 561, construing Puerto Rico Code.

Annotation: 85 A.L.R. 662.

In Ailstock v. Moore Lime Co. 104 Va. 565, 52 S. E. 213, 2 L.R.A.(N.S.) 1100, 113 Am. St. Rep. 1060, 7 Ann. Cas. 545, the court held that an action for damages could be maintained for maliciously suing out and levying an attachment from a court which was without jurisdiction.

[8] Spaids v. Barrett, 57 Ill. 289, 11 Am. Rep. 10; Ames v. Chirurg, 152 Iowa, 278, 132 N. W. 427, 38 L.R.A.(N.S.) 120; Alexander v. Harrison, 38 Mo. 258, 90 Am. Dec. 431; Marsh v. Steele, 9 Neb. 96, 1 N. W. 869, 31 Am. Rep. 406.

Annotation: 29 L.R.A.(N.S.) 273; 38 L.R.A.(N.S.) 122.

[9] See supra, § 984.

[10] Mullen v. Sanborn, 79 Md. 364, 29 A. 522, 25 L.R.A. 721, 47 Am. St. Rep. 415 (holding that an independent suit must first be brought, but that in most cases compensation for wrongful attachment can only be had from the bond); Lawing v. Schaufflu, 162 Tenn. 79, 34 S. W. (2d) 1055, 85 A.L.R. 633. Compare Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 59.

Annotation: 85 A.L.R. 661.

In Lawing v. Schaufflu, 162 Tenn. 79, 34 S. W. (2d) 1055, 85 A.L.R. 633, it was held that in the absence of statute authorizing the practice, the successful defendant in an attachment suit is not entitled to an assessment therein of damages for the wrongful issuance and levy of the attachment, but must bring an original suit upon the attachment bond.

[11] Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 59.

Annotation: 85 A.L.R. 661.

[12] Donnell v. Jones, 13 Ala. 390, 48 Am. Dec. 59; Lawrence v. Hagerman, 56 Ill. 68, 8 Am. Rep. 674; Spaids v. Barrett, 57 Ill. 289, 11 Am. Rep. 10.

Annotation: 85 A.L.R. 663.

And see supra, § 985.

[13] Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 59; Spaids v. Barrett, 57 Ill. 289, 11 Am. Rep. 10; Lawrence v. Hagerman, 56 Ill. 68, 8 Am. Rep. 674; State use of Roe v. Thomas, 19 Mo. 613, 61 Am. Dec. 580; Oklahoma State Bank v. Reed, 143 Okla. 131, 288 P. 281, 85 A.L.R. 635; Allith-Prouty Co. v. Wallace, 32 Wyo. 392, 233 P. 144, 234 P. 504, 39 A.L.R. 513 (implied).

Annotation: 85 A.L.R. 660, 663; 29 L.R.A. (N.S.) 273.

In Oklahoma State Bank v. Reed, 143 Okla. 131, 288 P. 281, 85 A.L.R. 635, the court held that the attachment defendant could maintain an independent action on the attachment bond, and that the statute permitting recovery in the attachment suit was not exclusive.

Upon the dissolution of an attachment, the aggrieved party may elect to sue upon the bond or waive the bond and sue the attaching plaintiff for wrongful attachment. If the proceedings were malicious and instituted without probable cause, the defendant can await the termination of the main action and sue for malicious prosecution. Reliable Mut. Hail Ins. Co. v. Rogers, 61 Okla. 226, 160 P. 914, L.R.A.1917B, 350.

[14] Perez v. Fernandez, 202 U. S. 80, 50 L. ed. 942, 26 S. Ct. 561 (stating the law of Puerto Rico); Goodbar v. Lindsley, 51 Ark. 380, 11 S. W. 377, 14 Am. St. Rep. 54; Willman v. Friedman, 4 Idaho, 209, 38 P. 937, 95 Am. St. Rep. 59; Oklahoma State Bank v. Reed, 143 Okla. 131, 288 P. 281, 85 A.L.R. 635.

Annotation: 85 A.L.R. 645.

Where the jury in the main action finds for the defendant, or the plaintiff is nonsuited, the jury should specially assess the damages sustained by reason of the wrongful attachment. Annotation: 85 A.L.R. 647.

Under the statutes of Arkansas, it has been held that damages may be assessed against the attachment plaintiff on the dissolution of the attachment. Goodbar v. Lindsley, 51 Ark. 380, 11 S. W. 577, 14 Am. St. Rep. 54.

[15] Lawing v. Schaufflu, 162 Tenn. 79, 34 S. W. (2d) 1055, 85 A.L.R. 633; Elder v. Massachusetts Mortg. Co. 159 Wash. 450, 293 P. 711, 85 A.L.R. 638.

Annotation: 85 A.L.R. 646.

In Lawing v. Schaufflu, 162 Tenn. 79, 34 S. W. (2d) 1055, 85 A.L.R. 633, the court held that where a plea in abatement to an attachment was sustained and the attach-

The liability of the obligors in a bond given to procure an attachment may be enforced in the action in which the attachment was issued in some jurisdictions,[16] but in other jurisdictions the bond cannot be enforced in that suit.[17] The view has been taken in some jurisdictions that an attachment defendant may recover damages for the malicious suing out of an attachment or garnishment in the original action in which the attachment was sued out,[18] but in others it has been held that no such recovery can be had in that action.[19]

§ 1020. —**Set-off, Counterclaim, Reconvention, Cross Complaint, Recoupment, Plea in Abatement, etc.**—The majority rule is that there can be no recovery in the attachment or garnishment suit of damages for wrongful attachment on a plea of counterclaim,[20] set-off,[1] recoupment,[2] reconvention,[3] or cross complaint.[4] However, in some jurisdictions such recovery has been allowed in the attachment or garnishment suit on a plea of counterclaim,[5] set-off,[6] reconvention,[7] or cross complaint.[8] In some jurisdictions an attachment

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ment suit was dismissed, the defendant in attachment could not have her damages assessed in the attachment suit, but was limited to an action on the attachment bond. The court further held that Shannon's Code, §§ 5347, 5348, did not authorize assessment of damages on motion in an attachment suit, but referred only to summary judgments against delinquent officials.

In Elder v. Massachusetts Mortg. Co. 159 Wash. 450, 293 P. 711, 85 A.L.R. 638, the court cited with approval earlier Washington decisions to the effect that a claim of damages for wrongful attachment was not a proper subject for adjudication in the action in which the attachment was issued.

[16] Goodbar v. Lindsley, 51 Ark. 380, 11 S. W. 577, 14 Am. St. Rep. 54.
Annotation: 85 A.L.R. 646.

[17] Annotation: 85 A.L.R. 647.

[18] Perez v. Fernandez, 202 U. S. 80, 50 L. ed. 942, 26 S. Ct. 561 (stating the law of Puerto Rico).
Annotation: 85 A.L.R. 647; 29 L.R.A. (N.S.) 274.

In Texas it has been held that exemplary damages can be recovered under a plea of reconvention in the attachment suit. Reed v. Samuels, 22 Tex. 114, 73 Am. Dec. 253.

[19] Goodbar v. Lindsley, 51 Ark. 380, 11 N. W. 577, 14 Am. St. Rep. 54.
Annotation: 85 A.L.R. 647.

[20] Annotation: 85 A.L.R. 648, 664.

The theory of the rule is that a cause of action for damages sustained by the defendant by reason of an attachment wrongfully levied on his property does not arise out of the contract or transaction set forth in the complaint as a foundation of the plaintiff's claim, and is not connected with the subject of the action. Annotation: 85 A.L.R. 651.

[1] Annotation: 85 A.L.R. 654.

In Pennsylvania, the rule stated in the text is followed. Annotation: 85 A.L.R. 655. See also Standard Pa. Prac. Vol. 10.

[2] Annotation: 85 A.L.R. 655.

[3] Annotation: 85 A.L.R. 655.

In Louisiana it has been held that an attachment defendant cannot institute a demand in reconvention for damages arising from the wrongful issuance and levy of an attachment where the plaintiff and the defendant reside in the same parish, but resident defendants have been permitted to recover damages against a foreign corporation under a plea in reconvention in the attachment suit. Annotation: 85 A.L.R. 655.

[4] Annotation: 85 A.L.R. 656.

[5] Annotation: 85 A.L.R. 651.

Such remedy is in the nature of a cross bill pleaded by the attachment defendant in his answer, in which he assumes the position of plaintiff in reconvention and alleges a claim for whatever damages he has suffered by reason of the wrongful attachment. And although the damages are dependent upon the decision in the attachment suit and cannot be known to exist at all until such judgment has been rendered, yet it is claimed that justice is more readily administered and business expedited by trying both issues together, to the end that the court, when vacating the attachment, may award damages to the reconvener at the same time. Under such counterclaim both actual and exemplary damages may be passed upon on the trial of the attachment suit. Annotation: 29 L.R.A.(N.S.) 274; 68 Am. St. Rep. 266, 267.

[6] Annotation: 85 A.L.R. 653.

However, it has been held that an attachment defendant cannot plead as a set-off against the plaintiff's demand damages arising from the wrongful issuance of an attachment sued out after the commencement of the action. Annotation: 85 A.L.R. 655.

[7] Reed v. Samuels, 22 Tex. 114, 73 Am. Dec. 253.
Annotation: 85 A.L.R. 655.
See note 3, supra, this section, as to the Louisiana rule.

[8] Willman v. Friedman, 4 Idaho, 209, 38 P. 937, 95 Am. St. Rep. 59.
Annotation: 85 A.L.R. 656.

In Willman v. Friedman, 4 Idaho, 209, 38 P. 937, 95 Am. St. Rep. 59, the defendant, after procuring the dissolution of an attachment on motion, served with his answer a cross complaint for damages sustained by reason of the wrongful issuance of the attachment. A statute provided that a defendant seeking affirmative relief relating to or depending on the contract or transaction on which action was brought, defendant can recover his damages for wrongful attachment by a plea in abatement.[9]

The view has been taken that an attachment defendant cannot plead a cause of action for malicious prosecution of an attachment as a counterclaim where the attachment proceedings have not terminated.[10] On the other hand, it has been held that exemplary damages can be recovered under a plea of reconvention in the attachment suit.[11]

§ 1021. Technical Form of Action.—The technical form of action for wrongful or malicious attachment or garnishment is of little consequence since the abolition of common-law forms of action in most states. Where it is of consequence, it may be an action on the case,[12] an action for conversion,[13] trespass,[14] action of replevin or to recover possession of the property,[15] or an action for damages,[16] depending upon local statutes and practice. An action for abuse of process or malicious prosecution has also been held to be proper where an attachment was wrongfully and maliciously sued out.[17]

The form of action on an attachment or garnishment bond may be debt, covenant, or simply an action on the bond, depending on local practice.[18]

§ 1022. Remedies of Third Persons.—The owner of property seized under an attachment or garnishment against the property of another can, under certain circumstances, maintain an action against the attachment plaintiff[19] to recover damages arising from the wrongful attachment. He may also maintain an action against the officer making the levy.[20]

In some jurisdictions an attachment bond given on the issuance of an attachment against the defendant's property generally does not inure to the benefit of a third person where property is seized under the attachment, and he can-

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or affecting property to which the action related, could file a cross complaint with his answer, or subsequently by permission of court. The court held that the cause of action set forth in the cross complaint arose out of the transaction which formed the basis of the action in which the attachment was issued, and was properly presented by cross complaint.

[9] Annotation: 85 A.L.R. 657; 29 L.R.A. (N.S.) 274.

[10] Annotation: 85 A.L.R. 653.

[11] Reed v. Samuels, 22 Tex. 114, 73 Am. Dec. 253.

Annotation: 85 A.L.R. 656.

[12] Forrest v. Collier, 20 Ala. 175, 56 Am. Dec. 190; Lawrence v. Hagerman, 56 Ill. 68, 8 Am. Rep. 674; Alexander v. Harrison, 38 Mo. 258, 90 Am. Dec. 431; State use of Roe v. Thomas, 19 Mo. 613, 61 Am. Dec. 580; McReady v. Rogers, 1 Neb. 124, 93 Am. Dec. 333; Shaver v. White, 6 Munf. (Va.) 110, 8 Am. Dec. 730.

Annotation: 85 A.L.R. 659, 663; 81 Am. Dec. 469, 478.

In Shaver v. White, 6 Munf. (Va.) 110, 8 Am. Dec. 730, the court held that case, and not trespass, was the proper remedy.

[13] Englehart v. Sage, 73 Mont. 139, 235 P. 767, 40 A.L.R. 590; Dyett v. Hyman, 129 N. Y. 351, 29 N. E. 261, 26 Am. St. Rep. 533; Wade v. Ray, 67 Okla. 39, 168 P. 447, L.R.A.1918B, 796; Newman v. Garfield, 93 Vt. 16, 104 A. 881, 5 A.L.R. 1507.

Annotation: 40 A.L.R. 594; 85 A.L.R. 660.

The attachment of one person's property to satisfy a claim against another is a conversion of the property, although actual possession of the property is not taken. Englehart v. Sage, 73 Mont. 139, 235 P. 767, 40 A.L.R. 590.

Although conversion lies after the wrongful attachment of property, the action is more in the nature of trespass de bonis asportatis, if not on the case, where the defendant, after procuring the dissolution of the attachment and an order for the return of the property, brings no such action until the property has been seized and sold on the plaintiff's execution against him. Wade v. Ray, 67 Okla. 39, 168 P. 447, L.R.A.1918B, 796.

An officer levying an attachment, at the suit of a creditor of the vendor, upon property sold in bulk without complying with the provisions of the Bulk Sales Law is liable in damages as for a conversion. Newman v. Garfield, 93 Vt. 16, 104 A. 881, 5 A.L.R. 1507.

Generally, goods sold in violation of bulk sales legislation may be attached by a creditor of the vendor. See Vol. 4, p. 618, § 100.

[14] Lamb v. Day, 8 Vt. 407, 30 Am. Dec. 479.

Annotation: 85 A.L.R. 660.

[15] Annotation: 85 A.L.R. 660.

[16] Annotation: 85 A.L.R. 660.

[17] Ames v. Chirurg, 152 Iowa, 278, 132 N. W. 427, 38 L.R.A.(N.S.) 120.

[18] Annotation: 85 A.L.R. 657; 81 Am. Dec. 469.

[19] See supra, § 992.

[20] See supra, § 992.

not maintain an action on the bond.[1] In other jurisdictions it has been held that a person whose property has been seized under an attachment against the property of another generally can maintain an action on the attachment bond.[2] Generally, however, the right of an owner of goods to recover damages from an attachment creditor who caused them to be seized as belonging to another person is held not to be restricted to an action on the bond given by such creditor to the officer.[3] It has been held that he may elect (1) to sue on the bond and recover according to its condition, (2) to sue the plaintiff on the facts of the case and recover according to the statute, precisely as if the plaintiff had given a bond, or (3) to sue for malicious prosecution and recover as at common law, where the attachment was malicious and without probable cause.[4]

Under some statutes a claimant may recover damages for wrongful or malicious attachment or garnishment on intervention.[5] But it has been held that in the absence of a statute permitting it, an owner of property seized under an attachment against the property of another cannot recover damages in the suit in which the attachment was issued.[6] Under this view, statutes allowing intervention by a claimant of attached property are generally construed to authorize only a trial of the right of property, and not to authorize an assessment and award of damages.[7]

It has been held that one whose property has been seized under an attachment issued against the property of another can maintain an action on the levying officer's official bond.[8]

One whose property is wrongfully attached or garnished in an action against another is not deprived of his cause of action for damages by intervention in the attachment suit.[9]

The form of action for wrongful attachment of goods as the property of another is a matter of no great significance under the statutes abolishing distinctions among the forms of action. Trespass,[10] trespass de bonis asportatis,[11] trover and conversion,[12] replevin,[13] action on the case, claim and delivery, malicious abuse of process, and trespass for abuse of process are forms that the remedy has taken in actions not based upon attachment bonds.[14]

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[1] Annotation: 85 A.L.R. 670.

In Louisiana it has been held that a claimant of attached property, who intervenes in the action in which an attachment has issued and establishes his claim, cannot maintain an action on the attachment bond. Annotation: 85 A.L.R. 670.

[2] Annotation: 85 A.L.R. 671.

[3] Dyett v. Hyman, 129 N. Y. 351, 29 N. E. 261, 26 Am. St. Rep. 533.

Annotation: 91 A.L.R. 935.

In Dyett v. Hyman, 129 N. Y. 351, 29 N. E. 261, 26 Am. St. Rep. 533, where a recovery in trover by an assignee against attaching creditors of the assignor was upheld, such creditors having given an indemnity bond, the court said: "The theory presented by the appellants in this case, that the defendants are liable as indemnitors only and are governed by the provisions of their bond, is wholly unfounded. The liability of the defendants rests wholly upon their participation in the original wrong and their liability for its consequences incurred by reason of their complicity in the trespass."

[4] Annotation: 85 A.L.R. 674.

[5] Farmers State Bank v. Hess, 138 Okla. 190, 280 P. 305, 66 A.L.R. 894.

Annotation: 66 A.L.R. 911; 85 A.L.R. 664.

In Farmers State Bank v. Hess, 138 Okla. 190, 280 P. 305, 66 A.L.R. 894, the court held that where property attached had been sold on the application of the plaintiff in the action in which the attachment was issued, without the consent of an interpleading claimant, and the interpleader established his claim, he was entitled to judgment for the value of the property and damages for the retention.

Where the right to the property was decided to be in the intervener, damages were assessed, limited to the value of the property at the time of the levy, with interest from that time, under a statute giving the court the right to assess damages by reason of the levy if the intervener is successful. Annotation: 66 A.L.R. 912; Ann. Cas. 1915B, 1220.

[6] Annotation: 85 A.L.R. 665.

[7] Annotation: 85 A.L.R. 666.

[8] Annotation: 85 A.L.R. 671.

See SHERIFFS [Also 24 R. C. L. p. 911].

[9] Englehart v. Sage, 73 Mont. 139, 235 P. 767, 40 A.L.R. 590.

[10] Allen v. Crary, 10 Wend. (N. Y.) 349, 25 Am. Dec. 566 (execution creditor).

Annotation: 85 A.L.R. 669; 91 A.L.R. 935.

[11] Phillips v. Hall, 8 Wend. (N. Y.) 610, 24 Am. Dec. 108.

§ 1023. Contribution among Attaching or Garnishing Creditors as to Liability for Wrongful Attachment.—It has been held that where several attaching creditors incurred liability for wrongful attachment, the amount thereof should be apportioned, and they should be required to contribute according to their respective interests in the matter which gave rise to the liability, i. e., according to the ratio which the several attachment liens bore to each other.[15] However, where several creditors secured on the same day separate attachments against the property of their debtor for their separate debts, each of them giving the sheriff an indemnifying bond, and the property was seized and sold by the sheriff under all of the attachments together, and one of the attaching creditors paid the amount of a judgment which was recovered against the sheriff for wrongful attachment, it was held that the liability of the attaching creditors on account of the attachments was a common liability for a single wrong, viz., the seizure and sale of the property by the sheriff, acting as their common agent, and that each of them was bound to contribute equally to the satisfaction of the judgment, without regard to the amount of their respective debts against the original attachment debtor.[16]

2. Parties

§ 1024. Generally.—The defendant in attachment whose property was seized under the writ is generally the person entitled to sue for the wrongful issuance of the process.[17] He may maintain the action for the benefit of others for whose indemnity the bond was given,[18] for example, for the benefit of the garnishee.[19] However, the person against whom the attaching creditor's malice was directed, although he is not the defendant, is the only one who is entitled to institute an action for malicious attachment.[20] Furthermore, title or right to possession constitutes the foundation of an action for wrongful attachment; consequently, such an action cannot be maintained by one without title or right to possession.[1]

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[12] Englehart v. Sage, 73 Mont. 139, 235 P. 767, 40 A.L.R. 590; Dyett v. Hyman, 129 N. Y. 351, 29 N. E. 261, 26 Am. St. Rep. 533; Newman v. Garfield, 93 Vt. 16, 104 A. 881, 5 A.L.R. 1507.
Annotation: 40 A.L.R. 594; 85 A.L.R. 670; 91 A.L.R. 935.

The attachment of one person's property to satisfy a claim against another is a conversion of the property, although actual possession of the property is not taken. Englehart v. Sage, 73 Mont. 139, 235 P. 767, 40 A.L.R. 590.

Where by statute a debt may be the subject of attachment, its wrongful attachment to satisfy a claim against a stranger is a conversion for which trover will lie, although the money is not paid over to the attachment officer or into court. Englehart v. Sage, 73 Mont. 139, 235 P. 767, 40 A.L.R. 590. Annotation: 40 A.L.R. 594.

[13] Allen v. Crary, 10 Wend. (N. Y.) 349, 25 Am. Dec. 566.

[14] Annotation: 91 A.L.R. 935.

[15] First Nat. Bank v. Avery Planter Co. 69 Neb. 329, 95 N. W. 622, 111 Am. St. Rep. 541.
Annotation: 64 A.L.R. 223.

[16] Vandiver v. Pollak, 107 Ala. 547, 19 So. 180, 54 Am. St. Rep. 118.
Annotation: 64 A.L.R. 223.

[17] Wheeler Sav. Bank v. Tracey, 141 Mo. 252, 42 S. W. 946, 64 Am. St. Rep. 505.

An assignee of a mortgage who interpleaded in the attachment suit, setting up his right to certain accounts included in the levy, on a part of which he recovered, without making any claim to the goods covered by the mortgage, cannot maintain an action. Ibid.

[18] Barnes v. Webster, 16 Mo. 258, 57 Am. Dec. 232.

[19] Ibid.

[20] See Wood v. Barker, 37 Ala. 60, 76 Am. Dec. 346.

[1] Halliday v. Hamilton, 11 Wall. (U. S.) 560, 20 L. ed. 214; Stevenson v. Palmer, 14 Colo. 565, 24 P. 5, 20 Am. St. Rep. 295; Palmer v. United States, 41 App. D. C. 341, Ann. Cas. 1915B, 1216; Dixon v. White Sewing Mach. Co. 128 Pa. 397, 18 A. 502, 5 L.R.A. 659, 15 Am. St. Rep. 683.

If a vendee, prior to actual levy, claims the property as his, such an act constitutes taking possession of the property, and the

A purchaser for value in good faith and without notice that an attachment had been levied against the property purchased may properly be awarded damages where the attachment was wrongful.[2]

The rule has been laid down that an administrator cannot subject the estate to an action for damages by his tortious conduct in improperly suing out a writ of attachment, but is liable to respond personally for the injury. It has been held that he is properly sued in his individual capacity, even though in suing out the attachment he described himself as administrator.[3]

§ 1025. Principal or Agent as Defendant.—A principal, upon the general principle of respondeat superior, may be held liable for the act of his agent in an action for wrongful attachment.[4] The rule is applicable to the wrongful attachment of the property of a person other than the attachment defendant.[5] To render the principal liable the agent ordinarily must have acted by his direction and in accordance with specific instructions.[6] If an attachment sued out by an agent is merely wrongful, and the act is ratified by his principal with knowledge, the latter is undoubtedly liable for actual damages the same as though he were acting by himself alone. And if the attachment is sued out by an agent acting maliciously and without probable cause, as well as wrongfully, and the act is ratified by the principal with full knowledge of the facts, the recovery is not limited to actual damages, but exemplary damages also may be recovered against the principal. To make the principal liable in exemplary damages because of the malice of his agent, the evidence must always show that he had knowledge of, and participated in, the malice, or afterwards ratified, adopted, or approved the malicious acts.[7] In the absence of proof of such participation in, or ratification or adoption of, such malicious act by the principal, the court is not warranted in submitting to the jury the issue as to his liability for exemplary damages on that ground.[8] Thus, a principal is not liable for punitive damages for an attachment sued out by his attorney, where he knew nothing of it until it had been served, and, with the first opportunity, dismissed the same at his cost.[9] But if the plaintiff gave the attorney full authority to use his name in the commencement of a suit, he cannot shield himself in this way.[10]

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vendor cannot thereafter maintain an action against the officer making the wrongful levy, because possession is the foundation of the action. Palmer v. United States, 41 App. D. C. 341, Ann. Cas. 1915B, 1216.

Where the title to goods has passed to the consignee, the consignee may maintain an action of wrongful attachment against a creditor of the consignor who attached the goods. Halliday v. Hamilton, 11 Wall. (U. S.) 560, 20 L. ed. 214.

To maintain trespass against an officer for a levy on goods, it is essential that the plaintiff be in actual possession or have the right of taking possession at the time of the trespass. Dixon v. White Sewing Mach. Co. 128 Pa. 397, 18 A. 502, 5 L.R.A. 659, 15 Am. St. Rep. 683.

Sureties on a delivery bond under which attached property has been surrendered to the defendant by the officer levying the writ have no right to the possession thereof before the entry of final judgment in the action, and hence cannot maintain an action of replevin against an officer who subsequently seizes the property under another writ. Stevenson v. Palmer, 14 Colo. 565, 24 P. 5, 20 Am. St. Rep. 295.

[2] Dorrington v. Jacobs, 213 Wis. 521, 252 N. W. 307, 91 A.L.R. 737.

[3] Annotation: 44 A.L.R. 674.

[4] Brock v. Berry, 132 Ala. 95, 31 So. 517, 90 Am. St. Rep. 896; Perez v. Fernandez, 202 U. S. 80, 50 L. ed. 942, 26 S. Ct. 561 (under Puerto Rico Code).

Annotation: 91 A.L.R. 930; 1 Ann. Cas. 723.

[5] Annotation: 91 A.L.R. 931.

See also supra, § 992, as to cause of action against attaching creditor for act of attaching officer in attaching property of person other than defendant.

[6] Brock v. Berry, 132 Ala. 95, 31 So. 517, 90 Am. St. Rep. 896.

Annotation: 91 A.L.R. 930.

[7] Annotation: 29 L.R.A.(N.S.) 279, 280; 68 Am. St. Rep. 275.

[8] Annotation: 68 Am. St. Rep. 275.

[9] Annotation: 29 L.R.A.(N.S.) 280; 68 Am. St. Rep. 275; 81 Am. Dec. 477.

[10] Annotation: 81 Am. Dec. 477.

If an agent who makes the affidavit and bond in attachment acts maliciously in doing it, he, of course, is liable therefor.[11]

§ 1026. Corporation Defendant.—An action may be maintained against a private corporation to recover damages for wrongfully, maliciously, and without just or probable cause, obtaining and levying an order of attachment upon personal property, and exemplary damages may be recovered therein.[12] A municipal corporation may not be held liable in an action for wrongful attachment unless its responsibility may be shown to exist by virtue of a statute.[13]

§ 1027. Joint Defendants.[14]—It seems that where several independent writs are executed simultaneously by the same officer, a rule has been developed of holding the several plaintiffs jointly liable for trespass.[15] This rule would seem to be highly artificial and not in accord with the general rule as to independent tort-feasors.[16] It has been held that where attachments were simultaneously sued out by different creditors acting through the same attorney and levied by the same officer on the same property at the same time, but so that one constituted a prior lien on the personalty and the other a prior lien upon the realty attached, the creditors were not joint wrongdoers, since neither was interested in the success of the other, and their actions, although simultaneous, were not for a common purpose.[17]

§ 1028. In Action on Bond.—The proper and only party who can sue on an attachment bond is, as a general rule, the defendant.[18] However, as will appear in the following discussion, it is not the universal rule, at least where there are other obligees in the bond. Accordingly, the rule has been stated that to authorize a recovery on an attachment bond, all the obligees named therein must join as plaintiffs, in the capacity in which they are named, for the use of such as claim to have been injured,[19] and where the bond is in favor of all of several defendants, the action on the bond must be in the name of all, though the levy of the attachment was on the separate property of each.[20] The rule is the same in the case of a bond given to a partnership on attachment of partnership property. But it has been held that a separate right of action accrues to those of several defendants who alone were injured by the attachment, and that it is not necessary that the defendants against whom the attachment was rightfully obtained should be joined either as plaintiffs or as defendants. From the fact that in most states the statute requires the bond to be given to the people, the people, as the nominal obligee, is often the nominal plaintiff, but the action is always to be brought, if not in the name of the defendant in attachment, at least for his use and benefit.[1] While it is true as a general rule that the action on a contract, whether by parol or under seal or of record, should be brought in the name of the party in whom the legal interest is vested, yet if the obligee is a mere trustee, the prevailing practice permits the suit to be maintained by the cestuis que trust in the name of the obligee or in their own names, and this rule applies to actions on bonds given in attachment suits as well as in other legal proceedings.[2] Hence, if a bond to procure an attachment is given to the sheriff or other officer, the sureties may be held liable by the prevailing party in an action brought in the name of the officer.[3] Similarly, the obligee in an attachment bond may maintain an action on it for the benefit of a garnishee when the attachment was dissolved, the suit dismissed, and the garnishee discharged.[4]

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[11] Annotation: 68 Am. St. Rep. 275.

[12] Annotation: 29 L.R.A.(N.S.) 280.

[13] Reed v. Howell County, 125 Mo. 58, 28 S. W. 177, 46 Am. St. Rep. 466.

[14] As to joinder of persons liable on bond, see infra, § 1029.

[15] Conrad v. Fisher, 37 Mo. App. 352, 8 L.R.A. 147.

Annotation: 9 A.L.R. 944, s. 35 A.L.R. 411, and 91 A.L.R. 762; 6 L.R.A.(N.S.) 598.

Where attaching creditors were joint actors, all of them are guilty of a conversion in case any of the levies are adjudged tortious. Conrad v. Fisher, 37 Mo. App. 352, 8 L.R.A. 147.

As to contribution among attaching or garnishing creditors as to liability for wrongful attachment or garnishment, see supra, § 1023.

[16] Annotation: 9 A.L.R. 944, s. 35 A.L.R. 411, and 91 A.L.R. 762.

[17] Annotation: 9 A.L.R. 944, s. 35 A.L.R. 411, and 91 A.L.R. 762.

[18] Annotation: 64 L.R.A. 605; 81 Am. Dec. 469.

[19] Painter v. Munn, 117 Ala. 322, 23 So. 83, 67 Am. St. Rep. 170.

[20] Annotation: 81 Am. Dec. 469.

See BONDS [Also 4 R. C. L. p. 45].

[1] Annotation: 81 Am. Dec. 469, 470.

§ 1029. —**Defendants.**[5]—The principal obligors and sureties on an attachment or garnishment bond may, in the discretion of the obligees, be sued jointly[6] or separately[7] in an action to enforce the obligation. However, it has been held that if the principal is sued alone, the sureties cannot be made liable upon the judgment, for they are not then parties to it.[8]

3. Pleading

§ 1030. **Generally.**—In an action seeking to enforce the common-law remedy for malicious attachment, the declaration or complaint must contain substantially the same allegations as are essential in stating a cause of action for malicious prosecution,[9] unless it is in the nature of an action for abuse of process, in which case the allegations will be the same generally as in such an action.[10] In an action seeking to enforce statutory liability for wrongful attachment, the complaint should set out fully the statutory cause of action.[11] Allegations that the writ was sued out maliciously and without probable cause are indispensable where the action is based upon malicious attachment[12] or where the plaintiff wishes to recover exemplary damages.[13] In setting out these elements the declaration need not allege malice and want of probable cause in terms; it will be deemed sufficient if it contains language of the same import as the words in question.[14] Thus, a complaint which alleges that the affidavit for the attachment was wholly false in every particular, and that the plaintiff in the attachment suit knew it to be so when he made it, is sufficient as against a general objection at the trial to the admission of any evidence under it.[15] Where the action is based upon the statute, and only actual damages are claimed, it is unnecessary to allege malice and want of probable cause,[16] unless the statute makes want of probable cause an element of such a cause of action.[17]

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[2] Wortsman v. Wade, 77 Ga. 651, 4 Am. St. Rep. 102; Barnes v. Webster, 16 Mo. 258, 57 Am. Dec. 232.

Annotation: 64 L.R.A. 606.

[3] Huff v. Hutchinson, 14 How. (U. S.) 586, 14 L. ed. 553; Rice v. Wood, 61 Ark. 442, 33 S. W. 636, 31 L.R.A. 609; Wortsman v. Wade, 77 Ga. 651, 4 Am. St. Rep. 102.

Where a bond was given in the name of a marshal, and his successor in office, the court held that a suit thereon was well brought in the name of the marshal, though he had been succeeded in office, for the name of the obligee, being used as a matter of form, the action could be brought in his name or in that of his successor. Huff v. Hutchinson, 14 How. (U. S.) 586, 14 L. ed. 553.

[4] Barnes v. Webster, 16 Mo. 258, 57 Am. Dec. 232.

[5] See also supra, § 994, as to liability of surety.

[6] Rice v. Wood, 61 Ark. 442, 33 S. W. 636, 31 L.R.A. 609.

[7] Rice v. Wood, 61 Ark. 442, 33 S. W. 636, 31 L.R.A. 609; McReady v. Rogers, 1 Neb. 124, 93 Am. Dec. 333 (on theory of several wrongdoers).

[8] Annotation: 81 Am. Dec. 470.

[9] For an approved form of declaration, see Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 59.

See supra, § 984.

[10] See supra, § 984.

[11] See supra, § 985.

[12] Beyersdorf v. Sump, 39 Minn. 495, 41 N. W. 101, 12 Am. St. Rep. 678; Young v. Gregory, 3 Call (Va.) 446, 2 Am. Dec. 556.

Annotation: 7 Ann. Cas. 548; 81 Am. Dec. 478.

[13] United States Fidelity & G. Co. v. Miller, 218 Ala. 158, 117 So. 668, citing R. C. L.; Painter v. Munn, 117 Ala. 322, 23 So. 83, 67 Am. St. Rep. 170; Reliable Mut. Hail Ins. Co. v. Rogers, 61 Okla. 226, 160 P. 914, L.R.A.1917B, 350.

[14] Spaids v. Barrett, 57 Ill. 289, 11 Am. Rep. 10. Compare Young v. Gregory, 3 Call (Va.) 446, 2 Am. Dec. 256.

Annotation: 81 Am. Dec. 479.

In Forrest v. Collier, 20 Ala. 175, 56 Am. Dec. 190, it was held that an averment that the attachment was done "wrongfully and fraudulently, to injure," took the place of an averment of malice.

Generally, as to malice and want of probable cause as elements of the cause of action, see supra, §§ 986, 987.

The allegations concerning damages should show the real damages sustained and intended to be relied on.[18] The declaration or complaint is good without an averment of special damage, as the law implies nominal damages from the act complained of,[19] but if the plaintiff wishes to recover special damages, he must embody appropriate averments in his pleading.[20] Damages to credit, where recoverable, are special damages and must be pleaded.[1] The same is true of damages to reputation [2] and of attorneys' fees for defending the attachment or garnishment.[3]

§ 1031. In Action on Bond.—Pleadings in an action on the bond are governed by the general principles stated in the preceding section, as modified according to the cause of action or liability on the bond.[4] Accordingly, the declaration or complaint need not set out the proceedings in the attachment or garnishment,[5] for the obvious reason that the obligors in such a bond are estopped from setting up irregularities and defects in the attachment or garnishment proceedings as a defense to such an action.[6] Hence, failure to allege that a proper affidavit was filed to procure the issuance of the writ of attachment does not render the complaint insufficient.[7] However, it is a general rule that the declaration should show the execution of the bond, that the proceedings in attachment were injurious to the plaintiff, the nature of the damages, and that they have not been paid.[8] Furthermore, it must be alleged that no ground for the attachment or garnishment existed, where the absence of such ground constitutes the cause of action on the bond.[9] A complaint which alleges the execution of the bond by the principal, and sets out a copy thereof with the names of the sureties appended, but fails to allege that they joined in its execution, is insufficient on their demurrer.[10]

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[15] Beyersdorf v. Sump, 39 Minn. 495, 41 N. W. 101, 12 Am. St. Rep. 678.

[16] Reliable Mut. Hail Ins. Co. v. Rogers, 61 Okla. 226, 160 P. 914, L.R.A.1917B, 350, citing R. C. L.
Annotation: 38 L.R.A.(N.S.) 121.

[17] See supra, § 987.

[18] Annotation: 81 Am. Dec. 470.

[19] Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 59.

[20] First Nat. Bank v. Cox, 82 Okla. 129, 198 P. 579, citing R. C. L.
Annotation: 81 Am. Dec. 471.

[1] Kyd v. Cook, 56 Neb. 71, 76 N. W. 524, 71 Am. St. Rep. 661.
Annotation: 54 A.L.R. 455.
A complaint specifically alleging that the plaintiff's credit was injured and destroyed because of the fact that the sheriff attached and removed his property and locked up and closed his place of business is broad enough to admit evidence of all damages sustained by the plaintiff in consequence of the wrongful attachment, including his loss of character, credit, and business. Kyd v. Cook, 56 Neb. 71, 76 N. W. 524, 71 Am. St. Rep. 661.

[2] **If there is no averment of particular damage resulting** from the loss of reputation, credit, or business, or of the withdrawal of particular customers, proof of such loss, if properly objected to, is not admissible. Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 59.

[3] Annotation: 25 A.L.R. 599, s. 71 A.L.R. 1463.
In several cases, however, it has been held that the allegations were sufficient to authorize recovery of attorneys' fees without claiming such fees in so many words. It has been held that even if the petition was defective in not specifically alleging what attorney's fee had been paid or agreed to be paid for defending the attachment, the defect, if any, was cured by the answer, verdict, and judgment. It has also been said, with respect to the allowance of attorneys' fees for wrongful attachment, that fees can be recovered for one firm of lawyers only, unless the jury is satisfied by the evidence that the defendant in the case required more than one, and that the defendant, who had set up a cross action for damages, could not swell the damages to be paid by the plaintiff by employing an unnecessary number of counsel. Annotation: 25 A.L.R. 599, s. 71 A.L.R. 1463.

[4] As to liability on bond, see supra, §§ 993, 994.

[5] Brown v. Tidrick, 14 S. D. 249, 85 N. W. 185, 86 Am. St. Rep. 754.

[6] See supra, § 996.

[7] Brown v. Tidrick, 14 S. D. 249, 85 N. W. 185, 86 Am. St. Rep. 754.
It is presumed that a proper affidavit for attachment was filed with the clerk, if it is stated in the complaint that the plaintiff made an application for a warrant of attachment and the warrant was issued. Brown v. Tidrick, 14 S. D. 249, 85 N. W. 185, 86 Am. St. Rep. 754.

The general rules stated in the preceding section as to allegations of special damages apply to a complaint in an action on the bond. When exemplary damages are claimed, the complaint, in addition to averring that the attachment was wrongfully sued out, must negative the sworn ground upon which the attachment issued, and aver that it was sued out without probable cause for believing the sworn ground to be true. But this averment is not necessary where only actual damages are, or can be, claimed.[11]

4. Evidence

§ 1032. Generally.—The rules of evidence discussed generally in another title[12] are applicable in actions involving attachments and garnishments. The reader is referred to the general discussion of the subject for the general rules. Here only specific applications to actions arising out of attachment and garnishment are considered.

§ 1033. Presumptions and Burden of Proof.—Certain presumptions arise in attachment and garnishment actions as in other cases.[13] Possession raises a presumption of ownership,[14] and title, having been proved in a person, is presumed to continue until evidence of a parting with title is introduced.[15]

The burden of proof rests, as it usually does, on the party asserting the affirmative of the issue, usually the plaintiff, to establish the elements constituting the cause of action.[16] In an action for wrongful attachment he must show the existence of these elements,[17] including lack of probable cause for the attachment or garnishment, where this is an element of the cause of action. Even though probable cause is set up as a defense, the burden is still on the plaintiff to prove its nonexistence.[18]

In an action by a third person for wrongful attachment of his property, the burden of proving title to the property rests upon him.[19]

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[8] Annotation: 81 Am. Dec. 470.

[9] Painter v. Munn, 117 Ala. 322, 23 So. 83, 67 Am. St. Rep. 170.

[10] Seattle Crockery Co. v. Haley, 6 Wash. 302, 33 P. 650, 36 Am. St. Rep. 156.

[11] Painter v. Munn, 117 Ala. 322, 23 So. 83, 67 Am. St. Rep. 170.

Generally, exemplary damages for malicious attachment or garnishment are not recoverable in an action on the attachment bond. See supra, § 1007.

[12] See Evidence [Also 10 R. C. L. p. 847].

The introduction by the defendant, in an action on an attachment bond, of evidence of the plaintiff's insolvency at the time of the issuance of the attachment is no ground for complaint by the plaintiff, where the plaintiff first introduced evidence of his solvency, and the court afterwards ruled out all the testimony on the subject. Burton v. Knapp, 14 Iowa, 196, 81 Am. Dec. 465.

[13] When an officer justifies the holding of goods under a writ of attachment valid upon its face, the recital of indebtedness in the affidavit raises a presumption of such indebtedness. If this presumption is rebutted, it then devolves upon the officer to prove the indebtedness by other evidence than the affidavit; but in the absence of such rebutting proof, the attachment papers are a sufficient showing upon the part of the officer to enable him to contest the title of the party seeking to reclaim the goods taken, whether the action is replevin, trespass, or trover. Treat v. Dunham, 74 Mich. 114, 41 N. W. 876, 16 Am. St. Rep. 616.

[14] Wipperman Mercantile Co. v. Robbins, 23 N. D. 208, 135 N. W. 785, Ann. Cas. 1914D, 682.

[15] Preston v. Newcomb, 149 Mich. 512, 113 N. W. 29, 119 Am. St. Rep. 691.

[16] W. B. Moses & Sons v. Lockwood, 54 App. D. C. 115, 295 F. 936, 33 A.L.R. 1467.

Annotation: 81 Am. Dec. 472, 477.

[17] Ames v. Chirurg, 152 Iowa, 278, 132 N. W. 427, 38 L.R.A.(N.S.) 120.

Annotation: 38 L.R.A.(N.S.) 120, s. L.R.A. 1915A, 541; 81 Am. Dec. 472, 477.

[18] Annotation: 81 Am. Dec. 472.

[19] Wipperman Mercantile Co. v. Robbins

§ 1034. Admissibility.—Questions relating to the admissibility of evidence in actions arising out of attachment or garnishment have raised a multitude of questions, which are set out in the footnote.[20] The general rule that evidence, in order to be admissible, must be material applies.[1]

Expenses and attorneys' fees incurred in seeking the dissolution of an attachment or garnishment constitute an element of recovery in an action for wrongful or malicious attachment or garnishment, whether or not such an action is brought on the attachment or garnishment bond.[2] Consequently, evidence of such expenses is generally admissible in such an action.[3] The contract price for such services is not conclusive on the question of the amount of attorneys' fees recoverable so far as the defendant in that action is concerned, but proof of such agreement is competent for the jury, with other evidence tending to show what is, in fact, a reasonable compensation.[4] Direct evidence of the facts sought to be proved is admissible, but direct proof is not always necessary.[5]

§ 1035. —Writ and Record.—The writ and return and the record and proceedings in the attachment suit are competent evidence in actions for wrongful or malicious attachment.[6] In an action on the bond, such record is competent evidence against the sureties.[7]

§ 1036. —Admissions and Declarations.—Admissions and declarations are

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23 N. D. 208, 135 N. W. 785, Ann. Cas. 1914D, 682.

[20] **In an action for wrongful attachment,** evidence of profits derived from the conduct of his poolroom, run in connection with the store from which the goods were taken, was properly excluded, where the pool tables and their appurtenances were not taken and the plaintiff continued to carry on some business. Sterling v. Marine Bank, 120 Md. 396, 87 A. 697, Ann. Cas. 1915A, 1219.

A judgment against a plaintiff in attachment is not admissible in evidence for the purpose of showing that there was no indebtedness due, at the time of issuing the writ of attachment, from the defendant to the plaintiff, until four days after the rendition of the verdict upon which the judgment is based. Treat v. Dunham, 74 Mich. 114, 41 N. W. 876, 16 Am. St. Rep. 616.

In an action against a levying officer for the attachment of a carload of poultry, claimed by the plaintiff as his property, evidence of the presence in the car at the time of levy of wild game belonging to the attachment defendant is admissible. Wipperman Mercantile Co. v. Robbins, 23 N. D. 208, 135 N. W. 785, Ann. Cas. 1914D, 682.

In an action against an officer for the attachment of goods claimed by the plaintiff, where it is shown that wild game belonging to the attachment defendant, which was taken from the car containing the attached goods, was found on the plaintiff's premises, evidence that the plaintiff, on the discovery of the wild game on his premises, notified the proper authorities, who immediately took possession thereof, is properly excluded as immaterial. Ibid.

In an action to recover for a wrongful levy, certain acts occurring after the levy, tending to establish the surreptitious removal by the defendant in attachment, with the knowledge and consent of the persons claiming to own the property, of a part of the personal property levied upon, are properly received in evidence, upon a sufficient foundation laid therefor, as being material to the title and possession of the personal property levied upon. Ibid.

Where a mortgagee of chattels brings trespass against an officer who levied on part of them while in the plaintiff's possession by virtue of an attachment against the mortgagor, and the defendant claims that enough property was left in the plaintiff's possession to satisfy the mortgage, the plaintiff may show that a part of the property left with him did not belong to the mortgagor, but to a third person. Ward v. Henry, 19 Wis. 77, 88 Am. Dec. 672.

[1] Sterling v. Marine Bank, 120 Md. 396, 87 A. 697, Ann. Cas. 1915A, 1219; Treat v. Dunham, 74 Mich. 114, 41 N. W. 876, 16 Am. St. Rep. 616.

In an action for the wrongful attachment of merchandise, the court properly refused to permit the plaintiff to state from whom he purchased his stock, such evidence being immaterial. Sterling v. Marine Bank, 120 Md. 396, 87 A. 697, Ann. Cas. 1915A, 1219.

[2] See supra, § 1014.

[3] Plymouth Gold Min. Co. v. United States Fidelity & G. Co. 35 Mont. 23, 88 P. 565, 10 Ann. Cas. 951.

[4] Plymouth Gold Min. Co. v. United States Fidelity & G. Co. 35 Mont. 23, 88 P. 565, 10 Ann. Cas. 951.

[5] W. B. Moses & Sons v. Lockwood, 54 App. D. C. 115, 295 F. 936, 33 A.L.R. 1467 (direct proof of malice and want of probable cause is not necessary).

[6] Donnell v. Jones, 17 Ala. 689, 52 Am. Dec. 194.

Annotation: 81 Am. Dec. 471.

[7] Raver v. Webster, 3 Iowa, 502, 66 Am. Dec. 96.

admissible in certain cases,[8] as, for example, to show the reason of the plaintiff in the attachment action for having it issued.[9] But declarations of the plaintiff in attachment long after the attachment was issued and without any evidence tending to show that such declarations related directly to the act of suing out the attachment are inadmissible.[10]

Declarations of the attachment defendant relating to the ownership of the attached property are admissible in favor of the plaintiff in attachment or the levying officer when accompanied by acts of ownership, such as possession of the property.[11] Such declarations are admissible, according to the weight of authority, even as against a third party claiming title.[12] In a few jurisdictions, however, such evidence is not admissible as against a third person.[13]

Declarations of a third party as to ownership made in the presence of a party to the attachment suit may be admissible as a part of the res gestæ.[14]

Admissions of an agent, to be admissible, must be within the scope of the agent's authority.[15]

§ 1037. Weight and Sufficiency of Evidence.—The weight and sufficiency of evidence in any particular case are questions that cannot be answered generally. They are questions which depend upon the facts of the particular case.[16]

Proof of the levying of an attachment is not sufficient to show injury so as to raise a liability on the bond in case the levy proves to have been wrongful, under a statute requiring want of probable cause as a condition to such liability.[17]

Title may be proved in various ways. It is proved by a purchase in bankruptcy supported by a written agreement between the purchaser and the bankrupt recognizing such ownership.[18]

5. TRIAL

§ 1038. Generally.—The law of trial applies generally to the trial of an action for wrongful or malicious attachment or garnishment.[19] Instructions must be given upon the issues and the applicable law and upon the controlling, basic, main, or fundamental facts.[20] Instructions must have some support in the evidence; otherwise, they should not be given.[1]

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[8] Wood v. Barker, 37 Ala. 60, 76 Am. Dec. 346; Raver v. Webster, 3 Iowa, 502, 66 Am. Dec. 96 (admission of act on which attachment action was founded, in action on a bond for wrongful attachment).
Annotation: 81 Am. Dec. 471.

[9] **Admissions of the defendant at the time of the issuance of the attachment** as to his reason for having it issued are admissible. Wood v. Barker, 37 Ala. 60, 76 Am. Dec. 346.

[10] Burton v. Knapp, 14 Iowa, 196, 81 Am. Dec. 465.

[11] Avery v. Clemons, 18 Conn. 306, 46 Am. Dec. 323; Wipperman Mercantile Co. v. Robbins, 23 N. D. 208, 135 N. W. 785, Ann. Cas. 1914D, 682.

[12] Avery v. Clemons, 18 Conn. 306, 46 Am. Dec. 323.
Annotation: Ann. Cas. 1914D, 690.

[13] Annotation: Ann. Cas. 1914D, 693.

[14] Wipperman Mercantile Co. v. Robbins, 23 N. D. 208, 135 N. W. 785, Ann. Cas. 1914D, 682.

[15] See EVIDENCE [Also ADMISSIONS AND DECLARATIONS, 1 R. C. L. p. 507, §§ 48 et seq.].

Statements made by the plaintiff's attorney after the attachment was sued out are irrelevant and inadmissible as proof of the motive of the plaintiff in suing out the writ. Empire Mill Co. v. Lovell, 77 Iowa, 100, 41 N. W. 583, 14 Am. St. Rep. 272.

[16] **Evidence is insufficient** to take issue of the value of corn attached to the jury where undisputed testimony of the value is given and the person who ordered the corn testifies that he was ready to take it at such price. First Nat. Bank v. McSwain, 93 S. C. 30, 75 S. E. 1106, Ann. Cas. 1914D, 809.

[17] Ames v. Chirurg, 152 Iowa, 278, 132 N. W. 427, 38 L.R.A.(N.S.) 120.

[18] Preston v. Newcomb, 149 Mich. 512, 113 N. W. 29, 119 Am. St. Rep. 691.

[19] See TRIAL [Also 26 R. C. L. p. 1008].

[20] Brand v. Hinchman, 68 Mich. 590, 36 N. W. 664, 13 Am. St. Rep. 362 (as to probable cause); Wipperman Mercantile Co. v. Robbins, 23 N. D. 208, 135 N. W. 785, Ann. Cas. 1914D, 682 (as to burden of proof of title where in issue).
See TRIAL [Also INSTRUCTIONS, 14 R. C. L. p. 723].

The province of court and jury is the same in such an action as in other actions. Speaking generally, questions of law are for the court, questions of fact for the jury.

Malice is always a question of fact exclusively for the jury.[2] While it is an inference which may be drawn from proof of the want of probable cause,[3] such inference is one of fact to be drawn by the jury. The jury is not required to draw the inference merely because they may find a want of probable cause.[4] What facts, and whether particular facts, constitute probable cause are questions of law to be determined by the court. The province of the jury is to find the facts.[5] Accordingly, it is for the jury to determine whether the defendant (attaching creditor) honestly believed that he had probable cause,[6] the test being what careful and prudent business men would have done under like circumstances.[7]

The question as to what is a reasonable attorney's fee which may be recovered in an action on the attachment bond for procuring the discharge of the attachment is a question for the jury; and to warrant submission of this question to the jury, evidence which shows the services rendered and the amount paid to the attorneys is sufficient. While it is common to offer proof in such cases by attorneys as to what is a reasonable fee, yet the jury is not concluded by such testimony and may fix the fee at a different sum. And even though testimony of the plaintiff's attorney in an action on the attachment bond as to what was a reasonable compensation for his services in obtaining a dissolution of the attachment was uncontradicted, it was held erroneous for the court to direct a verdict in favor of the plaintiff for attorneys' fees, since the question as to what was a reasonable fee was for the jury.[8] It is provided by statute in at least one state that actual damages sustained, including reasonable attorneys' fees, from wrongful attachment are to be fixed by the court in an action on the bond.[9]

The extent of the damage to credit is ordinarily, it seems, a question for the jury.[10]

As a rule, the amount of exemplary damages is discretionary with the jury.[11] The court ordinarily will not disturb a verdict on the ground that it is excessive, and the sum must be manifestly unjust and grossly disproportionate to the injury to justify any interference.[12] Nor will the award by the jury be disturbed on appeal as excessive except in extreme cases.[13]

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[1] W. B. Moses & Sons v. Lockwood, 54 App. D. C. 115, 295 F. 936, 33 A.L.R. 1467.

[2] See Malicious Prosecution [Also 18 R. C. L. p. 30, § 17].

[3] Brand v. Hinchman, 68 Mich. 590, 36 N. W. 664, 13 Am. St. Rep. 362.

Annotation: 38 L.R.A.(N.S.) 127, s. L.R.A. 1915A, 543; 68 Am. St. Rep. 268; 81 Am. Dec. 477.

[4] Annotation: 81 Am. Dec. 477.

See Malicious Prosecution [Also 18 R. C. L. p. 31, § 17].

[5] See Malicious Prosecution [Also 18 R. C. L. p. 58, § 39].

[6] Brand v. Hinchman, 68 Mich. 590, 36 N. W. 664, 13 Am. St. Rep. 362.

[7] See supra, § 986.

[8] Annotation: 25 A.L.R. 600, s. 71 A.L.R. 1463.

[9] **The Iowa statute** (Code, § 2961), for example, provides that "in an action on such bond, the plaintiff therein may recover if he shows that the attachment was wrongfully sued out, and that there was no reasonable cause to believe the ground upon which the same was issued to be true, the actual damages sustained, and reasonable attorneys' fees, to be fixed by the court." The statute has been held constitutional, it being held that the legislature might authorize the court to fix the amount of attorneys' fees, without submitting the question to a jury. The decisions construing the Iowa statute are somewhat confused, as the court has admitted in the more recent cases. Annotation: 25 A.L.R. 602, s. 71 A.L.R. 1464.

[10] Annotation: 54 A.L.R. 451.

[11] Annotation: 29 L.R.A.(N.S.) 281.

[12] Annotation: 29 L.R.A.(N.S.) 281; 81 Am. Dec. 479.

[13] International Harvester Co. v. Iowa

6. Judgments

§ 1039. Generally.—Judgments in actions for wrongful or malicious attachment or garnishment are in the same substance and form and have the same operation and effect as judgments in other cases generally.[14] In an action in debt on an attachment bond, final judgment should be rendered on the merits as in other cases and, if for the plaintiff, should be rendered for the debt mentioned in the declaration, so far as it has been sustained, with costs, and execution awarded accordingly.[15]

7. Costs

§ 1040. Generally.—The allowance and taxation of costs are the same generally in actions for wrongful or malicious attachment or garnishment as in other actions.[16] Such costs are to be distinguished from the costs of defending the attachment, including attorneys' fees, allowable as damages for the wrongful attachment.[17] While the latter are thus recoverable as damages, attorneys' fees for prosecuting the proceeding for damages for the wrongful attachment stand in the same class as fees in ordinary actions and are not generally recoverable in the absence of express statutory or contract provision.[18] However, there is authority to the contrary.[19]

Hardware Co. 146 Iowa, 172, 122 N. W. 951, 29 L.R.A.(N.S.) 272.

Annotation: 68 Am. St. Rep. 280.

[14] See Judgments [Also 15 R. C. L. p. 554].

[15] Annotation: 62 L.R.A. 442.

[16] See Costs [Also 7 R. C. L. p. 779].

[17] See supra, §§ 1014 et seq.

[18] Annotation: 25 A.L.R. 598, s. 71 A.L.R. 1463; 81 Am. Dec. 473.

As to the recovery of fees for defending the attachment or garnishment, see supra, § 1014.

[19] **The Iowa statute** has been construed as authorizing the recovery of such fees. Annotation: 25 A.L.R. 598, s. 71 A.L.R. 1463.

See Seattle Crockery Co. v. Haley, 6 Wash. 302, 33 P. 650, 36 Am. St. Rep. 156, where, in an action on an attachment bond, attorneys' fees, to be fixed by the court, for prosecuting the action were held recoverable.

It has been held that fees for counsel in bringing the action on the attachment bond were not within the condition of the bond to "prosecute the attachment to effect, and pay the defendant all such damages as he may sustain from the wrongful or vexatious suing out of such attachment." as such fees were not damages proximately caused by the suing out of the attachment, but stood on the same principle as fees in other actions brought for breaches of covenants or executory contracts. Annotation: 25 A.L.R. 598, s. 71 A.L.R. 1463.

ATTEMPTS

See Criminal Law.

ATTESTATION

See Acknowledgments, Vol. 1, p. 311; Chattel Mortgages; Deeds; Mortgages; Wills.

ATTORNEY GENERAL

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I. INTRODUCTORY

§ 1. Scope of Article.—This article discusses the general law with respect to the status, powers, rights, and duties of the Attorney General of the United States and of the attorneys general of the various states. Many of the matters discussed are determined or influenced by constitutional and statutory provisions which, with respect to a particular jurisdiction, should always be consulted, for while many cases which consider the effect of statutes are given due consideration here, no attempt is made to include all of the statutory provisions. In considering the participation of the attorney general in particular proceedings, only the function of the attorney general in connection with such proceedings is discussed; the proceedings themselves are discussed in other articles.[1]

§ 2. Definition.—An attorney general is the chief law officer of a state or nation, to whom is usually intrusted not only the duty of prosecuting all suits or proceedings wherein the state is concerned, but also the task of advising the chief executive and other administrative heads of the government in all legal matters on which they may desire his opinion.[2] As an officer of the English government, an Attorney General occupies a position very different from the officer denoted by the same name in either the Federal or state government in this country. He is appointed by letters patent authorizing him to hold office during the pleasure of the Crown, and, with the aid of others, is required to manage all legal affairs and suits in which the Crown is interested. He acts as agent and representative of the Crown and has for centuries enjoyed high prerogative rights as its servant. The office, however, is not as ancient as that of the Lord High Chancellor.[3] The Attorney General of the United States, as an officer of the Federal government, is a member of the cabinet, appointed by the President with the advice and consent of the Senate,[4] and as such, under Act of Congress, is fourth in the line of succession to the presidency in the event of a contingency arising which should necessitate having recourse to that body in order to fill a vacancy in the office of President.[5]

§ 3. Distinction between Prosecuting Attorneys and Attorneys General.—The office of prosecuting or district attorney, unlike that of attorney general, is of modern creation, with its duties chiefly prescribed by statute.[6] The civil and criminal business of the state which once pertained actually, as well as theoretically, to the office of attorney general, has been divided between the two offices for purposes of convenience. In fact, the office of prosecuting attorney has been carved out of that of attorney general and virtually made an independent office. In the exercise of his common-law powers, the attorney general undoubtedly may advise the prosecuting attorney as he does other officers, since he is regarded as the chief law officer of the state; but in practically all jurisdictions, either the Constitution or laws of the state make the two offices separate and distinct and vest in the prosecuting attorney certain powers, and impose upon him certain duties, which can be neither increased nor decreased by the attorney general.[7] If, however, the right to bring a certain action falls within the common-law powers of the attorney general, and the power to bring such action is not specifically granted to the district attorney by statute, the latter cannot sue.[8] In many instances, by constitutional or statutory provision, the authority of the attorney general and that of the district attorney are concurrent,[9] and under the laws of many of the states, the attorney general, in the exercise of his common-law powers, and in the absence of express restrictions, has a general authority in criminal prosecutions by the state, concurrent with that of the district attorney.[10]

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[1] See, for example, CORPORATIONS [Also 7 R. C. L. p. 1]; ESCHEAT [Also 10 R. C. L. p. 602]; FRANCHISES [Also 12 R. C. L. p. 172]; MONOPOLIES AND COMBINATIONS [Also 19 R. C. L. p. 1]; NUISANCES [Also 20 R. C. L. p. 376]; PUBLIC OFFICERS [Also 22 R. C. L. p. 362]; QUO WARRANTO [Also 22 R. C. L. p. 654]; WILLS [Also 28 R. C. L. p. 47].

As to the misconduct of the attorney general as ground for suspension or disbarment as an attorney, see ATTORNEYS AT LAW, infra, p. —.

As to liability or immunity of the attorney general from an action for malicious prosecution, see MALICIOUS PROSECUTION [Also 18 R. C. L. p. 9].

[2] State v. Finch, 128 Kan. 665, 280 P. 910, 66 A.L.R. 1369.

Annotation: Ann. Cas. 1913C, 1307.

The attorney general is, generally speaking, the attorney for the state. It is his duty to devote his time and energies to that employment, as it is the duty of attorneys generally to appear and defend the rights of their clients in the litigation in which they are employed. Follamer v. State, 94 Neb. 217, 142 N. W. 908, Ann. Cas. 1914D, 151.

[3] See State v. Cunningham, 83 Wis. 90, 53 N. W. 35, 17 L.R.A. 145, 35 Am. St. Rep. 27.

[4] See infra, § 4.

[5] U. S. C. A. title 3, § 22.

[6] State v. Finch, 128 Kan. 665, 280 P. 910, 66 A.L.R. 1369; Withee v. Lane & L. Fisheries Co. 120 Me. 121, 113 A. 22, citing R. C. L.; Capitol Stages v. State, 157 Miss. 576, 128 So. 759, citing R. C. L.; State v. Ehrlick, 65 W. Va. 700, 64 S. E. 935, 23 L.R.A.(N.S.) 691.

See also PROSECUTING ATTORNEYS [Also 22 R C. L. p. 87, § 2].

[7] State v. Finch, 128 Kan. 665, 280 P. 910, 66 A.L.R. 1369; Capitol Stages v. State, 157 Miss. 576, 128 So. 759, citing R. C. L.;

Some statutes provide that the attorney general is to exercise a supervisory power over county attorneys in all matters pertaining to the duties of their offices.[11] Others confer authority upon the attorney general to file informations and prosecute cases when required by the governor or general assembly,[12] or when required by the public service,[13] or when the county attorney neglects or refuses to enforce a statute,[14] or when a statute is not being enforced for any reason whatever.[15] And the fact that specific duties are also imposed on prosecuting attorneys does not limit or exclude the general authority of the attorney general.[16]

Where the authority of the attorney general and that of the district attorney are concurrent, their action should be co-ordinated,[17] and in the event of a conflict between them, the attorney general, being the superior officer, has control.[18]

§ 4. Appointment, Qualifications, and Tenure of Office.—The Attorney General, in England, was appointed by letters patent from the Crown, and the tenure of his official position depended entirely upon the royal pleasure.[19] The office of Attorney General of the United States is also an appointive one; the United States Attorney General is appointed by the President of the United States, with the advice and consent of the Senate and is the head of the

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State v. Ehrlick, 65 W. Va. 700, 64 S. E. 935, 23 L.R.A.(N.S.) 691.

[8] Withee v. Lane & L. Fisheries Co. 120 Me. 121, 113 A. 22, citing R. C. L.; Capitol Stages v. State, 157 Miss. 576, 128 So. 759, citing R. C. L.

[9] Coco v. Oden, 143 La. 718, 79 So. 287, 8 A.L.R. 679; State ex rel. Miller v. District Ct. 19 N. D. 819, 124 N. W. 417, Ann. Cas. 1912D, 935.

[10] See infra, § 21.

[11] Cosson v. Bradshaw, 160 Iowa, 296, 141 N. W. 1062, Ann. Cas. 1915D, 157; State ex rel. Miller v. District Ct. 19 N. Dak. 819, 124 N. W. 417, Ann. Cas. 1912D, 935.

Annotation: Ann. Cas. 1914D, 156.

[12] People v. Gibson, 53 Colo. 231, 125 P. 531, Ann. Cas. 1914B, 138; Cosson v. Bradshaw, 160 Iowa, 296, 141 N. W. 1062, Ann. Cas. 1915D, 157; State ex rel. Miller v. District Ct. 19 N. D. 819, 124 N. W. 417, Ann. Cas. 1912D, 935; Dupree v. State, 14 Okla. Crim. Rep. 369, 171 P. 489, L.R.A.1918D, 365.

[13] Cosson v. Bradshaw, 160 Iowa, 296, 141 N. W. 1062, Ann. Cas. 1915D, 157; State ex rel. Miller v. District Ct. 19 N. D. 819, 124 N. W. 417, Ann. Cas. 1912D, 935.

[14] State v. Finch, 128 Kan. 665, 280 P. 910, 66 A.L.R. 1369.

[15] State v. Finch, 128 Kan. 665, 280 P. 910, 66 A.L.R. 1369.

And see infra, § 21.

[16] People v. Gibson, 53 Colo. 231, 125 P. 531, Ann. Cas. 1914B, 138; Dupree v. State, 14 Okla. Crim. Rep. 369, 171 P. 489, L.R.A. 1918D, 365.

A statute imposing specific duties upon county attorneys in the matter of its enforcement is not a limitation upon, nor does it exclude, the general authority of the attorney general upon the same subject. State ex rel. Young v. Robinson, 101 Minn. 277, 112 N. W. 269, 20 L.R.A.(N.S.) 1127, in which the court stated, with regard to a statute regulating the sale of intoxicating liquors: "The purpose of this statute was not to confer special exclusive authority upon the county attorney, but rather specifically to require of him the performance of an existing official duty."

[17] State v. Finch, 128 Kan. 665, 280 P. 910, 66 A.L.R. 1369.

The attorney general, on filing an information at the request of the governor as prescribed by statute, is clothed with the same authority as the county attorney and should act concurrently with him, where the latter has instituted a prosecution for the same offense, which is pending. Dupree v. State, 14 Okla. Crim. Rep. 369, 171 P. 489, L.R.A.1918D, 365 (a defendant may not be placed in double jeopardy).

[18] See infra, § 21.

[19] State ex rel. Lamb v. Cunningham, 83 Wis. 90, 53 N. W. 35, 17 L.R.A. 145, 35 Am. St. Rep. 27.

See supra, § 2.

Department of Justice.[20] In most states, the office is an elective one; in some states, however, it is appointive, being filled by nomination on the part of the chief executive and the approval of such selection by the upper body of the state legislature.

Whether elective or appointive, the duration of the term of office is definitely fixed by law in each jurisdiction, the only difference being that where the office is appointive, the attorney general is usually removable at the pleasure of the governor, though in some instances such removal can be only for cause. Although in the Federal government the Attorney General is appointed by the President with the advice and consent of the Senate, the power of removal possessed by the President is absolutely unlimited.[1]

The qualifications necessary to render one eligible for the office of attorney general are seldom prescribed by law, perhaps owing to the fact that they are deemed to be sufficiently manifest in the nature of the office and the duties to be performed by the incumbent, and therefore to require no enumeration. Responsibilities of so high a character are usually placed upon a lawyer of ability, experience, and character.[2] That it is advisable to leave the determination of a person's fitness for the office to the good judgment of the individual or individuals having the power of selection is evidenced by the conduct of Congress, which, in creating the position, saw fit merely to declare that the attorney general should be "a meet person learned in the law." In some instances, however, the law of the jurisdiction expressly exacts certain requisites which, of course, must be possessed by an applicant or candidate in order to render him eligible for the position.[3] All questions arising as to the eligibility of a candidate or appointee, and the validity of his election, appointment, or removal are governed by the principles of law applicable to public officers in general.[4]

II. POWERS AND DUTIES

A. In General

§ 5. At Common Law.—The common-law duties of the attorney general, as chief law officer of the state, when not restricted or limited by statute, are very numerous and varied.[5] In England, the Attorney General was the chief legal adviser of the Crown and was intrusted with the management of all legal affairs and the prosecution of all suits, civil and criminal, in which the Crown was interested.[6] He exercised the right of enforcing public charities, possessed supervisory powers over the estates of lunatics, and could institute equitable proceedings for the abatement of public nuisances which affected or endangered the public safety or convenience and required immediate judicial interposition.[7] Such being the nature of the rights and duties that attached to the position at its inception, it is generally held that in the exercise of his common-law powers, an attorney general may not only control and manage all litigation in behalf of the state,[8] but he may also intervene in all suits or proceedings which are of concern to the general public.[9]

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[20] U. S. Const. Art. II. § 2; U. S. C. A. title 5, § 291.

[1] Shurtleff v. United States, 189 U. S. 311, 47 L. ed. 828, 23 S. Ct. 535.

[2] State v. Burleigh County, 19 N. D. 819, 124 N. W. 417, Ann. Cas. 1912D, 935.

[3] In some states the Constitutions prescribe that the attorney general must be a "male" citizen. State v. Hostetter, 137 Mo. 636, 39 S. W. 270, 38 L.R.A. 208, 59 Am. St. Rep. 515.

Residence and practice within the jurisdiction for a specified period is a requisite in some states. Saint v. Allen, 172 La. 350, 134 So. 246, citing R. C. L.

[4] See Public Officers [Also 22 R. C. L. p. 362].

[5] State v. Finch, 128 Kan. 665, 280 P. 910, 66 A.L.R. 1369; Mundy v. McDonald, 216 Mich. 444, 185 N. W. 877, 20 A.L.R. 398; Capitol Stages v. State, 157 Miss. 576, 128 So. 759, citing R. C. L.; State ex rel. Lamb v. Cunningham, 83 Wis. 90, 53 N. W. 35, 17 L.R.A. 145, 35 Am. St. Rep. 27.

[6] State v. Finch, 128 Kan. 665, 280 P. 910, 66 A.L.R. 1369; Capitol Stages v. State, 157 Miss. 576, 128 So. 759, citing R. C. L.; State ex rel. Lamb v. Cunningham, 83 Wis. 90, 53 N. W. 35, 17 L.R.A. 145, 35 Am. St. Rep. 27.

§ 6. Under Modern Statutes.—As there are numerous variations in the duties attached to the office of attorney general in the different states, reference should be had in each instance to the law of the particular jurisdiction; in many instances statutes have given him very significant and extensive powers.[10] As a rule, however, the various statutes are more or less declaratory of the common law.[11] Moreover, it is generally held that the attorney general, in addition to the powers and duties conferred and imposed upon him by statute, is clothed and charged with all the common-law powers and duties pertaining to his office as well, except in so far as they have been expressly restricted.[12] The duties of the office are so numerous and varied that it has not been the policy of the state legislatures to attempt specifically to enumerate them; and it cannot be presumed, therefore, in the absence of an express inhibition, that the attorney general has not such authority as pertained to his office at common law. Accordingly, as the chief law officer of the state, he may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may, from time to time, require, and may institute, conduct, and maintain all such suits and proceedings as he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights.[13] In a few jurisdictions, however, it is held that the attorney general has only such powers as are expressly conferred upon him by law.[14]

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[7] Atty.-Gen. v. Tudor Ice Co. 104 Mass. 239, 6 Am. Rep. 227; State v. Young, 54 Mont. 401, 170 P. 947, citing R. C. L.; State ex rel. Lamb v. Cunningham, 83 Wis. 90, 53 N. W. 35, 17 L.R.A. 145, 35 Am. St. Rep. 27.
See infra, §§ 16, 17.

[8] Capitol Stages v. State, 157 Miss. 576, 128 So. 759, citing R. C. L.; State v. Ehrlick, 65 W. Va. 700, 64 S. E. 935, 23 L.R.A. (N.S.) 691.

[9] See infra, § 9.

[10] State v. Burleigh County, 19 N. D. 819, 124 N. W. 417, Ann. Cas. 1912D, 935.

[11] Parker v. State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L.R.A. 567; State v. Bowles, 70 Kan. 821, 79 P. 726, 69 L.R.A. 176; Re Creighton's Estate, 91 Neb. 654, 136 N. W. 1001, Ann. Cas. 1913D, 128; State v. Milwaukee Electric R. & Light Co. 136 Wis. 179, 116 N. W. 900, 18 L.R.A.(N.S.) 672; State ex rel. Lamb v. Cunningham, 83 Wis. 90, 53 N. W. 35, 17 L.R.A. 145, 35 Am. St. Rep. 27.
Annotation: Ann. Cas. 1913C, 1307.

[12] Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 28 S. Ct. 441, 13 L.R.A.(N.S.) 932, 14 Ann. Cas. 764. Cited in Pierce v. Superior Ct. 1 Cal. (2d) 759, 37 P. (2d) 460, 96 A.L.R. 1020; State v. Finch, 128 Kan. 665, 280 P. 910, 66 A.L.R. 1369; Respass v. Com. 131 Ky. 807, 115 S. W. 1131, 21 L.R.A.(N.S.) 836; Withee v. Lane & L. Fisheries Co. 120 Me. 121, 113 A. 22, citing R. C. L.; Mundy v. McDonald, 216 Mich. 444, 185 N. W. 877, 20 A.L.R. 398; State v. Robinson, 101 Minn. 277, 112 N. W. 269, 20 L.R.A.(N.S.) 1127; State v. Young, 54 Mont. 401, 170 P. 947, citing R. C. L.; Re Natural Gas Pipe Lines, 123 Neb. 259, 242 N. W. 609, citing R. C. L.; State v. Moore, 46 Nev. 65, 207 P. 75, 22 A.L.R. 1101; State v. Ehrlick, 65 W. Va. 700, 64 S. E. 935, 23 L.R.A.(N.S.) 691.

"It is the general consensus of opinion that in practically every state of this Union whose basis of jurisprudence is the common law, the office of attorney general, as it existed in England, was adopted as a part of the governmental machinery, and that in the absence of express restrictions, the common-law duties attach themselves to the office so far as they are applicable and in harmony with our system of government." State v. Young, 54 Mont. 401, 170 P. 947, citing R. C. L.

By constitutional or statutory provision, the attorney general may be expressly clothed with "such other authority" as is conferred upon him at common law. Capitol Stages v. State, 157 Miss. 576, 128 So. 759, citing R. C. L.

[13] Withee v. Lane & L. Fisheries Co. 120 Me. 121, 113 A. 22, citing R. C. L.; State v. Robinson, 101 Minn. 277, 112 N. W. 269, 20 L.R.A.(N.S.) 1127; Re Natural Gas Pipe Lines, 123 Neb. 259, 242 N. W. 609, citing R. C. L.; State v. Broad River Power Co. 157 S. C. 1, 153 S. E. 537, citing R. C. L. See also Ex parte, Young, 209 U. S. 123, 52 L. ed. 714, 28 S. Ct. 441, 13 L.R.A.(N.S.) 932, 14 Ann. Cas. 764.
Annotation: Ann. Cas. 1914D, 155.

In the absence of any statutory provision to the contrary, the attorney general has the management and control of civil litigation on behalf of the state. State v. Ehrlick, 65 W. Va. 700, 64 S. E. 935, 23 L.R.A. (N.S.) 691.

Generally speaking, the attorney general is charged with the duty of advising the heads of the various departments of the state government,[15] yet it has been held that he cannot prevent the employment of a special attorney by a state department which is given such power by statute in cases of importance or difficulty.[16] Also, it has been held that the duties of the attorney general do not attach to a special commission such as a state highway commission, created as a body corporate and empowered to sue and be sued, and such a commission may employ other counsel.[17]

B. United States Attorney General

§ 7. Generally.—While the Federal statutes which establish and regulate the Department of Justice provide that "there shall be at the seat of government an executive department to be known as the Department of Justice, and an Attorney General, who shall be the head thereof," [18] they contain no specific statement of the general duties of the Attorney General; it is to be seen, however, from the several sections relating thereto,[19] that he has authority, and it is made his duty, to supervise the conduct of all suits brought by or against the United States, and to give advice to the President and the heads of the other departments of the government.[20] It cannot, however, be claimed that all the powers and duties which characterize the position at common law attach virtute officii to that of Attorney General of the United States, inasmuch as the Federal government is one of enumerated powers only, and Congress has no power to confer a right not expressly or impliedly included within the powers granted the Federal government by the several states. Consequently, only such duties and powers attach to the position as are expressly or impliedly conferred by Congress acting within its constitutional limits.

While there is no specific statement in the enactments of Congress enumerating the general duties of the office, it is held that as the Constitution contemplates the existence of an officer of the government to determine when the United States shall sue, to decide for what it shall sue, and to be responsible for the conduct of suits, Congress, in creating the office of attorney general and in using that term in other statutes has reference to the similar office under the English law,[1] and therefore have impliedly conferred upon him authority, and made it his duty, to supervise the conduct of all suits brought by or against the United States.[2] Under the authority vested in the Attorney

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[14] State v. Milwaukee Electric R. & Light Co. 136 Wis. 179, 116 N. W. 900, 18 L.R.A. (N.S.) 672. See also Cosson v. Bradshaw, 160 Iowa, 296, 141 N. W. 1062, Ann. Cas. 1915D, 157.

[15] See infra, § 14.

[16] Follmer v. State, 94 Neb. 217, 142 N. W. 908, Ann. Cas. 1914D, 151.

This is a qualification to the general rule that the attorney general has the exclusive management and control of all litigation in which the state is interested. Annotation: Ann. Cas. 1914D, 156.

[17] Saint v. Allen, 172 La. 350, 134 So. 246, citing R. C. L.

[18] U. S. C. A. title 5, § 291.

[19] U. S. C. A. title 5, §§ 302, 303.

[20] United States v. San Jacinto Tin Co. 125 U. S. 273, 31 L. ed. 747, 8 S. Ct. 850.

[1] United States v. San Jacinto Tin Co. 125 U. S. 273, 31 L. ed. 747, 8 S. Ct. 850; United States v. Koleno (C. C. A. 8th) 226 F. 180, citing R. C. L.

[2] Ponzi v. Fessenden, 258 U. S. 254, 66 L. ed. 607, 42 S. Ct. 309, 22 A.L.R. 879; New York v. New Jersey, 256 U. S. 296, 65 L. ed. 937, 41 S. Ct. 492; United States v. San Jacinto Tin Co. 125 U. S. 273, 31 L. ed. 747, 8 S. Ct. 850; Confiscation Cases, 7 Wall. (U. S.) 454, 19 L. ed. 196; North Dakota-Montana Wheat Growers Asso. v. United States (C. C. A. 8th) 66 F. (2d) 573, 92 A.L.R. 1484, writ of certiorari denied in 291 U. S. 672, 78 L. ed. 1061, 54 S. Ct. 457; United States v. Koleno (C. C. A. 8th) 226 F. 180, citing R. C. L.

Acts of Congress sometimes expressly provide for their enforcement by the attorney general. See Ervien v. United States, 251 U. S. 41, 64 L. ed. 128, 40 S. Ct.

General of the United States to supervise and conduct suits in which the government is interested, he may dismiss any action when in his opinion such is the proper course,[3] and he has power to enter into a compromise.[4] As the head of the Department of Justice, he has supervisory power over all officers of such department, including the Solicitor General and the Federal District Attorneys.[5] And he has power to appoint such assistants as may be necessary to discharge the business of his office.[6] As to the specific powers of the United States Attorney General, the statutes of the United States should be consulted.[7] It may be noted that whenever he deems it for the interest of the United States, he may conduct and argue, in person, any case in any court of the United States in which the United States is interested.[8] It is the duty of the Attorney General to give his advice and opinion upon questions of law, whenever required to do so by the President or the head of any of the executive departments.[9] It would seem, however, that the advisory duties of the Attorney General do not require him to advise the committees of Congress upon questions of law occurring in matters before them.[10] The official opinions of the Attorney General of the United States are collected in a series of bound volumes published by authority of Congress, and while these opinions have not the force of law, it has always been regarded as the proper practice to follow their guidance.[11] The prisons of the United States and the custody of prisoners under sentence are generally under the supervision and regulation of the Attorney General,[12] and the examination of all applications for pardon or commutation, and a report and recommendation to the President, are within his duties.[13] It is also within his province, representing the United States, to practice comity with the judicial systems of the states.[14]

75; Confiscation Cases, 7 Wall. (U. S.) 454, 19 L. ed. 196.

He is the hand of the President in taking care that the laws of the United States in legal proceedings and in the prosecution of offenses be faithfully executed. Ponzi v. Fessenden, 258 U. S. 254, 66 L. ed. 607, 42 S. Ct. 309, 22 A.L.R. 879.

The initiation and control of a suit by the United States to set aside, cancel, or annul a patent for land issued in its name, on the ground that it was obtained by fraud or mistake, lies with the attorney general. United States v. San Jacinto Tin Co. 125 U. S. 273, 31 L. ed. 747, 8 S. Ct. 850.

[3] Confiscation Cases, 7 Wall. (U. S.) 454, 19 L. ed. 196.

Annotation: 81 A.L.R. 128.

[4] Annotation: 81 A.L.R. 128.

It is within the power of the Attorney General of the United States to enter into a consent decree in a proceeding to enjoin the violation of Anti-Trust Acts. Swift v. United States, 276 U. S. 311, 72 L. ed. 587, 48 S. Ct. 311.

Where the Federal government intervened in a suit begun by the state of New York in the Federal Supreme Court to enjoin the state of New Jersey and its sewerage commissioners from discharging sewage into the waters of upper New York bay, it was held that it was within the authority of the attorney general to agree that the United States should retire from the case upon terms stated in a stipulation on behalf of the state of New Jersey, which were approved by the Secretary of War. New York v. New Jersey, 256 U. S. 296, 65 L. ed. 937, 41 S. Ct. 192.

[5] Ponzi v. Fessenden, 258 U. S. 254, 66 L. ed. 607, 42 S. Ct. 309, 22 A.L.R. 879; United States v. Waters, 133 U. S. 208, 33 L. ed. 594, 10 S. Ct. 249; United States v. San Jacinto Tin Co. 125 U. S. 273, 31 L. ed. 747, 8 S. Ct. 850; Confiscation Cases, 7 Wall. (U. S.) 454, 19 L. ed. 196.

He is authorized by law to send the solicitor general or any officer of the department of justice "to any state or district in the United States to attend to the interests of the United States in any suit pending in any of the courts of the United States or in the courts of any state or to attend to any other interest of the United States." Ponzi v. Fessenden, 258 U. S. 254, 66 L. ed. 607, 42 S. Ct. 309, 22 A.L.R. 879.

[6] United States v. San Jacinto Tin Co. 125 U. S. 273, 31 L. ed. 747, 8 S. Ct. 850.

[7] U. S. C. A. title 5, §§ 291–337.

[8] U. S. C. A. title 5, § 309.

[9] United States v. San Jacinto Tin Co. 125 U. S. 273, 31 L. ed. 747, 8 S. Ct. 850.

U. S. C. A. title 5, §§ 303, 304.

As to further provisions regarding advice of attorney general, see United States Statutes.

[10] United States v. San Jacinto Tin Co. 125 U. S. 273, 31 L. ed. 747, 8 S. Ct. 850.

[11] Annotation: Ann. Cas. 1913C, 1308.

As to weight and effect of opinion of state attorney general, see infra, § 14.

[12] Ponzi v. Fessenden, 258 U. S. 254, 66 L. ed. 607, 42 S. Ct. 309, 22 A.L.R. 879.

[13] Ibid.

[14] **Thus, he may consent to the appearance in a state court** for trial of a Federal

C. State Attorney General

§ 8. Conducting Litigation—In General.—Obviously there can be no dispute as to the right of an attorney general to represent the state in all litigation of a public character. The attorney general represents the public and may bring all proper suits to protect its rights.[15] A breach or violation of public duty, either actual or threatened, is essential to the right of action.[16] Whether or not a particular action is such that it could be maintained by the state must be decided by the court in which it is brought. In determining this question it should be noted that pecuniary interest on the part of the state is not decisive of the matter, for the obligation it is under to promote the interest of all and to prevent the wrongdoing of one resulting in injury to the general welfare is often of itself sufficient to give it standing in court.[17] Statutes directing suits for specific objects to be brought by the attorney general, and regulating the proceedings in them, are common, and their validity has been recognized uniformly.[18] As illustrations of the many and varied proceedings which the attorney general may prosecute, the following may be mentioned: Actions to abate public nuisances;[19] actions to enforce public charities;[20] quo warranto proceedings against public officers[1] and against corporations;[2] and prosecutions for criminal offenses.[3] He may also maintain proceedings to compel the removal of buildings erected by private individuals on land reserved for public landing places,[4] to enjoin the exacting of unlawful and excessive rates by common carriers,[5] and to restrain the conduct of an unlawful monopoly or combination in restraint of trade.[6] Powers and duties with respect to the collection of taxes due the state, and the representation of the state tax commissioner in any litigation, may be expressly conferred upon him.[7] He is the proper relator in a mandamus proceeding to compel school directors to dismiss, from public schools, children admitted in violation of statutes requiring them to be vaccinated.[8] It has been held that under a statute making it the duty of the attorney general to defend cases in which the people of the state may be interested, he may defend a judge sued for libel for statements in a report charging wilful neglect on the part of public officials in the enforcement of the criminal laws, made after a hearing initiated

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prisoner while under commitment of a sentence imposed in a Federal court. Ibid.

[15] State ex rel. Porterie v. Walmsley, 181 La. 597, 160 So. 91, citing R. C. L.; Knowlton v. Williams, 174 Mass. 476, 55 N. E. 77, 47 L.R.A. 314.

Re Bennett, 52 Ont. L. Rep. 229 [1923] 3 D. L. R. 1173, 11 B. R. C. 799.

The Attorney General, as the chief law officer of the state, has broad powers derived from the common law, and in the absence of any legislative restriction, has the power to file any civil action or proceeding directly involving the rights and interests of the state, or which he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights and interests. Pierce v. Superior Ct. 1 Cal. (2d) 759, 37 P. (2d) 460, 96 A.L.R. 1020.

[16] State ex rel. Taylor v. Lord, 28 Or. 498, 43 P. 471. 31 L.R.A. 473.

[17] State v. Zachritz, 166 Mo. 307, 65 S. W. 999, 89 Am. St. Rep. 711; State v. Pacific Exp. Co. 80 Neb. 823, 115 N. W. 619, 18 L.R.A.(N.S.) 664.

See also States [Also 25 R. C. L. p. 408, § 44].

[18] An illustration is a proceeding in quo warranto, or a bill in equity against corporations to test the rights to the exercise of their franchises or declare them forfeited, or, if insolvent, to wind up their business and distribute their assets. United States v. Union P. R. Co. 98 U. S. 569, 25 L. ed. 143.

And see infra, § 19.

[19] See infra, § 16.

[20] See infra, § 17.

[1] See infra, § 18.

[2] See infra, §§ 19, 20.

[3] See infra, § 21.

[4] Atty. Gen. ex rel. Adams v. Tarr, 148 Mass. 309, 19 N. E. 358, 2 L.R.A. 87.

[5] See infra, § 19.

[6] See infra, § 19.

[7] State ex rel. Wilson v. Young, 44 Wyo. 6, 7 P. (2d) 216, 81 A.L.R. 114.

[8] Com. ex rel. Schaffer v. Wilkins, 271 Pa. 523, 115 A. 887, 19 A.L.R. 1379.

by complaint of the prosecuting attorney.[9] The attorney general may also maintain an action in equity for a breach or violation of public duty touching property or funds held by public or municipal corporations for public use.[10] In a suit between private individuals, where the rights of the state are connected with the relief sought against the defendant, the attorney general, representing the state, may be joined as a party defendant.[11]

§ 9. **—As Affected by Private or Public Character of Litigation.**—Generally, litigation over which the attorney general has authority involves the enforcement of rights of the state or of the people.[12] In the absence of statutory amplification of his authority, he can participate in a litigation of a private character only when it has a bearing on the interests of the general public or affects the interests and welfare of the general public; [13] he has neither the right nor duty to participate in litigation which is purely of a private character, with no bearing on the interests of the general public. It has been held that a civil action to recover money fraudulently obtained from a municipal corporation by alleged conspirators is not maintainable by an attorney general, as the corporation, and not the state, is the proper party plaintiff.[14]

At common law, an individual who had some private interest to subserve, in conjunction with the rights of the Crown, or an interest acquired from the Crown by grant or otherwise, which it was within the province of the Crown to protect, could as a matter of right interpose as a relator through the attorney general to set in motion the judicial machinery.[15] In cases of purely public concern, however, affecting the welfare of the whole people or the state at large, the jurisdiction of the court can only be invoked by such executive officers of the state as are by law intrusted with the discharge of such duties.[16]

§ 10. **—Discretionary Power.**—It is generally acknowledged that the attorney general is the proper party to determine the necessity and advisability of undertaking or prosecuting actions on the part of the state.[17] Frequently, the language of the statute designating his powers indicates an intention to confer upon him the right to exercise his discretion in a large degree.[18] Generally if he, in his discretion, declines to institute an action, the courts will not assume jurisdiction to compel him to do so. As a rule, the character of the duties pertaining to the office are such as call for the exercise of personal judgment based upon the facts and circumstances surrounding each particular question.[19] Thus, the discretion of the attorney general in determining what the public interests require as to bringing an action against a domestic business corporation or its officers is absolute and cannot be made the subject of inquiry by the courts.[20] In like manner, under a statute imposing upon the attorney general the duty of enforcing a prohibition law whenever it is not enforced in any county of the state, he is the sole person to judge of the existence of the statutory grounds calling for intervention on his part.[1] He may, however, be compelled to perform mere ministerial duties,[2] and in certain cases, where the attorney general refuses to bring or consent to the bringing of a suit to protect the rights of the public, a private individual may institute a proceeding on his relation, in the name of the state.[3] Moreover, there are constitutional and statutory provisions in many states which make it the duty of the attorney general, when required by the governor, to appear for the state and prosecute in any court or before any officer, in any cause or matter, civil or criminal, in which the state may be a party or interested. Such provisions are considered mandatory, and when required by the governor, the attorney general has no discretion to refuse to prosecute the matter in question.[4] If he does refuse, a writ of mandamus will issue to compel him to perform his official duties.[5]

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[9] Mundy v. McDonald, 216 Mich. 444, 185 N. W. 877, 20 A.L.R. 398.

[10] State ex rel. Taylor v. Lord, 28 Or. 498, 43 P. 471, 31 L.R.A. 473.

[11] Varick v. Smith, 5 Paige (N. Y.) 137, 28 Am. Dec. 417.

[12] State ex rel. Taylor v. Lord, 28 Or. 498, 43 P. 471, 31 L.R.A. 473; State ex rel. Atty. Gen. v. Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L.R.A. 561.

The attorney general is charged with the duty of representing the state in all judicial proceedings in which the state has an interest, either as plaintiff, defendant or intervener. Pecuniary interest on the part of the state is not decisive of the matter; for the obligation it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it standing in court. State ex rel. Porterie v. Walmsley, 181 La. 597, 160 So. 91, citing R. C. L.

That the expense of a suit filed by the attorney general for the abatement of a nuisance is paid by private relators does not make it a private suit. State v. Excelsior Powder Mfg. Co. 259 Mo. 254, 169 S. W. 267, L.R.A.1915A, 615.

[13] Capitol Stages v. State, 157 Miss. 576, 128 So. 759, citing R. C. L.; Re Co-operative Law Co. 198 N. Y. 479, 92 N. E. 15, 32 L.R.A. (N.S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879.

Where the right of a corporation to practice law is involved, the common-law duty of the attorney general to represent the people calls upon him to take part in a controversy of such vital interest to the people as a whole, even though it is raised in a private proceeding. Re Co-operative Law Co. 198 N. Y. 479, 92 N. E. 15, 32 L.R.A. (N.S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879.

As to the right of the attorney general to intervene in a divorce action or to bring an independent action to set aside a decree of divorce on behalf of the government, see DIVORCE AND SEPARATION [Also 9 R. C. L. p. 409, § 208].

[14] People v. Ingersoll, 58 N. Y. 1, 17 Am. Rep. 178.

[15] State ex rel. Taylor v. Lord, 28 Or. 498, 43 P. 471, 31 L.R.A. 473.

And see infra, § 12.

[16] State ex rel. Taylor v. Lord, 28 Or. 498, 43 P. 471, 31 L.R.A. 473; State ex rel. Atty. Gen. v. Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L.R.A. 561.

In the case of mandamus proceedings, however, a different rule prevails in some jurisdictions. See infra, § 12.

The manner in which a proceeding to enforce a purely public right should be brought is discussed infra, § 12.

§ 11. —Control over and Disposition of Litigation; Dismissal or Compromise; Waiver of State's Immunity from Suit.—Ordinarily the attorney general, both under the common law and by statute, is empowered to make any disposition of the state's litigation which he deems for its best interest.[6] His power effectively to control litigation involves the power to discontinue if and when, in his opinion, this should be done.[7] Generally, therefore, the attorney general has authority to direct the dismissal of proceedings instituted in behalf of the state.[8] And he may enter into compromises and settlements of suits in which the state is an interested party, which will be binding on the state, where there is doubt and an honest dispute as to the state's rights, and the compromise or settlement is a bona fide one,[9] at least when he acts with the approval of the executive head of the department having charge of the matter involved in the suit.[10] Under certain circumstances, however, it has been held that the attorney general has no right or power to compromise or direct dismissal of the litigation.[11] And even though an attorney general may have the power and may have concluded to dismiss an action begun by him if no steps are taken by him to dismiss the suit, other than to make a minute of such determination, until his term of office expires, he is without power thereafter to order dismissal if his successor in office continues the prosecution.[12] Where the allegations of fact and contentions of law in several actions are the same, it has been held that the attorney general may properly enter into an agreement to accept the evidence taken in some of the cases with the same force and effect as if taken in the particular case, and that such agreement is binding upon his successor in office who has been substituted as a party.[13]

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[17] State v. Finch, 128 Kan. 665, 280 P. 910, 66 A.L.R. 1369; State ex rel. Porterie v. Walmsley, 181 La. 597, 160 So. 91, citing R. C. L.; State ex rel. Peterson v. Fraser, 191 Minn. 427, 254 N. W. 776, citing R. C. L.; State v. Pacific Exp. Co. 80 Neb. 823, 115 N. W. 619, 18 L.R.A.(N.S.) 664; People v. Ballard, 134 N. Y. 269, 32 N. E. 54, 17 L.R.A. 737; State v. Burleigh County, 19 N. D. 819, 124 N. W. 417, Ann. Cas. 1912D, 935.

Annotation: 52 L.R.A.(N.S.) 443.

Under a statute making it the duty of the Attorney General to prosecute and defend cases pertaining to the public interest, "in any cause or matter, civil or criminal, in which the people of this State may be a party or interested," a broad discretion is vested in the attorney general in determining what matters may or may not be of interest to the people generally. Mundy v. McDonald, 216 Mich. 444, 185 N. W. 877, 20 A.L.R. 398.

[18] Cosson v. Bradshaw, 160 Iowa, 296, 141 N. W. 1062, Ann. Cas. 1915D, 157 ("when, in his judgment, the interests of the state require, he shall appear for the state before any other court or tribunal, prosecute or defend all actions and proceedings, civil or criminal, in which the state may be a party or interested"); State ex rel. Miller v. District Ct. 19 N. D. 819, 124 N. W. 417, Ann. Cas. 1912D, 935 ("the attorney general or his assistants are authorized to institute and prosecute any cases in which the state is a party, whenever in their judgment it would be to the interests of the state so to do").

[19] State v. Finch, 128 Kan. 665, 280 P. 910, 66 A.L.R. 1369.

[20] State v. Finch, 128 Kan. 665, 280 P. 910, 66 A.L.R. 1369; People v. Ballard, 134 N. Y. 269, 32 N. E. 54, 17 L.R.A. 737.

Annotation: 52 L.R.A.(N.S.) 443.

And see infra, § 19.

[1] State v. Finch, 128 Kan. 665, 280 P. 910, 66 A.L.R. 1369; State v. Burleigh County, 19 N. D. 819, 124 N. W. 417, Ann. Cas. 1912D, 935.

[2] Annotation: 52 L.R.A.(N.S.) 442.

[3] People ex rel. Graves v. District Ct. 37 Colo. 443, 86 P. 87, 13 L.R.A.(N.S.) 768 (bill charging election frauds); State ex rel. Lamb v. Cunningham, 83 Wis. 90, 53 N. W. 35, 17 L.R.A. 145 (suit charging an unconstitutional apportionment by the legislature of election districts). And see State ex rel. McCue v. Blaisdell, 18 N. D. 55, 118 N. W. 141, 24 L.R.A.(N.S.) 465, 138 Am. St. Rep. 741 (action claiming election law unconstitutional).

[4] **A proceeding for the examination** of witnesses under the provisions of a prohibitory liquor law is a matter before an officer, in which the state is interested; and when required by the governor, the attorney general has no discretion to refuse to prosecute in such a proceeding. State ex rel. Stubbs v. Dawson, 86 Kan. 180, 119 P. 360, 39 L.R.A.(N.S.) 993.

[5] See MANDAMUS [Also 18 R. C. L. p. 78].

It is generally held that unless duly authorized by law, the attorney general may not waive the immunity of the state from suit, and thus cannot bind the state by appearing in an action so as to give the court jurisdiction,[14] although there is some authority to the contrary.[15]

§ 12. —Matters of Practice.—In the conduct of legal proceedings no greater liberties or concessions are made to the attorney general than are granted to other litigants, but he must comply with the rules of practice and show the same deference to the rules of the court in which he institutes his action as would be required if he were representing private individuals.[16] In the actual conduct of litigation, the attorney general, owing to the multiplicity of his duties, is under no obligation to appear or prosecute in person, and he may authorize any member of the bar to do so in his behalf.[17] The mere fact that a pleading on behalf of the state is signed by counsel other than the attorney general and does not disclose, on its face, authority or direction from that officer to file the same, does not make it demurrable. Such an objection must be raised by motion, plea, or answer.[18]

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[6] State v. Finch, 128 Kan. 665, 280 P. 910, 66 A.L.R. 1369.
Annotation: Ann. Cas. 1914D, 156.

[7] State v. Finch, 128 Kan. 665, 280 P. 910, 66 A.L.R. 1369.

[8] State v. Finch, 128 Kan. 665, 280 P. 910, 66 A.L.R. 1369 (criminal prosecution); State ex rel. Wilson v. Young, 44 Wyo. 6, 7 P. (2d) 216, 81 A.L.R. 114.
Annotation: 81 A.L.R. 124.
And see, as to the dismissal of criminal prosecutions, infra, § 21.
As to power of United States Attorney General, see supra, § 7.

[9] New York v. New Jersey, 256 U. S. 296, 65 L. ed. 937, 41 S. Ct. 492.
Annotation: 81 A.L.R. 124.
As to right of attorney general to compromise or settle matters in dispute in litigation respecting a public charity, see infra, § 17.

[10] **Where it is the duty of the attorney general to represent the inheritance tax commissioner** in any litigation, he may, acting in conjunction with such commissioner, bind the state by a compromise of a suit to recover an inheritance tax. State ex rel. Wilson v. Young, 44 Wyo. 6, 7 P. (2d) 216, 81 A.L.R. 114.

[11] **The attorney general has been held to have no power to dismiss the suit,** where the relator is the real party in interest seeking the cancelation of a patent of land issued to defendant, in a case alleging usurpation of the office of governor. Annotation: 81 A.L.R. 130.
He has been held to be without authority to compromise a suit brought by the state for the foreclosure of a mortgage, by acceptance of payment of less than the amount due. Annotation: 81 A.L.R. 131.
He has been held to have no power, without the consent of the state comptroller, to discontinue proceedings begun by him at the instigation of the comptroller, for the closing of the affairs of a fire insurance company. Annotation: 81 A.L.R. 131.

[12] Annotation: 81 A.L.R. 132.

[13] Prout v. Starr, 188 U. S. 537, 47 L. ed. 584, 23 S. Ct. 398.

[14] Annotation: 42 A.L.R. 1484.

[15] Annotation: 42 A.L.R. 1485.

[16] Com. v. Knapp, 10 Pick. (Mass.) 476, 20 Am. Dec. 534.

Where the matters involved are of purely public concern, affecting the welfare of all the people or the state at large, rather than matters of private right, the appropriate action or proceeding should be instituted in the name of the attorney general [19] or in the name of the state upon the relation of the attorney general,[1] and not in the name of a private relator.[2] However, a distinction has been made where the proceeding is one of mandamus, and although the authorities are divided, it has been held that where the question is one of public right, and the object of the mandamus is to procure the enforcement of a public duty, a private person may, in behalf of the public, and without showing any individual or special interest to be served, become a relator, and, through the proper state officer, institute the proceeding.[3]

At common law, where a suit did not immediately concern the rights of the Crown, it generally depended upon the relation of some person whose name was inserted in the information, and who was called the "relator." The relator was considered answerable to the court and the parties for the propriety of the suit and the conduct of it, and he became responsible for costs if it appeared the suit was improperly instituted or conducted.[4]

In a suit between private individuals, where the rights of the state are

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If the attorney general undertakes to exercise the powers and duties of prosecuting attorneys, he is limited by the same rules of practice that control them. Com. v. Knapp, 10 Pick. (Mass.) 476, 20 Am. Dec. 534; Denham v. Robinson, 72 W. Va. 243, 77 S. E. 970, 45 L.R.A.(N.S.) 1123.

[17] See infra, § 13.

[18] State v. Ehrlick, 65 W. Va. 700, 64 S. E. 935, 23 L.R.A.(N.S.) 691.

[19] State ex rel. Taylor v. Lord, 28 Or. 498, 43 P. 471, 31 L.R.A. 473.

Where an attorney general is authorized by constitutional provision to bring a suit for the forfeiture of an office legally held, by reason of misconduct, and it is not expressly provided that such proceeding shall be in the name of the state, a suit in the name of the attorney general, in his official capacity, is well brought, although a statute provides that a suit against the usurper of an office must be brought in the name of the state. Coco v. Oden, 143 La. 718, 79 So. 287, 8 A.L.R. 679.

[1] State ex rel. Taylor v. Lord, 28 Or. 498, 43 P. 471, 31 L.R.A. 473; Com. ex rel. Schaffer v. Wilkins, 271 Pa. 523, 115 A. 887, 19 A.L.R. 1379; State ex rel. Atty. Gen. v. Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L.R.A. 561.

If it is permissible at all to bring the suit in the name of the state alone, the complaint or information should show upon its face that the appropriate law officer brings the same for or in behalf of the state. State ex rel. Taylor v. Lord, 28 Or. 498, 43 P. 471, 31 L.R.A. 473.

Where it is sought to procure the enforcement of a public duty owed by public officials, it is the proper practice to issue a writ in the name of the state on the relation of the attorney general. Com. ex rel. Schaffer v. Wilkins, 271 Pa. 523, 115 A. 887, 19 A.L.R. 1379.

[2] People v. Ballard, 134 N. Y. 269, 32 N. E. 54, 17 L.R.A. 737, rehearing denied in 136 N. Y. 639, 32 N. E. 611; State ex rel. Taylor v. Lord, 28 Or. 498, 43 P. 471, 31 L.R.A. 473; State ex rel. Atty. Gen. v. Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L.R.A. 561.

Where a complaint or bill purports to be that of a private relator, and is verified by such individual, the mere fact that the attorney general affixed his signature thereto in his official capacity will not obviate the deficiency of the proceeding. State ex rel. Taylor v. Lord, 28 Or. 498, 43 P. 471, 31 L.R.A. 473.

[3] Ibid.

[4] State ex rel. Taylor v. Lord, 28 Or. 498, 43 P. 471, 31 L.R.A. 473; State ex rel. Atty. Gen. v. Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L.R.A. 561.

At common law, if a private individual had an interest in the proceeding apart from the interest of the government, he might, as relator, have his bill incorporated with the information of the attorney general, which was denominated an "information and bill." In practice, if it afterwards appeared that the relator had no interest to be subserved, the bill was dismissed and the information retained. Ibid.

connected with the relief sought against the defendant, the attorney general, representing the state, may be joined as a party defendant.[5]

If the question involved in a private litigation is such as to warrant intervention on the part of the attorney general,[6] it is perfectly proper for him to appear on behalf of the state, pursuant to notice served upon him by order of the court, and to participate in the argument thereof.[7]

§ 13. **Assistants.**—Ordinarily, the attorney general is expressly authorized by law to appoint such assistants as may be necessary to discharge the business of his office.[8] In the actual conduct and prosecution of litigation, he is under no obligation to appear in person, for any member of the bar may appear in his behalf if specially authorized to do so.[9] It has been held that special counsel designated by the attorney general to represent him in a litigation concerning a charitable fund may not, however, be granted an allowance out of the fund in litigation.[10]

§ 14. **Advisory Opinions; Weight and Effect of Opinion.**[11]—As previously indicated, one of the most important duties of an attorney general, and at the same time one having its inception in the origin of the office,[12] is that of advising the executive heads of the government. In most jurisdictions statutes expressly impose upon him the duty of advising the chief executive and departmental heads upon questions of law touching their official duties. In the discharge of this function he acts in an advisory and ministerial, rather than a judicial, capacity, his opinion being for the information of the officer to whom it is rendered. While it may be persuasive, it is neither conclusive nor binding, and the recipient of it is free to follow it or not as he chooses.[13] Consequently, a public officer is neither justified in a particular act nor shielded from its legal consequences by a written opinion of the attorney general upholding the legality thereof.[14] Of course, under the familiar rule that a charge of malicious prosecution is well met by proof that the proceedings were instituted in good faith, in reliance on the advice of counsel received after a full statement to him of the facts known to the prosecutor, or which he had reason to suppose existed,[15] an officer who takes the precaution of first consulting the attorney general, and thereafter, in good faith, acts in strict accordance with his views and under his instructions, is not open to the charge that he instituted the proceedings complained of without probable cause, and is therefore not liable for malicious prosecution.[16] Although the opinions of the attorney general have in no sense the effect of judicial utterances,[17] in actual practice they are usually followed.[18] And there can be no question but that his advice and opinions are of great influence in affecting public interests and the rights of all persons within the state.[19] Moreover, in the conduct of his office there are certain matters that rest in his discretion, and in these matters the courts have no right to overrule his decision or to interfere with his authority.[20] Where a question of law is before a court for determination, an opinion previously rendered by the attorney general on such question, while entitled to careful consideration and quite generally regarded as highly persuasive, is not binding on the court.[1]

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[5] Varick v. Smith, 5 Paige (N. Y.) 137, 28 Am. Dec. 417.

[6] See supra, § 9.

[7] Re Co-operative Law Co. 198 N. Y. 479, 92 N. E. 15, 32 L.R.A.(N.S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879.

Where the attorney general is granted leave to appear in a private action involving the constitutionality of a statute, he does not become, in the strict sense, a party to the proceeding so as to entitle him to file a petition for a rehearing. In such case, no judgment could be rendered for or against him, or for or against the state. His relation to the court is rather that of an amicus curiæ. Parker v. State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L.R.A. 567.

And see Amicus Curiæ, Vol. 2, p. 679.

[8] State v. Burleigh County, 19 N. D. 819, 124 N. W. 417, Ann. Cas. 1912D, 935; Wemme v. First Church of Christ, 110 Or. 179, 219 P. 618, 223 P. 250, citing R. C. L.

And, as to criminal prosecutions, see infra, § 21.

[9] Re Creighton, 91 Neb. 654, 136 N. W. 1001, Ann. Cas. 1913D, 128; Wemme v. First Church of Christ, 110 Or. 179, 219 P. 618, 223 P. 250, citing R. C. L.; State v. Ehrlick, 65 W. Va. 700, 64 S. E. 935, 23 L.R.A.(N.S.) 691.

Annotation: 62 A.L.R. 890.

Pleadings or other papers executed in his name by responsible members of the bar will not be disregarded upon the sole ground that the attorney general must appear in person, and with no suggestion that such appearance was not duly authorized. Re Creighton, 91 Neb. 654, 136 N. W. 1001, Ann. Cas. 1913D, 128.

[10] Wemme v. First Church of Christ, 110 Or. 179, 219 P. 618, 223 P. 250, citing R. C. L.

[11] As to United States Attorney General, see supra, § 7.

[12] See supra, §§ 5, 6.

[13] Follmer v. State, 94 Neb. 217, 142 N. W. 908, Ann. Cas. 1914D, 151.

Annotation: Ann. Cas. 1913C, 1307.

"If the law were otherwise, any executive office of the state could be controlled by the opinion of the attorney general specifying what the law requires to be done in that office." Follmer v. State, 94 Neb. 217, 142 N. W. 908, Ann. Cas. 1914D, 151.

[14] Annotation: Ann. Cas. 1913C, 1307.

[15] See Malicious Prosecution [Also 18 R. C. L. p. 45, § 27].

III. COMPENSATION

§ 15. Generally.—The compensation of the attorney general is a matter determined by statute. Where a salary is provided for, the statute may declare that such salary is in lieu of all other fees, commissions, and emoluments. It has been held that under such a statute, in litigation involving a charitable fund, an allowance of attorneys' fees may not be made out of such fund to either the attorney general, his assistants appointed pursuant to the statute, or to a special counsel designated by the attorney general to represent him.[2]

IV. ACTS IN PARTICULAR PROCEEDINGS

§ 16. Actions to Restrain Public Nuisances.—It is the unquestioned right of the attorney general to file an information in equity for the abatement of nuisances which affect or endanger the public safety or convenience, and require immediate judicial interposition.[3] Thus, he may institute proceedings to restrain acts which are injurious to public health,[4] safety,[5] or morals,[6] and may prevent any invasion upon the rights of the public in highways,[7] parks,[8] and other public lands,[9] and in navigable waters.[10] It is the general rule that the fact that the acts constituting the nuisance are punishable under the criminal law does not affect the right of the attorney general to institute equitable proceedings to enjoin the nuisance, when for any reason such procedure is found to be more convenient and appropriate.[11] To render a nuisance public in character, so as to warrant proceedings on the part of the attorney general for its abatement, it is not essential that proof of actual injury to the public be adduced, so long as the nature of the acts complained of is such as to tend to the public detriment. Whenever an illegal act is being committed which in its nature tends to injure the public, the attorney general may maintain an action to restrain its commission without introducing any evidence of actual injury to the public.[12]

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[16] Annotation: Ann. Cas. 1913C, 1308.

[17] Leddy v. Cornell, 52 Colo. 189, 120 P. 153, Ann. Cas. 1913C, 1304.

[18] Annotation: Ann. Cas. 1913C, 1308.

[19] State v. Burleigh County, 19 N. D. 819, 124 N. W. 417, Ann. Cas. 1912D, 935.

[20] See supra, § 10.

Thus, in those jurisdictions which follow the common-law rule, his determination as to whether a given set of circumstances calls for the institution of quo warranto proceedings for the recovery of a public office is final and conclusive. See infra, § 18.

In like manner, where the attorney general has vested in him by law a general supervisory power over the accounts of marshals, his decision disallowing certain fees claimed to be due to a deputy marshal is conclusive and not subject to collateral attack in the courts. Annotation: Ann. Cas. 1913C, 1307.

[1] Leddy v. Cornell, 52 Colo. 189, 120 P. 153, Ann. Cas. 1913C, 1304; People ex rel. Brundage v. Peters, 305 Ill. 223, 137 N. E. 118, 26 A.L.R. 16; Jones v. Williams, 121 Tex. 94, 45 S. W. (2d) 130, 79 A.L.R. 983.

While the construction placed upon a statute in the opinion of the attorney general is persuasive authority, it is neither conclusive nor binding upon the courts, and where it is without authoritative legal support, it should not be approved or followed. Leddy v. Cornell, 52 Colo. 189, 120 P. 153, Ann. Cas. 1913C, 1304.

An admission by the attorney general does not control the determination of the court as to whether or not a contempt is civil or criminal. People ex rel. Brundage v. Peters, 305 Ill. 223, 137 N. E. 118, 26 A.L.R. 16.

[2] Wemme v. First Church of Christ, 110 Or. 179, 219 P. 618, 223 P. 250, citing R. C. L.

[3] Georgetown v. Alexandria Canal Co. 12 Pet. (U. S.) 91, 9 L. ed. 1012; State ex rel. La Prade v. Smith, — Ariz. —, 29 P. (2d) 718, 31 P. (2d) 102, 92 A.L.R. 168; People v. Truckee Lumber Co. 116 Cal. 397, 48 P. 374, 39 L.R.A. 581, 58 Am. St. Rep. 183; People v. Gold Run Ditch & Min. Co. 66 Cal. 138, 4 P. 1152, 56 Am. Rep. 80; Augusta v. Reynolds, 122 Ga. 754, 50 S. E. 998, 69 L.R.A. 564, 106 Am. St. Rep. 147; State v. Ohio Oil Co. 150 Ind. 21, 49 N. E. 809, 47 L.R.A. 627; Respass v. Com. 131 Ky. 807, 115 S. W. 1131, 21 L.R.A.(N.S.) 836; State v. Zachritz, 166 Mo. 307, 65 S. W. 999, 89 Am. St. Rep. 711.

Annotation: 40 A.L.R. 1161, s. 91 A.L.R. 320; 23 L.R.A.(N.S.) 641.

See NUISANCES [Also 20 R. C. L. p. 376].

[4] **The practice of medicine and surgery by one who is unskilled and incompetent** is a menace to public health and constitutes a public nuisance which may be enjoined by the attorney general. State ex rel. La Prade v. Smith, — Ariz. —, 29 P. (2d) 718, 92 A.L.R. 168, modified on rehearing in — Ariz. —, 31 P. (2d) 102, 92 A.L.R. 173. Annotation: 92 A.L.R. 173.

A suit to enjoin a municipal corporation from emptying sewage into a stream in such a manner as to constitute a public nuisance may be maintained by the attorney general. Atty.-Gen. v. Grand Rapids, 175 Mich. 503, 141 N. W. 890, 50 L.R.A.(N.S.) 473, Ann. Cas. 1915A, 968.

[5] **Operating a powder mill where persons** on public roads and railroads and in villages are subject to danger from an explosion is a public nuisance which may be enjoined by the attorney general. State v. Excelsior Powder Mfg. Co. 259 Mo. 254, 169 S. W. 267, L.R.A.1915A, 615.

[6] Respass v. Com. 131 Ky. 807, 115 S. W. 1131, 21 L.R.A.(N.S.) 836.

[7] State v. Ehrlick, 65 W. Va. 700, 64 S. E. 935, 23 L.R.A.(N.S.) 691.

Annotation: 40 A.L.R. 1169, s. 91 A.L.R. 322.

An obstruction in a public street which materially interferes with travel is a public nuisance which may be enjoined in equity on the information of the attorney general. Augusta v. Reynolds, 122 Ga. 754, 50 S. E. 998, 69 L.R.A. 564, 106 Am. St. Rep. 147.

A court of equity is, however, as a rule loath to interfere to enjoin obstructions upon public highways in a proceeding by the attorney general where the law makes other remedies available. Thus, where power was conferred upon a city to prevent and remove obstructions of streets, and there is no allegation of any demand upon or refusal of the city council to act, it was held there was neither necessity nor authority for the attorney general to act. Atty.-Gen. v. Murray, 225 Mich. 170, 196 N. W. 446, citing R. C. L.

[8] **While the erection of a building above the statutory height permitted** in the case of edifices fronting upon a public park is not a public nuisance in the strict and narrow sense of that term, it is in the nature of one, and an information in equity by the attorney general is the proper remedy for the enforcement of the public rights infringed as a consequence thereof. Atty-Gen. v. Williams, 140 Mass. 329, 2 N. E. 80, 3 N. E. 214, 54 Am. Rep. 468.

And see BUILDINGS [Also 4 R. C. L. p. 393].

[9] Atty.-Gen. v. Tarr, 148 Mass. 309, 19 N. E. 358, 2 L.R.A. 87 (public landing place).

The attorney general may restrain the erection of bay windows over a passageway, where the state, as original owner, has deeded the land bounded by the passageway, but has reserved to itself the right of entry upon the premises to remove all obstructions which may be erected on the premises contrary to the stipulations. Atty.-Gen. v. Williams, 174 Mass. 476, 55 N. E. 77, 47 L.R.A. 314.

[10] Georgetown v. Alexandria Canal Co. 12 Pet. (U. S.) 91, 9 L. ed. 1012.

See also: Pennsylvania v. Wheeling & B. Bridge Co. 13 How. (U. S.) 518, 14 L. ed. 249; People v. Truckee Lumber Co. 116 Cal. 397, 48 P. 374, 39 L.R.A. 581, 58 Am. St. Rep. 183 (restraining the unlawful destruction of fish).

The Attorney General of the United States may bring suit to protect the waters of the Great Lakes from withdrawal. See WATERS [Also 27 R. C. L. p. 1352, § 263].

[11] State ex rel. La Prade v. Smith, — Ariz. —, 29 P. (2d) 718, 92 A.L.R. 168, modified on rehearing in — Ariz. —, 31 P. (2d) 102, 92 A.L.R. 173; Respass v. Com. 131 Ky. 807, 115 S. W. 1131, 21 L.R.A.(N.S.) 836; Atty.-Gen. v. Tarr, 148 Mas. 309, 19 N. E. 358, 2 L.R.A. 87.

Annotation: 40 A.L.R. 1145, s. 91 A.L.R. 315; 23 L.R.A.(N.S.) 691.

A court of chancery may, at the suit of the attorney general, enjoin as a common nuisance the maintenance of a place where pools upon horse racing are sold, notwithstanding it may also be a crime, especially where the criminal laws have proved ineffectual to afford relief. Respass v. Com. 131 Ky. 807, 115 S. W. 1131, 21 L.R.A.(N.S.) 836.

The power to enjoin a public nuisance at the instance of the state or an individual, although the act is punishable as a crime, is conferred by statute in some instances. Annotation: 40 A.L.R. 1145, s. 91 A.L.R. 315; 23 L.R.A.(N.S.) 691.

[12] Smith v. McDowell, 148 Ill. 51, 35 N. E. 141, 22 L.R.A. 393; State v. Zachritz, 166 Mo. 307, 65 S. W. 999, 89 Am. St. Rep. 711.

Atty.-Gen. v. Shrewsbury Bridge Co. L. R. 21 Ch. Div. 752, 1 Eng. Rul. Cas. 567.

Annotation: 22 Eng. Rul. Cas. 129.

§ 17. Probate Proceedings and Actions Concerning Charitable Trusts.—Upon the question of whether an attorney general may intervene in probate proceedings solely by reason of the possible interest of the state in the event of a contingency causing an escheat, the authorities are divided. Some take the view that the interest of the state in property which would escheat to it in case of intestacy, the testator leaving no heirs or kindred, is sufficient to entitle it to contest the probate of a will,[13] while others hold that it is not.[14]

Where, however, a will makes provision for a public charity or charitable trust, the decisions are in general accord as to the right of the attorney general to represent the public. A charitable trust is of public concern and the attorney general is the protector of the interests of the public, or, what is the same thing, of the indefinite and fluctuating body of persons who are the cestuis que trust.[15] If the charity is of a public character, he is the proper person to institute proceedings for its enforcement, and he may file an information either on his own motion or on the relation of any party concerned;[16] he may come into the suit by intervention,[17] or he may be made a party defendant as representing the public interests.[18] Some cases, at least in the language of the opinion, appear to support the proposition that the attorney general is the only person entitled to maintain a suit to enforce or administer a charitable or benevolent trust,[19] but there are many cases in which the action is held maintainable by other parties than the attorney general, and it seems to be sufficient if he is a party to the suit, either as plaintiff or defendant, for in either event the interests of the public at large, or of the indefinite class of the public who constitute the beneficiaries, are represented and protected.[20] Generally, however, the attorney general is not only a proper, but a necessary, party to proceedings relating to public charities, for no final and conclusive settlement may be had unless the state is represented.[1]

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[13] Fell v. Fell, 31 C. L. R. (Austr.) 268, 13 B. R. C. 1093.

Annotation: 130 Am. St. Rep. 204.

And see Escheat [Also 10 R. C. L. p. 602].

[14] Annotation: 130 Am. St. Rep. 204.

[15] Beatty v. Kurtz, 2 Pet. (U. S.) 566, 7 L. ed. 521; Philadelphia Baptist Asso. v. Hart, 4 Wheat. (U. S.) 1, 4 L. ed. 499; People ex rel. Ellert v. Cogswell, 113 Cal. 129, 45 P. 270, 35 L.R.A. 269; Stowell v. Prentiss, 323 Ill. 309, 154 N. E. 120, 50 A.L.R. 584; People ex rel. Smith v. Braucher, 258 Ill. 604, 101 N. E. 944, 47 L.R.A.(N.S.) 1015; Going v. Emery, 16 Pick. (Mass.) 107, 26 Am. Dec. 645; Dickey v. Volker, 321 Mo. 235, 11 S. W. (2d) 278, 62 A.L.R. 858; Re Creighton, 91 Neb. 654, 136 N. W. 1001, Ann. Cas. 1913D, 128; MacKenzie v. Presbytery of Jersey City, 67 N. J. Eq. 652, 61 A. 1027, 3 L.R.A.(N.S.) 227; Stearns v. Newport Hospital, 27 R. I. 309, 62 A. 132, 8 Ann. Cas. 1176; Ewell v. Sneed, 136 Tenn. 602, 191 S. W. 131, 5 A.L.R. 303; Kenney Presby. Home v. State, 174 Wash. 19, 24 P. (2d) 403, citing R. C. L.

Annotation: 62 A.L.R. 883; Ann. Cas. 1913D, 138.

In England, the King, as parens patriæ, was the guardian of charitable trusts, and enforced them by his attorney general with the aid of the chancellor. Philadelphia Baptist Asso. v. Hart, 4 Wheat. (U. S.) 1, 4 L. ed. 499; Going v. Emery, 16 Pick. (Mass.) 107, 26 Am. Dec. 645; Dickey v. Volker, 321 Mo. 235, 11 S. W. (2d) 278, 62 A.L.R. 858.

In this country, it is the general view that the people or the state, as parens patriæ, are the guardian of charitable trusts, enforcing them by their attorney general. People ex rel. Ellert v. Cogswell, 113 Cal. 129, 45 P. 270, 35 L.R.A. 269; Dickey v. Volker, 321 Mo. 235, 11 S. W. (2d) 278, 62 A.L.R. 858. See also Beatty v. Kurtz, 2 Pet. (U. S.) 566, 7 L. ed. 521.

In some jurisdictions, however, it has been held or suggested that the government does not succeed to the full prerogative of the Crown, as parens patriæ. Hence, although a statute confers a right upon the attorney general to bring the trustees of charitable funds to an account for the management of such property, where the beneficiaries of a charitable trust are not named or are uncertain individuals of an unascertained class, such statute does not confer upon the attorney general a power to act as parens patriæ in order to set up the invalid charity undertaken by the will. Ewell v. Sneed, 136 Tenn. 602, 191 S. W. 131, 5 A.L.R. 303. And see Philadelphia Baptist Asso. v. Hart, 4 Wheat. (U. S.) 1, 4 L. ed. 499; Re Creighton, 91 Neb. 654, 136 N. W. 1001, Ann. Cas. 1913D, 128.

But, in such a jurisdiction, where certain and ascertainable trustees are appointed, it has been held that it is the duty of the attorney general to appear in support of the charity. Re Creighton, 91 Neb. 654, 136 N. W. 1001, Ann. Cas. 1913D, 128.

And in Ewell v. Sneed, 136 Tenn. 602, 191 S. W. 131, 5 A.L.R. 303, the court intimated that where a charitable trust is lawfully created and title to the property has once vested in the trustees named, it may be that the attorney general can intervene if the trustees named die or refuse to act, and have others appointed in their stead. And see Philadelphia Baptist Asso. v. Hart, 4 Wheat. (U. S.) 1, 4 L. ed. 499.

And see Charities [Also 5 R. C. L. p. 287].

[16] Dickey v. Volker, 321 Mo. 235, 11 S. W. (2d) 278, 62 A.L.R. 858; Kenney Presby. Home v. State, 174 Wash. 19, 24 P. (2d) 403, citing R. C. L.

Annotation: 62 A.L.R. 884; Ann. Cas. 1913D, 138.

[17] Stowell v. Prentiss, 323 Ill. 309, 154 N. E. 120, 50 A.L.R. 584.

[18] Dickey v. Volker, 321 Mo. 235, 11 S. W. (2d) 278, 62 A.L.R. 858.

Annotation: 62 A.L.R. 887; Ann. Cas. 1913D, 138.

He may come into the suit by intervention or be brought in by amendment to the pleadings, when necessary, and in case he should choose to do so, he should be given the right to take charge and control of that portion of the litigation which relates to the public right. Stowell v. Prentiss, 323 Ill. 309, 154 N. E. 120, 50 A.L.R. 584.

The refusal of the attorney general to institute a proceeding where he believes it inadvisable is not a usurpation of judicial power, and where, in such case, he is made an unwilling party, he may challenge the right of the plaintiff to maintain the suit.[2] The attorney general may compromise or settle matters in dispute in litigation respecting a charity, where he believes that the settlement will be more beneficial to the charity than a long and contested litigation, even though the settlement does not concede the utmost that the charity is entitled to, and such a settlement will be sanctioned by the court.[3]

The power of the attorney general to institute a suit for the enforcement of a public charitable trust is a common-law power incident to the office, not dependent on statutes;[4] but the right or duty of the attorney general, or of the state generally, to enforce charitable trusts, has been the subject of statutory provisions enacted in some states.[5] Unless, however, a gift is definitely to a charity such as equity recognizes, and one more or less public or general, there is no right in the public to serve as a ground for suit or intervention on the part of the attorney general.[6]

§ 18. Actions against Public Officers.—The attorney general is the proper person to institute proceedings against public officers whose acts require the supervision of a court. Here, as elsewhere, it is essential to the successful prosecution of such matters that the state or the general public be concerned therein.[7]

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[19] Dickey v. Volker, 321 Mo. 235, 11 S. W. (2d) 278, 62 A.L.R. 858; MacKenzie v. Presbytery of Jersey City, 67 N. J. Eq. 652, 61 A. 1027, 3 L.R.A.(N.S.) 227; Kenney Presby. Home v. State, 174 Wash. 19, 24 P. (2d) 403, citing R. C. L.

Annotation: 62 A.L.R. 885.

[20] Annotation: 62 A.L.R. 886.

Those with a special interest may enforce the trust, or a localized or grouped charity may be enforced by a class suit. Dickey v. Volker, 321 Mo. 235, 11 S. W. (2d) 278, 62 A.L.R. 858.

The children and heirs of the donor of a trust for charitable uses are not entitled to maintain a suit to restrain the use of the property in alleged violation of the terms of the trust, where the complainants have no standing in court by right of reverter or as being in themselves possible beneficiaries. Only the attorney general, by way of information, or the trustee can properly invoke the superintending power of the courts over the administration of the trust. MacKenzie v. Presbytery of Jersey City, 67 N. J. Eq. 652, 61 A. 1027, 3 L.R.A. (N.S.) 227.

[1] Philadelphia Baptist Asso. v. Hart, 4 Wheat. (U. S.) 1, 4 L. ed. 499; People ex rel. Ellert v. Cogswell, 113 Cal. 129, 45 P. 270, 35 L.R.A. 269; Stowell v. Prentiss, 323 Ill. 309, 154 N. E. 120, 50 A.L.R. 584; Dickey v. Volker, 321 Mo. 235, 11 S. W. (2d) 278, 62 A.L.R. 858. See also Ewell v. Sneed, 136 Tenn. 602, 191 S. W. 131, 5 A.L.R. 303.

Annotation: 62 A.L.R. 887; 81 A.L.R. 130; Ann. Cas. 1913D, 138.

But when a deed of gift creates a charitable trust for two beneficiaries, one of them may institute a suit against the other seeking to be allowed to discharge the duties imposed upon it by the terms of the trust, and the attorney general is not a necessary, although he would have been a proper, party to the proceeding. Annotation: 62 A.L.R. 888.

[2] Dickey v. Volker, 321 Mo. 235, 11 S. W. (2d) 278, 62 A.L.R. 858.

Generally, as to discretionary power of attorney general, see supra, § 10.

[3] Annotation: 81 A.L.R. 130.

In England, the Attorney General is a necessary party to all actions relating to charities, and no compromise can be enforced without his sanction. The court has a discretion, instead of acting according to the strict rules of law, to refer matters arising out of an action to the consideration of the attorney general and to act on his certificate or report. Annotation: 81 A.L.R. 130.

[4] Annotation: 62 A.L.R. 891.

[5] Annotation: 62 A.L.R. 891.

[6] Annotation: 62 A.L.R. 889; Ann. Cas. 1913D, 138.

One of the most important of the duties of the attorney general is that of instituting proceedings in the nature of quo warranto for the recovery of public offices from those who wrongfully assume to be the lawful occupants thereof.[8] It is quite uniformly agreed that in the absence of statute, his discretion as to the necessity of instituting quo warranto proceedings for this purpose is absolute, the courts having neither the power of sitting in judgment upon the exercise of his discretion nor of coercing action on his part, and that neither an individual claiming office, nor any other person, has any legal right to compel the attorney general to bring an action in the name of the people.[9] Under statutes in some states, however, where the attorney general or other officer refuses to bring an information, it may be brought by the relator himself, with leave of the court.[10] If, on the other hand, the attorney general elects to proceed, the writ should issue as a matter of course,[11] for at common law he has, ex officio, the right either to sue out a writ of quo warranto or to bring an information in the nature of a quo warranto without leave of the court.[12]

The duty of the attorney general to recover a public office arises not only in the case of a wrongful usurpation, but also where an office is forfeited by the holder thereof.[13] It has been held that where a statute empowers the attorney general to enforce forfeitures of office, without restriction or limitation as to particular offices, he may enforce the forfeiture of a municipal office.[14] And such power is in no way interfered with because the city charter confers upon the city council a similar power to remove municipal officers who have failed properly to discharge their duties, the powers of the state and of the city council being concurrent.[15]

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[7] Yett v. Cook, 115 Tex. 205, 281 S. W. 837, citing R. C. L.; State ex rel. Atty. Gen. v. Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L.R.A. 561.

Annotation: 6 Ann. Cas. 912.

The rule is elementary that the state, the guardian and protector of all public rights, may maintain an action to prevent an abuse of power by public officers. Yett v. Cook, 115 Tex. 205, 281 S. W. 837, citing R. C. L.

[8] **An action to determine a disputed title to a public office can be brought only** in the name of the state by the attorney general or district attorney on his own information or that of another who may be joined as plaintiff. Guillotte v. Poincy, 41 La. Ann. 333, 6 So. 507, 5 L.R.A. 403.

[9] Annotation: 15 L.R.A.(N.S.) 604 et seq.; Ann. Cas. 1913C, 1307 et seq.

That he should have such absolute discretion wherever the title to public office is concerned is highly proper, for the usurpation of a public office is essentially a public wrong, even though the private individual wrongfully excluded therefrom is deeply interested in securing the ouster of the wrongdoer. Being a public wrong, it is for the state to determine when it deems its rights to have been infringed so as to call for the necessity of commencing such an action; and as the state must confide the power of making such determination to some one of its public servants, it is most fitting that it should be vested in the attorney general to whom it intrusts all of its legal matters. To be sure, it is not uncommon for cases to arise in which the disturbing influence of party feeling so affects the action of the attorney general as to result in great injustice to individuals. It is to be presumed, however, that he will do his duty and act with strict impartiality. Annotation: 15 L.R.A.(N.S.) 605; Ann. Cas. 1913C, 1308.

In some cases, however, it is held that the discretion of the attorney general is subject, in a measure at least, to the control of the courts. Annotation: 15 L.R.A. (N.S.) 606.

[10] Annotation: 15 L.R.A.(N.S.) 603.

[11] Com. v. Walter, 83 Pa. 105, 24 Am. Rep. 154.

Annotation: 1 L.R.A.(N.S.) 826; 6 Ann. Cas. 912.

[12] Atty.-Gen. v. Sullivan, 163 Mass. 448, 40 N. E. 843, 28 L.R.A. 455.

Annotation: 1 L.R.A.(N.S.) 826; 6 Ann. Cas. 912.

A distinction, however, is made between proceedings by the attorney general on behalf of the public and proceedings on the relation of an individual. In the absence of a statute permitting the filing of the information on the relation of a private individual, it is generally held that an information by an individual, or even by a public officer on the relation of an individual and for the vindication of a private right, can only be filed with leave of court. Annotation: 6 Ann. Cas. 913.

[13] Coco v. Oden, 143 La. 718, 79 So. 287, 8 A.L.R. 679; State ex rel. Young v. Robinson, 101 Minn. 277, 112 N. W. 269, 20 L.R.A.(N.S.) 1127.

A suit against a sheriff for forfeiture of his office because he accepted, received, and used a free pass or free transportation, or accepted discriminatory passenger rates, is properly brought by the attorney general, or district attorney, under constitutional provision. Coco v. Oden, 143 La. 718, 79 So. 287, 8 A.L.R. 679.

[14] State ex rel. Young v. Robinson, 101

In addition to the remedy available to the attorney general by forfeiture of office, he may proceed, in protecting the rights of the people, and in curbing the misconduct of officers, through the less drastic remedies of injunction and mandamus.[16] It is competent for the state, at common law, through its officers, to maintain injunction proceedings to restrain apprehended wrong on the part of public officers.[17] Thus, the attorney general, by virtue of his office, may on his own relation enjoin the secretary of state from giving notices to proceed with an election under an act alleged to be unconstitutional.[18] It has been held, however, that the attorney general may not interfere in the case of every illegal act of a public officer, and that where the state has no direct interest, it may not interfere to protect individuals from the illegal acts of a public officer, where such individuals have, in the ordinary course of the law, ample and adequate means of protection.[19] Again, a writ of mandamus against public officers to compel the performance of a public duty may be issued in the name of the state on the relation of the attorney general.[20] Thus, he may bring mandamus to compel school directors to observe a statute excluding from the public schools children who have not been vaccinated,[1] or to require municipal officers to call an election to fill their own offices.[2]

§ 19. Actions Concerning Corporations.—Where the injury sought to be redressed is public in its nature, the attorney general may institute proceedings on his own relation against a private corporation, even though the wrong complained of results in private as well as public harm.[3] It is especially the province of the attorney general to sue out a writ of quo warranto against a corporation guilty of public wrong,[4] or which has exceeded its powers,[5] and he may bring quo warranto proceedings to inquire into particular acts of private corporations alleged to be unlawful, to oust a corporation from the exercise of powers not granted or powers forbidden to be exercised.[6] And

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Minn. 277, 112 N. W. 269, 20 L.R.A.(N.S.) 1127.

[15] Ibid.

[16] Yett v. Cook, 115 Tex. 205, 281 S. W. 837, citing R. C. L.

"Indeed, we know of no reason why the State may not avail itself of any of the writs and processes of the law available to individuals for the enforcement of rights, and the redress of wrongs. So that the form of the action is no objection, if the right exists in the State to interfere." State v. McLaughlin, 15 Kan. 228, 22 Am. Rep. 264.

[17] State v. McLaughlin, 15 Kan. 228, 22 Am. Rep. 264.

[18] State ex rel. Atty. Gen. v. Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L.R.A. 561.

[19] State v. McLaughlin, 15 Kan. 228, 22 Am. Rep. 264.

The attorney general cannot maintain an action for an injunction to restrain a county treasurer from collecting a tax levied to pay void bonds issued by a public school district. Though the payment of such bonds is illegal, it would work no greater wrong to the state or general public than would the payment of an illegal debt by a single individual; and, conceding the bonds to be void, each and every taxpayer has ample protection by an action of injunction, or all the taxpayers may unite in a single action. Ibid.

[20] Com. ex rel. Schaffer v. Wilkins, 271 Pa. 523, 115 A. 887, 19 A.L.R. 1379; Yett v. Cook, 115 Tex. 205, 281 S. W. 837, citing R. C. L.

Annotation: 19 A.L.R. 1382.

[1] Com. ex rel. Schaffer v. Wilkins, 271 Pa. 523, 115 A. 887, 19 A.L.R. 1379.

[2] Yett v. Cook, 115 Tex. 205, 281 S. W. 837, citing R. C. L.

[3] State v. Broad River Power Co. 157 S. C. 1, 153 S. E. 537, citing R. C. L.

Annotation: 18 L.R.A.(N.S.) 672.

[4] Com. v. American Baseball Club, 290 Pa. 136, 138 A. 497, 53 A.L.R. 1027; Wright v. Milwaukee Electric R. & Light Co. 95 Wis. 29, 69 N. W. 791, 36 L.R.A. 47, 60 Am. St. Rep. 74.

[5] United States v. Union P. R. Co. 98 U. S. 569, 25 L. ed. 143.

Annotation: 73 A.L.R. 1336.

The attorney general may properly appear in a proceeding to test the right of a corporation to engage in the practice of the law. Re Co-operative Law Co. 198 N. Y. 479, 92 N. E. 15, 32 L.R.A.(N.S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879.

[6] Com. ex rel. Woodruff v. American Baseball Club, 290 Pa. 136, 138 A. 497, 53

it is held that the offices of a corporation, created by special act or under a general corporation law, are offices of a public character, and the remedy by information in the nature of quo warranto lies against one usurping such an office.[7] There is no doubt that the attorney general, however, may not seek a remedy for the redress of mere private grievances, unaccompanied by an injury to the public.[8] The courts are not entirely in agreement on the question of whether a particular injury is public in character or whether it is purely of a private nature. As it is within the province of the legislature to determine what acts affect the public interest, the statutes of the particular jurisdiction should be consulted, as they frequently determine the powers and duties of the attorney general with respect to corporations.[9] The prevailing view is that in the absence of statute, the attorney general has no right to enforce the primary right of the corporation to reclaim misapplied assets,[10] or to remove unsuitable or misbehaving officers.[11] It is the policy of some jurisdictions, however, to allow the attorney general to interfere with the affairs of private corporate bodies, without a relator, in every case where he is of the opinion that the public interests require that such an action be brought.[12] And it is recognized that the state may have a legal interest in the management or disposal of the funds of certain private corporations whose functions are public in nature, such as religious or charitable corporations.[13]

In some jurisdictions the peculiar nature of the business conducted by particular private corporations is so far considered as of public interest as to

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A.L.R. 1027, holding that an incorporated baseball club, conducting ball games on Sunday in violation of statute, may be ousted from any right, privilege, or authority to conduct games on Sunday, by a quo warranto proceeding instituted by the attorney general, although the statute provides for a penalty for its violation.

And see QUO WARRANTO [Also 22 R. C. L. p. 671, § 11].

[7] **An information in the nature of a quo warranto** may at common law be filed by the attorney general in the name of the state, to test the claim to office of an officer of a manufacturing corporation organized for private gain, either under special charter or under general incorporation laws, since the corporation is exercising a public franchise, and the title to its offices is a matter of public concern. Brooks v. State, 3 Boyce (Del.) 1, 79 A. 790, 51 L.R.A.(N.S.) 1126, Ann. Cas. 1915A, 1133. Annotation: Ann. Cas. 1915A, 1145.

And see State v. Milwaukee Electric R. & Light Co. 136 Wis. 179, 116 N. W. 900, 18 L.R.A.(N.S.) 672.

[8] Brooks v. State, 3 Boyce (Del.) 1, 79 A. 790, 51 L.R.A.(N.S.) 1126, Ann. Cas. 1915A, 1133.

[9] **Thus, it has been held** that statutory authority to the attorney general to prosecute all actions in the Supreme Court in which the state shall be interested or a party, and to appear for the state in any Circuit Court whenever requested by the governor or either branch of the legislature to do so, does not empower him, without the request of the governor or legislature, to institute in the Circuit Court an action to annul the franchise of a private corporation. State v. Milwaukee Electric R. & Light Co. 136 Wis. 179, 116 N. W. 900, 18 L.R.A.(N.S.) 672.

[10] State v. Milwaukee Electric R. & Light Co. 136 Wis. 179, 116 N. W. 900, 18 L.R.A. (N.S.) 672. See also United States v. Union P. R. Co. 98 U. S. 569, 25 L. ed. 143.

[11] State v. Milwaukee Electric R. & Light Co. 136 Wis. 179, 116 N. W. 900, 18 L.R.A. (N.S.) 672.

Annotation: 18 L.R.A.(N.S.) 672.

Such mere sentimental or remote interest as the whole public may have that corporate officers behave well, or that private corporations do not squander their own money, is not that sort of right which constitutes the state "the real party in interest." State v. Milwaukee Electric R. & Light Co. 136 Wis. 179, 116 N. W. 900, 18 L.R.A.(N.S.) 672.

[12] People v. Ballard, 134 N. Y. 269, 32 N. E. 54, 17 L.R.A. 737, rehearing denied in 136 N. Y. 639, 32 N. E. 611; State v. Lord, 28 Or. 498, 43 P. 471, 31 L.R.A. 473.

Under a system of legislation showing a progressive tendency towards state supervision of its corporations through its courts and the attorney general, which gives the courts jurisdiction of suits brought by the attorney general when he is convinced that the interest of the public will be promoted thereby, the attorney general may, in the name of the people, without a relator, maintain an action to remove the trustees of a business corporation and to compel them to account for its property. People v. Ballard, 134 N. Y. 269, 32 N. E. 54, 17 L.R.A. 737, rehearing denied in 136 N. Y. 639, 32 N. E. 611. Annotation: 18 L.R.A.(N.S.) 673.

And see CORPORATIONS [Also 7 R. C. L. p. 1].

[13] United States v. Union P. R. Co. 98 U. S. 569, 25 L. ed. 143; State v. Milwaukee Electric R. & Light Co. 136 Wis. 179, 116 N. W. 900, 18 L.R.A.(N.S.) 672.

And see supra, § 17.

justify the interference of the state through its officers in order to protect the members of such corporations. Thus, in some states, statutes have been enacted empowering the attorney general on the advice of the secretary of state or similar officer to bring an action to dissolve a building and loan association, and on the failure of such officer to act, making it the duty of the attorney general to institute proceedings on his own account.[14] And statutes have not infrequently been passed directing the attorney general to proceed against a particular and specified corporation (a bank, insurance company, railroad, etc.), to obtain a decree declaring its charter forfeited, or to wind up its business affairs for insolvency and distribute its assets, or to institute suit against the officers and others dealing with the corporation; and such statutes are well-recognized acts of legislative power uniformly sustained by the courts.[15]

§ 20. **—Injunction and Mandamus against Corporations.**—Although it is customary for English courts to permit the Attorney General to file an information in equity to enjoin a corporation from violating its charter and its public duties, in this country courts of equity do not assume jurisdiction in such matters quite so readily, on the ground that there is an adequate legal remedy by proceedings in the nature of a quo warranto, and for the further reason that it is not the function of equity to administer punishment or enforce forfeitures.[16] It is generally acknowledged, however, that the state, in its sovereign capacity, may appeal to the courts through its attorney general for relief by injunction whenever either its property is involved or public interests are threatened and jeopardized by any corporation, especially if the latter is of a public service character, such as a railroad trying to transcend its powers or to violate its duties to the general public.[17] Thus, the attorney general may maintain an action to enjoin common carriers whose rates are fixed by law from exacting unlawful and excessive rates,[18] and may bring suit to restrain an act which tends to create an unlawful monopoly or combination in restraint of trade, in violation of statute.[19]

Mandamus may be brought by the attorney general to compel a public service corporation to resume and maintain the operation of a street railway in accordance with its franchise,[20] and to compel a railroad to comply with a statute in a matter concerning the public.[1]

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[14] Union Sav. & Invest. Co. v. District Ct. 44 Utah, 397, 140 P. 221, Ann. Cas. 1917A, 821 and note.

[15] United States v. Union P. R. Co. 98 U. S. 569, 25 L. ed. 143.

[16] Atty.-Gen. v. Tudor Ice Co. 104 Mass. 239, 6 Am. Rep. 227.

Annotation: 88 Am. Dec. 537, 538.

[17] Atty-Gen. v. Old Colony R. Co. 160 Mass. 62, 35 N. E. 252, 22 L.R.A. 112; State v. American Surety Co. 91 Neb. 22, 135 N. W. 219, Ann. Cas. 1913B, 976; State v. Pacific Exp. Co. 80 Neb. 823, 115 N. W. 619, 18 L.R.A.(N.S.) 664; Stockton v. Central R. Co. 50 N. J. Eq. 52, 24 A. 964, 17 L.R.A. 97; Buck Mountain Coal Co. v. Lehigh Coal & Nav. Co. 50 Pa. 91, 88 Am. Dec. 534.

Annotation: 18 L.R.A.(N.S.) 664.

[18] State v. Pacific Exp. Co. 80 Neb. 823, 115 N. W. 619, 18 L.R.A.(N.S.) 664.

Annotation: 18 L.R.A.(N.S.) 664.

[19] State v. American Surety Co. 91 Neb. 22, 135 N. W. 365, Ann. Cas. 1913B, 976; Stockton v. Central R. Co. 50 N. J. Eq. 52, 24 A. 964, 17 L.R.A. 97.

Thus, a statute may make it the duty of the attorney general to enforce an act making unlawful combinations to prevent competition in insurance. State v. American Surety Co. 91 Neb. 22, 135 N. W. 365, Ann. Cas. 1913B, 976.

A railroad's lease of its franchises and roads to a railway corporation of another state, which was expressly forbidden by law, the effect of which was partially to destroy competition in the production and sale of anthracite coal, a staple commodity of the state, is an excess of corporate power which tends to monopoly and may be restrained in equity at the suit of the attorney general. Stockton v. Central R. Co. 50 N. J. Eq. 52, 24 A. 964, 17 L.R.A. 97.

[20] State ex rel. Daniel v. Broad River Power Co. 157 S. C. 1, 153 S. E. 537, citing R. C. L.

[1] Atty. Gen. v. Old Colony R. Co. 160 Mass. 62, 35 N. E. 252, 22 L.R.A. 112 (statute required railroad to issue mileage tickets and receive those of other companies; statute held unconstitutional).

§ 21. Criminal Prosecutions.—By virtue of his common-law powers, the attorney general may conduct such criminal prosecutions as he may see fit,[2] though in most jurisdictions, as a result of Constitution or statute, his office has been relieved of this duty, which is now discharged by the prosecuting attorneys of the various counties or districts.[3] The Constitution and statutes of the particular jurisdiction should be consulted.[4] Except in so far as the Constitution and statutes expressly restrict the common-law powers of the attorney general, however, it is the general rule that his powers in criminal matters are as broad as those at common law,[5] although in a few jurisdictions a contrary rule prevails.[6] In some instances statutes require him to prosecute such criminal matters as the governor may request him to undertake.[7] Provisions of this character are mandatory and the attorney general is bound to comply with the wishes of the chief executive.[8] Other statutes authorize the attorney general to appear for the state before any court or tribunal whenever in his judgment, the interests of the state require it, and prosecute criminal actions.[9] And with respect to the enforcement of particular laws, the attorney general may be empowered with special statutory authority.[10] Thus, the framework and plan of a state intoxicating liquor law may contemplate a central law enforcement head in the attorney general to insure that local laxness will not permit the law to be violated with impunity, and authorize him to undertake its enforcement in any county whenever in his judgment circumstances require it.[11]

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[2] State v. Finch, 128 Kan. 665, 280 P. 910, 66 A.L.R. 1369; State ex rel. Young v. Robinson, 101 Minn. 277, 112 N. W. 269, 20 L.R.A. (N.S.) 1127.

[3] As to respective powers of the attorney general and of prosecuting attorneys, see supra, § 3.

[4] **Under Act of Congress,** the attorney general of a territory, elected by its legislature, and not the attorney of the United States for such territory, appointed by the President, is entitled to prosecute persons accused in that territory of offenses against its laws. Snow v. United States, 18 Wall. (U. S.) 317, 21 L. ed. 784.

[5] State v. Finch, 128 Kan. 665, 280 P. 910, 66 A.L.R. 1369; State ex rel. Young v. Robinson, 101 Minn. 277, 112 N. W. 269, 20 L.R.A.(N.S.) 1127.

And see supra, § 6.

[6] Cosson v. Bradshaw, 160 Iowa, 296, 141 N. W. 1062, Ann. Cas. 1915D, 157.

See supra, § 6.

[7] People v. Gibson, 53 Colo. 231, 125 P. 531, Ann. Cas. 1914B, 138; State v. Finch, 128 Kan. 665, 280 P. 910, 66 A.L.R. 1369; State v. Dawson, 86 Kan. 180, 119 P. 360, 39 L.R.A. (N.S.) 993.

When requested by the governor, in such a jurisdiction, the attorney general has authority to charge by information, in the name of the people, the commission of a felony and to prosecute the proceeding in the District Court. People v. Gibson, 53 Colo. 231, 125 P. 531, Ann. Cas. 1914B, 138.

It has been held that such a statute, however, is not a restriction on the attorney general's common-law powers. State v. Finch, 128 Kan. 665, 280 P. 910, 66 A.L.R. 1369.

Contra: State v. Milwaukee Electric R. & Light Co. 136 Wis. 179, 116 N. W. 900, 18 L.R.A.(N.S.) 672.

Generally, as to effect of statutes on common-law powers of attorney general, see supra, § 6.

Where the authority of the attorney general arises in a particular matter by reason of an executive order requesting him to undertake the prosecution, the courts are bound to take judicial notice thereof, and it need not appear on the face of an indictment signed by him. State v. Bowles, 70 Kan. 821, 79 P. 726, 69 L.R.A. 176.

[8] State ex rel. Stubbs v. Dawson, 86 Kan. 180, 119 P. 360, 39 L.R.A.(N.S.) 993.

[9] Cosson v. Bradshaw, 160 Iowa, 296, 141 N. W. 1062, Ann. Cas. 1915D, 157. See also State ex rel. Miller v. District Ct. 19 N. D. 819, 124 N. W. 417, Ann. Cas. 1912D, 935.

"We are of the opinion that the attorney general is the proper party to decide when he shall attend the trial of any party accused of crime and assist in the prosecution, and that the attorney general or his assistants are the proper parties to decide when it is to the best interests of the state to institute and prosecute any case." State ex rel. Miller v. District Ct. 19 N. D. 819, 124 N. W. 417, Ann. Cas. 1912D, 935.

[10] See State ex rel. Miller v. District Ct. 19 N. D. 819, 124 N. W. 417, Ann. Cas. 1912D, 935.

[11] State v. Finch, 128 Kan. 665, 280 P. 910, 66 A.L.R. 1369; State v. Bowles, 70 Kan. 821, 79 P. 726, 69 L.R.A. 176; State ex rel. Miller v. District Ct. 19 N. D. 819, 124 N. W. 417, Ann. Cas. 1912D, 935.

Annotation: Ann. Cas. 1914B, 143 (discussing similar statutes in other states).

The intoxicating liquor law provided: "Whenever the county attorney shall be unable or shall neglect or refuse to enforce the provisions of this act in his county, or for any reason whatever the provisions of this act shall not be enforced in any county, it shall be the duty of the attorney general to enforce the same in such county." It

Where authority is conferred upon the attorney general to prosecute criminal proceedings, he possesses all the powers of a prosecuting attorney, including those of appearing before the grand jury,[12] of signing indictments, and of either pursuing cases to a final determination [13] or entering a nolle prosequi therein, in which latter respect his power is frequently greater than that of the local official.[14] And the attorney general may dismiss a criminal prosecution, pursuant to a promise of immunity, notwithstanding the opposition of the county attorney.[15]

Where the authority of the attorney general and the district attorney is concurrent, their action should be co-ordinated,[16] and, in the event of a conflict between them, the attorney general, being the superior officer, has control.[17]

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was held that if the attorney general believes that the plan or system followed by the county attorney is ineffective, he may go in, though he believes the county attorney is acting in entire good faith. State v. Finch, 128 Kan. 665, 280 P. 910, 66 A.L.R. 1369.

And see INTOXICATING LIQUORS [Also 15 R. C. L. p. 239].

[12] Cosson v. Bradshaw, 160 Iowa, 296, 141 N. W. 1062, Ann. Cas. 1915D, 157; State v. Bowles, 70 Kan. 821, 79 P. 726, 69 L.R.A. 176; People v. Rich, 237 Mich. 481, 212 N. W. 105, citing R. C. L.; State ex rel. Miller v. District Ct. 19 N. D. 819, 124 N. W. 417, Ann. Cas. 1912D, 935.

Annotation: Ann. Cas. 1912D, 945.

[13] State v. Bowles, 70 Kan. 821, 79 P. 726, 69 L.R.A. 176; People v. Rich, 237 Mich. 481, 212 N. W. 105, citing R. C. L., writ of certiorari denied in 275 U. S. 559, 72 L. ed. 425, 48 S. Ct. 118, and dismissed in 275 U. S. 500, 72 L. ed. 394, 48 S. Ct. 140.

Annotation: Ann. Cas. 1912D, 945.

[14] Confiscation Cases, 7 Wall. (U. S.) 454, 19 L. ed. 196 (as to Attorney General of the United States); State v. Finch, 128 Kan. 665, 280 P. 910, 66 A.L.R. 1369; People v. Rich, 237 Mich. 481, 212 N. W. 105, citing R. C. L., writ of certiorari denied in 275 U. S. 559, 72 L. ed. 425, 48 S. Ct. 118, and dismissed in 275 U. S. 500, 72 L. ed. 394, 48 S. Ct. 140; People v. McLeod, 1 Hill (N. Y.) 377, 25 Wend. 483, 37 Am. Dec. 328.

Annotation: 81 A.L.R. 132; 35 L.R.A. 701 et seq.

At common law, the attorney general alone could discontinue a criminal prosecution by entering a nolle prosequi therein. People v. McLeod, 1 Hill (N. Y.) 377, 25 Wend. 483, 37 Am. Dec. 328. See also State v. Anderson, 119 Tex. 110, 26 S. W. (2d) 174, 69 A.L.R. 233. Annotation: 69 A.L.R. 240; 81 A.L.R. 132.

The assent of the court was unnecessary. Denham v. Robinson, 72 W. Va. 243, 77 S. E. 970, 45 L.R.A.(N.S.) 1123. Annotation: 81 A.L.R. 132; 45 L.R.A.(N.S.) 1123

The common-law rule as to the assent of the court is followed in some of the states. Annotation: 45 L.R.A.(N.S.) 1123.

In other states, statutes require the consent of the court. Annotation: 45 L.R.A. (N.S.) 1124.

And other jurisdictions, by long practice, have established the rule that the consent of the court must be obtained. Denham v. Robinson, 72 W. Va. 243, 77 S. E. 970, 45 L.R.A.(N.S.) 1123. Annotation: 45 L.R.A. (N.S.) 1124.

In such a jurisdiction, it has been held that so far as the attorney general may undertake to exercise or control the powers and duties of prosecuting attorneys, he is limited by the same rules of practice that control them, and may not enter a nolle prosequi without the consent of the court. Denham v. Robinson, 72 W. Va. 243, 77 S. E. 970, 45 L.R.A.(N.S.) 1123.

As to power of prosecuting attorneys to enter nolle prosequi, see PROSECUTING ATTORNEYS [Also 22 R. C. L. p. 97, § 9].

[15] State v. Finch, 128 Kan. 665, 280 P. 910, 66 A.L.R. 1369.

Annotation: 66 A.L.R. 1378.

[16] State v. Finch, 128 Kan. 665, 280 P. 910, 66 A.L.R. 1369.

Under a statute making it the duty of the attorney general, upon request of the governor, to appear in the trial court and to institute and conduct the prosecution of particular criminal cases, he is clothed by such request with all the powers and duties of the county attorney in regard to the prosecution of criminal cases generally; but such request and appearance do not abrogate the powers and duties of the county attorney in regard to the particular prosecution, and consequently, a defendant who has been acquitted in proceedings instituted by a county attorney may plead former jeopardy in a prosecution for the same offense instituted by the attorney general. Dupree v. State, 14 Okla. Crim. Rep. 369, 171 P. 489, L.R.A.1918D, 365.

[17] State v. Finch, 128 Kan. 665, 280 P. 910, 66 A.L.R. 1369.

Annotation: Ann. Cas. 1914D, 156. See also Annotation: 81 A.L.R. 127.

The framework and plan of the Kansas intoxicating liquor law contemplates a central law enforcement head. That head is the attorney general, who has authority to enforce its provisions in any county in the state. State v. Finch, 128 Kan. 665, 280 P. 910, 66 A.L.R. 1369.

The attorney general may appear in an action instituted by the county attorney and move to dismiss (State v. Finch, 128 Kan. 665, 280 P. 910, 66 A.L.R. 1369). But, if an action has already been instituted in one court by the county attorney, the latter's powers are not abrogated by the fact that the attorney general subsequently institutes a prosecution for the same offense in another court. If the county attorney continues the prosecution which he has commenced, which results in the acquittal

To aid in the prosecution of criminal matters the attorney general may secure the assistance of another attorney, even in the case of a crime punishable by death, but such an attorney can receive no compensation from any private individual for his services, and the direction and control of the prosecution remains in the attorney general.[18]

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of the accused before the prosecution by the attorney general is reached for trial, that acquittal may be pleaded in bar in the prosecution by the attorney general. Dupree v. State, 14 Okla. Crim. Rep. 369, 171 P. 489, L.R.A.1918D, 365.

[18] Com. v. Knapp, 10 Pick. (Mass.) 477, 20 Am. Dec. 534.

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I. INTRODUCTORY

§ 1. **Scope.**—This article is a presentation of the law governing attorneys at law and their relations with their clients generally. It comprehends a discussion of the nature, status, and purpose of the office of attorney; the qualifications and admission to the practice of attorneys; the creation and termination of the relation of attorney and client; the rights, privileges, duties, and disabilities arising from the office or relation; the authority of the attorney and his client's responsibility for his acts; the liability of the attorney to his client or to third persons; the compensation of attorneys and their rights to assert liens for their fees; and the punishment, suspension, or disbarment of attorneys. Other articles discuss the authority of particular persons or classes of persons to employ an attorney;[1] the right of an attorney to act as surety for his client;[2] arguments of counsel;[3] and the question of attorneys' fees as costs.[4] The subject of privileged communications arising by reason of the relation of attorney and client also is treated elsewhere,[5] as is the question of the attorney's liability for, and the privilege attaching to, defamatory communications made regarding the subject of his employment.[6]

While the validity and enforcement of contracts between attorney and client are treated in this article, the general subject of champerty and maintenance is treated in another connection.[7]

§ 2. **Regulation of Practice of Law.**—The practice of law is affected with a public interest, and it is both the right and duty of the state to regulate and control it so that the public welfare will be served and promoted;[8] the legislature has the power to declare acts of unauthorized practice of the law illegal and punishable by fine or imprisonment, yet there is an inherent power in the courts to control and supervise the practice of law generally, whether in or out of court, notwithstanding the acts of the legislature in exercise of its power.[9]

§ 3. **What Constitutes Law Practice.**—The practice of law is not limited to the conduct of cases or litigation in court;[10] it embraces the preparation of pleadings and other papers incident to actions and special proceedings, the management of such actions and proceedings on behalf of clients before judges and courts, and, in addition, conveyancing. In general, all advice to clients, and all action taken for them in matters connected with the law,[11] incorporation services,[12] assessment and condemnation services contemplating an appearance before a judicial body,[13] the foreclosure of a mortgage,[14] enforcement of a creditor's claim in bankruptcy or insolvency proceedings,[15] and conducting proceedings in attachment[16] and in matters of estates and guardianship have been held to constitute law practice,[17] as do the preparation and drafting of all kinds of legal instruments,[18] where the work done involves the determination by a trained legal mind of the legal effect of facts and conditions.[19] However, such work is not legal practice when it involves only the clerical labor of filling in blanks and stereotyped forms which involve no legal determination.[1] Generally, the collection of claims without resort to courts of law does not constitute the practice of law,[2] although it may where the collector undertakes to give legal advice, threaten debtors with legal proceedings, or represent the employer in court, either directly or through an attorney engaged by him.[3] Other matters of a legal nature which are held to be an illegal practice of law by a corporation include the maintenance of a legal department to give free legal advice,[4] the furnishing of legal services for members of a protective association,[5] and the maintenance of a collection agency,[6] but not the mere fact of paying the expenses of a particular litigation[7] or the retainer of an attorney on an annual salary basis to attend to and conduct a corporation's own legal business.[8]

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[1] See Corporations [Also 7 R. C. L. p. 631, § 631]; Executors and Administrators [Also 11 R. C. L. p. 233, § 260]; Guardian and Ward [Also 12 R. C. L. p. 1135, § 32]; Husband and Wife [Also 13 R. C. L. p. 1286, § 324]; Infants [Also 14 R. C. L. p. 258, § 35]; Insane and Other Incompetent Persons [Also Insanity, 14 R. C. L. p. 587, § 41]; Receivers [Also 23 R. C. L. p. 116, § 124]; Trusts [Also 26 R. C. L. p. 1340, § 205]; and other specific titles.

[2] See Suretyship [Also Principal and Surety, 21 R. C. L. p. 957, § 11].

[3] See Trial [Also Arguments of Counsel, 2 R. C. L. p. 403].

[4] See Costs [Also 7 R. C. L. p. 792, § 17].

[5] See Witnesses [Also 28 R. C. L. p. 548, §§ 138 et seq.].

[6] See Libel and Slander [Also 17 R. C. L. p. 338, § 85].

[7] See Champerty and Maintenance [Also 5 R. C. L. p. 267].

[8] Kelly v. Judge of Recorder's Ct. (Kelly v. Boyne) 239 Mich. 204, 214 N. W. 316, 53 A.L.R. 273; Rhode Island Bar Asso. v. Automobile Serv. Asso. — R. I. —, 179 A. 139, 100 A.L.R. 226.

[9] Rhode Island Bar Asso. v. Automobile Serv. Asso. — R. I. —, 179 A. 139, 100 A.L.R. 226.

[10] Fitchette v. Taylor, 191 Minn. 582, 254 N. W. 910, 94 A.L.R. 356; Re Duncan, 83 S. C. 186, 65 S. E. 210, 24 L.R.A.(N.S.) 750, 18 Ann. Cas. 657.

Annotation: Ann. Cas. 1918C, 131.

Counsel as to legal status and rights, conduct in respect thereof, and the disposition of issues of legal right and wrong for others by advice and negotiation for hire are as much the practice of law as though process and pleadings with or without trial were necessary. Fitchette v. Taylor, 191 Minn. 582, 254 N. W. 910, 94 A.L.R. 356.

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[11] Re Duncan, 83 S. C. 186, 65 S. E. 210, 24 L.R.A.(N.S.) 750, 18 Ann. Cas. 657; Ferris v. Snively, 172 Wash. 167, 19 P. (2d) 942, 90 A.L.R. 278.

Annotation: 18 Ann. Cas. 658.

Where a person advises clients as to legal matters pending or to be brought before courts of record and prepares pleadings and proceedings for use in such courts, he "practices law." Re Bailey, 50 Mont. 365, 146 P. 1101, Ann. Cas. 1917B, 1198.

The practice of law comprehends all the activities of a lawyer in advising and assisting others in all matters of law both in and out of court. Rhode Island Bar Asso. v. Automobile Serv. Asso. — R. I. —, 179 A. 139, 100 A.L.R. 226.

One who obtains employment to prosecute a claim starts suit by summons, determines the form of action, prepares the declaration, attaches a claim of lien for the services for his own benefit, keeps control of the action through substitution of attorney in blank, negotiates a settlement, authorizes the plaintiff to take judgment, and tries to take a fee out of the judgment is engaged in the practice of law. Hightower v. Detroit Edison Co. 262 Mich. 1, 247 N. W. 97, 86 A.L.R. 509.

A definition of what constitutes the practice of law in a statute forbidding the practice of law by one not admitted to the practice is not all inclusive. Rhode Island Bar Asso. v. Automobile Serv. Asso. — R. I. —, 179 A. 139, 100 A.L.R. 226.

[12] Annotation: 73 A.L.R. 1335; Ann. Cas. 1918C, 131.

[13] Annotation: 73 A.L.R. 1333.

[14] Re Otterness, 181 Minn. 254, 232 N. W. 318, 73 A.L.R. 1319.

Annotation: 73 A.L.R. 1335.

[15] Annotation: Ann. Cas. 1918C, 133.

[16] Annotation: 73 A.L.R. 1335.

[17] Re Otterness, 181 Minn. 254, 232 N. W. 318, 73 A.L.R. 1319.

Annotation: 73 A.L.R. 1336.

[18] Re Duncan, 83 S. C. 186, 65 S. E. 210, 24 L.R.A.(N.S.) 750, 18 Ann. Cas. 657.

Annotation: 18 Ann. Cas. 658.

[19] Re Eastern Idaho Loan & T. Co. 49 Idaho, 280, 288 P. 157, 73 A.L.R. 1323.

Annotation: 73 A.L.R. 1332; Ann. Cas. 1918C, 132.

[1] Re Eastern Idaho Loan & T. Co. 49 Idaho, 280, 288 P. 157, 73 A.L.R. 1323.

Annotation: 73 A.L.R. 1332.

[2] Annotation: 84 A.L.R. 750.

[3] Berk v. State, 225 Ala. 324, 142 So. 832, 84 A.L.R. 740; Creditors Nat. Clearing House v. Bannwart, 227 Mass. 579, 116 N. E. 886, Ann. Cas. 1918C, 130; Re Co-operative Law Co. 198 N. Y. 479, 92 N. E. 15, 32 L.R.A. (N.S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879.

Annotation: 84 A.L.R. 751; Ann. Cas. 1918C, 133, 134.

[4] Creditors Nat. Clearing House v. Bannwart, 227 Mass. 579, 116 N. E. 886, Ann. Cas. 1918C, 130.

Annotation: 73 A.L.R. 1332.

[5] Rhode Island Bar Asso. v. Automobile Serv. Asso. — R. I. —, 179 A. 139, 100 A.L.R. 226.

Annotation: 73 A.L.R. 1333.

[6] Annotation: 73 A.L.R. 1333; Ann. Cas. 1918C, 134.

[7] Annotation: 73 A.L.R. 1335; Ann. Cas. 1918C, 135.

[8] Re Otterness, 181 Minn. 254, 232 N. W. 318, 73 A.L.R. 1319.

The execution of trusts, such as accepting appointments as executor or administrator and acting as such, is not part of the duties peculiarly pertaining to the legal profession and does not constitute what is ordinarily understood as the practice of law.[9]

§ 4. —**Work Done by Law Clerk.**—The work of a law clerk approaches in a degree that of the attorney by whom he is employed; so long, however, as it is work of a preparatory nature, such as research, investigation of details, assemblage of data, and such other work as will enable the employer to carry the matter to a conclusion through his own examination, approval, or additional effort, it does not constitute the practice of law. However services rendered by a law clerk in handling uncontested probate matters, giving oral opinions on abstracts of title, and in preparing wills, leases, mortgages, bills of sale, and contracts, upon his own initiative, with no supervision from his employer, even though performed without compensation direct from the client, amount to the practice of law within the meaning of a statute prohibiting an unlicensed person from doing work of a legal nature.[10]

§ 5. **Attorneys and Counsel Defined and Distinguished.**—An attorney at law is one who engages in any of the branches of the practice of law.[11] According to the definition given by the Supreme Court of the United States, persons acting professionally in legal formalities, negotiations, or proceedings by the warrant or authority of their clients may be regarded as attorneys at law within the usual meaning of that designation;[12] one who makes it his business to, and does, thus act for and by the warrant of others practices law.[13]

Formerly, a distinction was quite generally made between attorneys at law and counsel. Although some theoretical distinction is sometimes still maintained,[14] the actual distinction between attorneys or solicitors and counsel or barristers is practically abolished in nearly all the states of this country.[15] The lawyer in charge of a case acts both as solicitor and counsel, and his services in the one capacity and the other cannot be well distinguished.[16] It is a common practice, however, to refer to associate attorneys as "of counsel," to distinguish them from the "attorneys of record" in a cause.

§ 6. **Nature of Office of Attorney.**—In acting for a client, the attorney occupies, in a sense, the position of agent or employee.[17] He is, however, more than a mere agent or servant of his client.[18] Within his sphere and in the line of his special powers, he is as independent as the judge of the court and has, not only his duties and obligations to the court and to his client, but powers entirely different from, and superior to, those of an ordinary agent.[19]

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[9] Metcalfe v. Bradshaw, 145 Ill. 124, 33 N. E. 1116, 36 Am. St. Rep. 478.

[10] Ferris v. Snively, 172 Wash. 167, 19 P. (2d) 942, 90 A.L.R. 278.

[11] Re Duncan, 83 S. C. 186, 65 S. E. 210, 24 L.R.A.(N.S.) 750, 18 Ann. Cas. 657.

Annotation: 18 Ann. Cas. 658.

[12] National Sav. Bank v. Ward, 100 U. S. 195, 25 L. ed. 621; Re Duncan, 83 S. C. 186, 65 S. E. 210, 24 L.R.A.(N.S.) 750, 18 Ann. Cas. 657.

[13] Re Bailey, 50 Mont. 365, 146 P. 1101, Ann. Cas. 1917B, 1198.

[14] Bently v. Fidelity & D. Co. 75 N. J. L. 828, 69 A. 202, 127 Am. St. Rep. 837, 15 Ann. Cas. 1178.

The word "attorney" means attorney at law. Re Morse, 98 Vt. 85, 126 A. 550, 36 A.L.R. 527.

[15] Re Paschal, 10 Wall. (U. S.) 483, 19 L. ed. 992; Ingersoll v. Coal Creek Coal Co. 117 Tenn. 263, 98 S. W. 178, 9 L.R.A.(N.S.) 282, 119 Am. St. Rep. 1003, 10 Ann. Cas. 829.

Annotation: 18 Eng. Rul. Cas. 657; 24 Eng. Rul. Cas. 666.

[16] Re Paschal, 10 Wall. (U. S.) 483, 19 L. ed. 992.

[17] See infra, § 47.

[18] Curtis v. Richards, 4 Idaho, 434, 40 P. 57, 95 Am. St. Rep. 134.

[19] Ibid.

An attorney is, in a certain limited sense at least, a public officer,[20] although he does not come within the meaning of the term "public officer" or "civil officer," etc., as used in statutory or constitutional provisions.[1] He occupies what may be termed a "quasi judicial office,"[2] since he is, in fact, an officer of the court.[3] Like the court itself, an attorney is an instrument or agency to advance the ends of justice.[4]

§ 7. **Duties of Office.**—The trust and confidence which must necessarily be reposed in an attorney by clients require in the attorney a high standard and appreciation of his duty to his clients, his profession, the courts, and the public.[5] His duties are many and varied. Often, they are defined by statute.[6] Among them is the duty to support the Constitutions and laws of the United States and the states.[7] He must uphold the laws, counsel his fellow citizens to use peaceful and lawful methods in seeking justice,[8] and refrain from doing an intentional wrong to the adverse party.[9] Above all, an attorney owes to the court the duty of good faith and honorable dealing,[10] of maintaining a respectful and courteous attitude toward it, and of being obedient to its rules and proper orders.[11] He has no right, under the guise of protecting the interest of his client, to depart from the well-established rules of practice in order unnecessarily to insult, scandalize, and otherwise impugn the honor and integrity of the court.[12] He should be amenable to the rules and discipline of the court in all matters of order or procedure not in conflict with the Constitution or laws of the state.[13]

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[20] Re Bergeron, 220 Mass. 472, 107 N. E. 1007, Ann. Cas. 1917A, 549; Robinson's Case, 131 Mass. 376, 41 Am. Rep. 239, per Gray, Ch. J.

Annotation: 17 L.R.A. 244.

[1] National Sav. Bank v. Ward, 100 U. S. 195, 25 L. ed. 621; Re Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366; Ex parte Yale, 24 Cal. 241, 85 Am. Dec. 62; Re Thomas, 16 Colo. 441, 27 P. 707, 13 L.R.A. 538.

Annotation: 17 L.R.A. 245.

[2] Langen v. Borkowski, 188 Wis. 277, 206 N. W. 181, 43 A.L.R. 622.

[3] Powell v. Alabama, 287 U. S. 45, 77 L. ed. 158, 53 S. Ct. 55, 84 A.L.R. 527; Bank v. Ward, 100 U. S. 195, 25 L. ed. 621; Ex parte Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366; Re Speakman, 32 Ariz. 307, 257 P. 986, 56 A.L.R. 169; Paul v. Stuckey, 126 Ark. 389, 189 S. W. 676, L.R.A.1917B, 888; Re Durant, 80 Conn. 140, 67 A. 497, 10 Ann. Cas. 539; Gould v. State, 99 Fla. 662, 127 So. 309, 69 A.L.R. 699; Kloss v. State, 95 Fla. 433, 116 So. 39, citing R. C. L.; West v. Field, — Ga. — 181 S. E. 661, 101 A.L.R. 465; Curtis v. Richards, 4 Idaho, 434, 40 P. 57, 95 Am. St. Rep. 134; People ex rel. Atty. Gen. v. Beattie, 137 Ill. 553, 27 N. E. 1096, 31 Am. St. Rep. 384; State v. Perkins, 138 Kan. 899, 28 P. (2d) 765, citing R. C. L.; Hanson v. Grattan, 84 Kan. 843, 115 P. 646, 34 L.R.A. (N.S.) 240; Huggins v. Field, 196 Ky. 501, 244 S. W. 903, 29 A.L.R. 1268; Re Keenan, 287 Mass. 577, 192 N. E. 65, 96 A.L.R. 679; Berman v. Coakley, 243 Mass. 348, 137 N. E. 667, 26 A.L.R. 92; Re Bergeron, 220 Mass. 472, 107 N. E. 1007, Ann. Cas. 1917A, 549; Bar Asso. v. Casey, 211 Mass. 187, 97 N. E. 751, 39 L.R.A.(N.S.) 116, Ann. Cas. 1913A, 1226; Ricker's Petition, 66 N. H. 207, 29 A. 559, 24 L.R.A. 740; Lynde v. Lynde, 64 N. J. Eq. 736, 52 A. 694, 58 L.R.A. 471, 97 Am. St. Rep. 692; People ex rel. Karlin v. Culkin, 248 N. Y. 465, 162 N. E. 487, 60 A.L.R. 851; Seawell v. Parsons Lumber Co. 172 N. C. 320, 90 S. E. 241, citing R. C. L.; State Bar Commission ex rel. Williams v. Sullivan, 35 Okla. 745, 131 P. 703, L.R.A. 1915D, 1218; Austin's Case, 5 Rawle (Pa.) 191, 28 Am. Dec. 657; Rhode Island Bar Asso. v. Automobile Serv. Asso. — R. I. —, 179 A. 139, 100 A.L.R. 226; Cooper v. Bell, 127 Tenn. 142, 153 S. W. 844, Ann. Cas. 1914B, 980; Ingersoll v. Coal Creek Coal Co. 117 Tenn. 263, 98 S. W. 178, 9 L.R.A. (N.S.) 282, 119 Am. St. Rep. 1003, 10 Ann. Cas. 829; Langen v. Borkowski, 188 Wis. 277, 206 N. W. 181, 43 A.L.R. 622; Armstrong v. Morrow, 166 Wis. 1, 163 N. W. 179, Ann. Cas. 1918E, 1156; Re Mosness, 39 Wis. 509, 20 Am. Rep. 55.

An attorney for an indigent prisoner, in particular, stands in the position of a quasi public officer charged with the dual responsibility of a faithful discharge of his duties both to the individual and the state. State v. Hudson, — R. I. —, 179 A. 130, 100 A.L.R. 313.

[4] People ex rel. Karlin v. Culkin, 248 N. Y. 465, 162 N. E. 487, 60 A.L.R. 851.

[5] People ex rel. Chicago Bar Asso. v. Baker, 311 Ill. 66, 142 N. E. 554, 31 A.L.R. 737.

[6] Re Clifton, 33 Idaho, 614, 196 P. 670, 19 A.L.R. 931; Re Sylvester, 195 Iowa, 1329, 192 N. W. 442, 30 A.L.R. 180; State v. Breckenridge, 126 Okla. 86, 258 P. 744, 53 A.L.R. 1239.

[7] Ex parte Wall, 107 U. S. 265, 27 L. ed. 552, 2 S. Ct. 569; Re Clifton, 33 Idaho, 614, 196 P. 670, 19 A.L.R. 931; Re Hilton, 48 Utah, 172, 158 P. 691, Ann. Cas. 1918A, 271.

[8] Re Hittson, 20 N. M. 319, 150 P. 733, L.R.A.1916A, 1171; State ex rel. McLaughlin v. Graves, 73 Or. 331, 144 P. 484, L.R.A. 1915C, 259.

[9] Re Macy, 109 Kan. 1, 196 P. 1095, 14 A.L.R. 848.

[10] Re Durant, 80 Conn. 140, 67 A. 497, 10 Ann. Cas. 539; Kloss v. State, 95 Fla. 433, 116 So. 39, citing R. C. L.; Curtis v. Richards, 4 Idaho, 434, 40 P. 57, 95 Am. St. Rep. 134; People ex rel. Atty. Gen. v. Beattie, 137 Ill. 553, 27 N. E. 1096, 31 Am. St. Rep. 384; Hanson v. Grattan, 84 Kan. 843, 115 P. 646, 34 L.R.A.(N.S.) 240; Ricker's Petition, 66 N. H. 207, 29 A. 559, 24 L.R.A. 740; Lynde v. Lynde, 64 N. J. Eq. 736, 52 A. 694, 58 L.R.A. 471, 97 Am. St. Rep. 692; Austin's Case, 5 Rawle, 191, 28 Am. Dec. 657; Ingersoll v. Coal Creek Coal Co. 117 Tenn. 263, 98 S. W. 178, 9 L.R.A.(N.S.) 282, 119 Am. St. Rep. 1003, 10 Ann. Cas. 829; Re Mosness, 39 Wis. 509, 20 Am. Rep. 55.

No attorney at law should be permitted to engage in or continue in a course of conduct which brings the profession into disrepute. People ex rel. Chicago Bar Asso. v.

§ 8. —Precedence of Public, over Private, Duties.—An attorney at law has both public and private obligations, being sworn to act with all good fidelity toward both his client and the court.[14] His private obligations comprise those duties which he owes to his client;[15] his public duty consists in his obligation to aid the administration of justice,[16] to uphold the dignity of the court and respect its authority,[17] and to co-operate with it whenever justice would otherwise be imperiled.[18] Where his duties to his client conflict with those he owes to the public as an officer of the court in the administration of justice, the former must yield to the latter.[19] He violates his oath of office when he resorts to deception or allows his client to do so.[20]

§ 9. Sale of Law Business; Restrictive Covenants.—The good will that an attorney at law has built up in the practice of his profession may be made the subject of sale, like that of any other business.[1] So, while it has been held that specific performance of an agreement to purchase the business of an attorney will be denied,[2] it is held that an agreement made by an attorney at law, upon the sale of his business and good will, not to engage in the practice of his profession in the place to which the good will relates will be sustained.[3] So also, agreements made by clerks employed in the offices of attorneys not to practice their profession within a certain radius of a town or with-

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Baker, 311 Ill. 66, 142 N. E. 554, 31 A.L.R. 737.

[11] Bradley v. Fisher, 13 Wall. (U. S.) 335, 20 L. ed. 646; Re Speakman, 32 Ariz. 307, 257 P. 986, 56 A.L.R. 169; Huggins v. Field, 196 Ky. 501, 244 S. W. 903, 29 A.L.R. 1268; Re Cohen, 261 Mass. 484, 159 N. E. 495, 55 A.L.R. 1309; State Bar Commission ex rel. Williams v. Sullivan, 35 Okla. 745, 131 P. 703, L.R.A.1915D, 1218.

Annotation: 31 A.L.R. 1185.

It is the especial duty and obligation of members of the bar to protect the good name of the courts against ill-founded and unwarranted attacks. Re Breen, 30 Nev. 164, 93 P. 997, 17 L.R.A.(N.S.) 572.

As to when the attorney's conduct amounts to contempt, see CONTEMPT [Also 6 R. C. L. p. 493, § 7].

[12] Huggins v. Field, 196 Ky. 501, 244 S. W. 903, 29 A.L.R. 1268; Re Mindes, 88 N. J. L. 117, 95 A. 743, citing R. C. L.

[13] Gould v. State, 99 Fla. 662, 127 So. 309, 69 A.L.R. 699.

[14] Berman v. Coakley, 243 Mass. 348, 137 N. E. 667, 26 A.L.R. 92; Langen v. Borkowski, 188 Wis. 277, 206 N. W. 181, 43 A.L.R. 622.

[15] See infra, §§ 48, 49.

[16] Berman v. Coakley, 243 Mass. 348, 137 N. E. 667, 26 A.L.R. 92; Langen v. Borkowski, 188 Wis. 277, 206 N. W. 181, 43 A.L.R. 622; Armstrong v. Morrow, 166 Wis. 1, 163 N. W. 179, Ann. Cas. 1918E, 1156.

[17] Huggins v. Field, 196 Ky. 501, 244 S. W. 903, 29 A.L.R. 1268.

[18] People ex rel. Karlin v. Culkin, 248 N. Y. 465, 162 N. E. 487, 60 A.L.R. 851.

[19] Langen v. Borkowski, 188 Wis. 277, 206 N. W. 181, 43 A.L.R. 622.

An attorney is not justified in wrongfully deviating from a strict performance of his duty to the court, because of a bona fide belief that his adversary is attempting to take an unfair advantage. Re Hittson, 20 N. M. 319, 150 P. 733, L.R.A.1916A, 1171.

[20] Kloss v. State, 95 Fla. 433, 116 So. 39, citing R. C. L.; People v. Beattie, 137 Ill. 553, 27 N. E. 1096, 31 Am. St. Rep. 384.

There is nothing in the duty of diligence which a lawyer owes to his client which in any way makes it necessary under any circumstances, for him to practice, or attempt to practice, a fraud on the court or to swear to that which is not true. People ex rel. Chicago Bar Asso. v. Martin, 288 Ill. 615, 124 N. E. 340, 14 A.L.R. 854.

He must enter into no unlawful conspiracy with his client, the judge, or any other person, which might have a tendency either to frustrate the administration of justice or to obtain for his client something to which he is not justly and fairly entitled. Langen v. Borkowski, 188 Wis. 277, 206 N. W. 181, 43 A.L.R. 622.

[1] See GOOD WILL [Also 12 R. C. L. p. 982, §§ 6 et seq.].

[2] Annotation: L.R.A.1918E, 628.

[3] Smalley v. Greene, 52 Iowa, 241, 3 N. W. 78, 35 Am. Rep. 267.

Annotation: 24 L.R.A.(N.S.) 926.

in certain counties after the termination of their employment have been upheld.[4]

§ 10. Necessity of Representation by Attorney.—In England, prior to the enactment of statutes regulating the subject giving the courts the power to examine and admit attorneys, a suitor was not permitted to have an attorney, because the words of the writ commanded the defendant to appear, and that was always taken to mean in proper person. Attorneys, anterior to the statutes, could be had only by those who had permission of the King, and such attorneys were simply attorneys in fact. It was the custom of the King to direct his writs to the judges, commanding them to receive such persons by their attorney, and the judges were bound so to do.[5] The statute which gave shape to the matter and became a model for later statutes was that of 4 Hen. IV. chap. 18, which, among other things, provided that "all attorneys should be examined by the justices, and by their discretion their names should be put upon the roll." Under the American practice, it would seem that unless the English statutes on the subject are considered to be in force, a state statute is necessary in order that attorneys may be admitted to practice in the courts, and in the absence of statutory regulations, the common-law rule that all persons should appear in person would be operative.[6] The existence of a statute authorizing appearance by attorney does not, however, render such method of appearance obligatory. A party to an action may appear in his own proper person or by attorney,[7] unless such party is a corporation, in which case it can appear only by attorney.[8] Even a natural person cannot appear both in person and by attorney; he must elect between the two. If he appears by attorney, he must be heard through him alone.[9] If after the trial begins he insists upon examining a witness himself, he may be required to continue with the trial by himself.[10] However, it has been held not error to permit an attorney who is party to a suit to appear as his own attorney and argue the case to the jury, although he is represented by other counsel in the case.[11]

Every person, sui juris, who is charged with crime has the constitutional right to try his own cause,[12] and a trial court is not justified in imposing counsel on a defendant against his will, unless, indeed, it appears that he is mentally incompetent or not sui juris at the time of the trial.[13] The constitutional provision relating to the right of a prisoner to have the assistance of counsel was inserted for the purpose of abrogating the common-law practice under which prisoners accused of felony were denied such right, and to restrain the legislature from denying it by statute. Such provision is merely permissive, and conditional upon the pleasure of the accused. Preferring the protection of the court or choosing to rely upon his own skill and ability, he may not desire the assistance of counsel.[14] But he must elect by which method to proceed; he cannot insist upon examining one witness himself and then proceeding through his counsel.[15]

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[4] Annotation: 26 L.R.A.(N.S.) 961.

[5] State ex rel. Wolfe v. Kirke, 12 Fla. 278, 95 Am. Dec. 314; Re Day, 181 Ill. 73, 54 N. E. 646, 50 L.R.A. 519; Harshey v. Blackmarr, 20 Iowa, 161, 89 Am. Dec. 520.

[6] State ex rel. Wolfe v. Kirke, 12 Fla. 278, 95 Am. Dec. 314.

[7] Osborn v. Bank of United States, 9 Wheat. (U. S.) 738, 6 L. ed. 204; Funded Debt Comrs. v. Younger, 29 Cal. 147, 87 Am. Dec. 164; Henck v. Todhunter, 7 Harr. & J. (Md.) 275, 16 Am. Dec. 300; Abernethy v. Burns, 206 N. C. 370, 173 S. E. 899, citing R. C. L.

[8] Osborn v. Bank of United States, 9 Wheat. (U. S.) 738, 6 L. ed. 204.

[9] Funded Debt Comrs. v. Younger, 29 Cal. 147, 87 Am. Dec. 164; Henck v. Todhunter, 7 Harr. & J. (Md.) 275, 16 Am. Dec. 300; Abernethy v. Burns, 206 N. C. 370, 173 S. E. 899, citing R. C. L.

Annotation: 93 Am. St. Rep. 170.

[10] People v. Northcott, 209 Cal. 639, 289 P. 634, 70 A.L.R. 806.

[11] Scott v. Times-Mirror Co. 181 Cal. 345, 184 P. 672, 12 A.L.R. 1007.

[12] State v. Yoes, 67 W. Va. 546, 68 S. E. 181, 140 Am. St. Rep. 978; Dietz v. State, 149 Wis. 462, 136 N. W. 166, Ann. Cas. 1913C, 732.

[13] State v. Moore, 121 Mo. 514, 26 S. W. 345, 42 Am. St. Rep. 542, affirmed in 159 U. S. 673, 40 L. ed. 301, 16 S. Ct. 179; Dietz v. State, 149 Wis. 462, 136 N. W. 166, Ann. Cas. 1913C, 732.

§ 11. Privileges and Exemptions of Office.—An attorney, as such, enjoys various privileges and exemptions not enjoyed by laymen; these privileges are granted for the purpose of protecting the courts from interruption and delay; they are such as are considered necessary for the due administration of justice and the protection of the client's rights[16] and are of common-law origin, although in many states they have been made the subject of statutory regulation. For example, attorneys are usually among the classes of persons exempted by statute from jury service.[17] Such statutes would seem, however, to apply only to those who follow the business of the profession of law as their vocation or calling, and persons who, while nominally attorneys at law, are engaged as a means of livelihood in some other business are not exempt from jury service.

At common law, attorneys, barristers, and solicitors were privileged from arrest on any civil process while going to the place of trial, while attending there for the purposes of the cause, and while returning home,[18] and this common-law privilege is recognized in many states.[19] In others, there are express statutory provisions exempting attorneys from arrest while attending court in connection with causes in which they are employed,[20] some of which extend to arrest on a criminal warrant.[1] In some states, however, the privilege formerly existing has been modified or expressly repealed, and in still others it seems that it has never been recognized or acknowledged.[2]

In many jurisdictions attorneys, while attending court, are exempt from the service of summons or other process other than arrest; in some this exemption is limited to nonresident attorneys within the state for this purpose. In other jurisdictions there seems to be no such exemption in favor of attorneys. This matter is discussed in detail under another title.[3]

§ 12. Imposition of Occupation Tax—In General.—Statutes have been enacted imposing occupation taxes upon persons pursuing the vocation of attorney at law;[4] the constitutionality of these statutes has generally been sustained,[5] although some have been condemned as an invasion of the judicial department of the government.[6] Such taxes are different from and in addition to the license to practice,[7] being laid for revenue, and not an exaction for purposes of regulation,[8] and may, as a general rule, be imposed notwithstanding a previous license to practice.[9] The imposition of such taxes has been held not to conflict with a constitutional provision that all taxes shall be uniform and in proportion to the value of the property taxed,[10] nor is such a tax to be construed as a poll or capitation tax.[11] The power to levy such taxes includes the power to compel payment thereof as a condition precedent to entering on or practicing such occupation, and the power to impose a penalty for nonpayment.[12] In some jurisdictions an action at law will lie against an attorney at law to compel the payment of his occupation tax.[13]

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[14] State v. Yoes, 67 W. Va. 546, 68 S. E. 181, 140 Am. St. Rep. 978.

[15] People v. Northcott, 209 Cal. 639, 289 P. 634, 70 A.L.R. 806.

[16] Annotation: 71 A.L.R. 1399; L.R.A. 1917B, 893.

[17] Re Day, 181 Ill. 73, 54 N. E. 646, 50 L.R.A. 519.

The constitutionality of such statutes is upheld by the weight of authority. Annotation: 5 Ann. Cas. 783.

[18] Greenleaf v. People's Bank, 133 N. C. 292, 45 S. E. 638, 63 L.R.A. 499, 98 Am. St. Rep. 709; Bennington Iron Co. v. Rutherford, 18 N. J. L. 105, 35 Am. Dec. 528.

Generally, as to privilege from arrest on civil process, see ARREST, Vol. 4, p. 64, §§ 93–115.

[19] Re Day, 181 Ill. 73, 54 N. E. 646, 50 L.R.A. 519; Hoffman v. Bay County Circuit Judge, 113 Mich. 109, 71 N. W. 480, 38 L.R.A. 663, 67 Am. St. Rep. 458.

[20] Hoffman v. Bay County Circuit Judge, 113 Mich. 109, 71 N. W. 480, 38 L.R.A. 663, 67 Am. St. Rep. 458.

[1] Durst v. Tautges (C. C. A. 7th) 44 F. (2d) 507, 71 A.L.R. 1394 (construing Illinois statute).

[2] Greenleaf v. People's Bank, 133 N. C. 292, 45 S. E. 638, 63 L.R.A. 499, 98 Am. St. Rep. 709.

[3] See PROCESS [Also 21 R. C. L. p. 1304, § 48].

[4] Royall v. Virginia, 116 U. S. 572, 29 L. ed. 735, 6 S. Ct. 510; Cousins v. State, 50 Ala. 113, 20 Am. Rep. 290; Young v. Thomas, 17 Fla. 169, 35 Am. Rep. 93; Blanchard v. State, 30 Fla. 223, 11 So. 785, 18 L.R.A. 409; Simmons v. State, 12 Mo. 268, 49 Am. Dec. 131; American Union Exp. Co. v. St. Joseph, 66 Mo. 675, 27 Am. Rep. 382; Wilmington v. Macks, 86 N. C. 88, 41 Am. Rep. 443; Abraham v. Roseburg, 55 Or. 359, 105 P. 401, Ann. Cas. 1912A, 597; Ex parte Williams, 31 Tex. Crim. Rep. 262, 20 S. W. 580, 21 L.R.A. 783; Ould v. Richmond,

Each member of a firm of practicing lawyers may be required to pay the prescribed tax.[14]

§ 13. —By Municipal Corporation.—The legislature may delegate to municipalities authority to impose a tax on occupations and employments, including the occupation of attorney at law.[15] Such a tax may be imposed upon an attorney at law who has his office and place of business within the city limits, although he resides outside,[16] unless the authority granted to levy and collect license taxes on attorneys at law is, by its terms, limited to those residing in the city.[17] The power is not affected by the fact that the state has or has not imposed an occupation tax upon attorneys.[18] However, statutes del-

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23 Gratt. (Va.) 464, 14 Am. Rep. 139; Petersburg v. Cocke, 94 Va. 244, 26 S. E. 576, 36 L.R.A. 432.
Annotation: 18 L.R.A. 409; 21 L.R.A. 783; 129 Am. St. Rep. 291.

[5] Cousins v. State, 50 Ala. 113, 20 Am. Rep. 290; Ex parte Williams, 31 Tex. Crim. Rep. 262, 20 S. W. 580, 21 L.R.A. 783.
Annotation: 18 L.R.A. 409; Ann. Cas. 1912A, 599.

Such a tax is not unconstitutional as to lawyers on the ground that some criminal might be deprived of counsel by reason of the law, at least without showing that some criminal has actually been deprived thereby of legal counsel. Ex parte Williams, 31 Tex. Crim. Rep. 262, 20 S. W. 580, 21 L.R.A. 783.

[6] Annotation: 18 L.R.A. 409; Ann. Cas. 1912A, 600.

[7] Royall v. Virginia, 116 U. S. 572, 29 L. ed. 735, 6 S. Ct. 510.

[8] Ibid.

[9] Young v. Thomas, 17 Fla. 169, 35 Am. Rep. 93; Ex parte Williams, 31 Tex. Crim. Rep. 262, 20 S. W. 580, 21 L.R.A. 783; Ould v. Richmond, 23 Gratt. (Va.) 469, 14 Am. Rep. 139.
Annotation: 18 L.R.A. 409; 8 L.R.A. (N.S.) 1274; Ann. Cas. 1912A, 599.

[10] Simmons v. State, 12 Mo. 268, 49 Am. Dec. 131; Ex parte Williams, 31 Tex. Crim. Rep. 262, 20 S. W. 580, 21 L.R.A. 783.
Annotation: Ann. Cas. 1912A, 599.

[11] Annotation: Ann. Cas. 1912A, 599.

[12] Royall v. Virginia, 116 U. S. 572, 29 L. ed. 735, 6 S. Ct. 510; Cousins v. State, 50 Ala. 113, 20 Am. Rep. 290; Wilmington v. Macks, 86 N. C. 88, 41 Am. Rep. 443; Simmons v. State, 12 Mo. 268, 49 Am. Dec. 131.
Annotation: Ann. Cas. 1912A, 599.

[13] Shepherd v. Little Rock, 183 Ark. 244, 35 S. W. (2d) 361, citing R. C. L.; Wilmington v. Macks, 86 N. C. 88, 41 Am. Rep. 443.

[14] Blanchard v. State, 30 Fla. 223, 11 So. 785, 18 L.R.A. 409.
Annotation: 129 Am. St. Rep. 293; 2 L.R.A.(N.S.) 394.

Under a statute applicable to "any person, firm, company, or corporation, who desires to engage in or carry on any business or profession hereinafter named," each member of a firm must pay the sum required. Annotation: 18 L.R.A. 409.

[15] Davies v. Hot Springs, 141 Ark. 521, 217 S. W. 769, citing R. C. L.; Wilmington v. Macks, 86 N. C. 88, 41 Am. Rep. 443; Abraham v. Roseburg, 55 Or. 359, 105 P. 401, Ann. Cas. 1912A, 597; Ould v. Richmond, 23 Gratt. (Va.) 464, 14 Am. Rep. 139; Petersburg v. Cocke, 94 Va. 244, 26 S. E. 576, 36 L.R.A. 432.
Annotation: 129 Am. St. Rep. 292; Ann. Cas. 1912A, 599.

Authority "to license and regulate all such callings, trades, and employments as the public good may require to be licensed" empowers a city to impose a license tax upon attorneys. Abraham v. Roseburg, 55 Or. 359, 105 P. 401, Ann. Cas. 1912A, 597.

A city council may, by ordinance, divide lawyers into certain classes and require the members of each class to pay a specified tax, such classification being made by a committee, and public notice being given so that any lawyer dissatisfied with his classification may appear and correct it if it is erroneous. Ould v. Richmond, 23 Gratt. (Va.) 464, 14 Am. Rep. 139.

[16] Petersburg v. Cocke, 94 Va. 244, 26 S. E. 576, 36 L.R.A. 432.
Annotation: 129 Am. St. Rep. 293.

[17] Annotation: Ann. Cas. 1912A, 599.

[18] Annotation: Ann. Cas. 1912A, 599.

egating this power are to be strictly construed; the delegation of authority should be in clear and unmistakable terms.[19]

II. ADMISSION TO PRACTICE

A. In General

§ 14. Right and License to Practice.—The practice of law is not a profession open to all who wish to engage in it, nor is it a natural, inherent, or vested right, or one guaranteed by the Constitution; it is a personal right or privilege limited to persons of good moral character, with special qualifications duly ascertained and certified.[20] The privilege cannot be assigned or inherited, but must be earned by study and good conduct.[1] It is in the nature of a franchise from the state conferred only for merit.[2] Without any statutes on the subject of admission to practice, a person cannot practice as an attorney without a license from the court,[3] even though associated as partner with a duly licensed attorney,[4] not even by hiring a licensed attorney to practice law for his own benefit or profit,[5] for the admission of attorneys to the practice of law in the state courts is subject entirely to state control.[6] This is true although the claim involved in the litigation arises out of interstate commerce.[7] Statutes usually forbid the practice of law by those who are unlicensed,[8] although a party complying with the statutory conditions is entitled as of right to a license to practice law,[9] which he may enforce by mandamus against an officer whose duty to issue it is merely ministerial.[10]

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[19] American U. Exp. Co. v. St. Joseph, 66 Mo. 675, 27 Am. Rep. 382; Abraham v. Roseburg, 55 Or. 359, 105 P. 401, Ann. Cas. 1912A, 597.

Annotation: 129 Am. St. Rep. 292, 293; Ann. Cas. 1912A, 599.

A grant of authority to tax persons engaged in enumerated trades and occupations and "all other business, trades, avocations, or professions whatever has been held not to empower a municipality to tax lawyers. Annotation: Ann. Cas. 1912A, 599.

[20] Wernimont v. State, 101 Ark. 210, 142 S. W. 194, Ann. Cas. 1913D, 1156; Re Durant, 80 Conn. 140, 67 A. 497, 10 Ann. Cas. 539; State v. Rosborough, 152 La. 945, 94 So. 858, citing R. C. L.; Re Maddox, 93 Md. 727, 50 A. 487, 55 L.R.A. 298; Simmons v. State, 12 Mo. 268, 49 Am. Dec. 131; Re Bailey, 50 Mont. 365, 146 P. 1101, Ann. Cas. 1917B, 1198; Re Co-operative Law Co. 198 N. Y. 479, 92 N. E. 15, 32 L.R.A.(N.S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879; State Bar Commission ex rel. Williams v. Sullivan, 35 Okla. 745, 131 P. 703, L.R.A. 1915D, 1218; Danforth v. Egan, 23 S. D. 43, 119 N. W. 1021, 139 Am. St. Rep. 1030, 20 Ann. Cas. 418; Re Morse, 98 Vt. 85, 126 A. 550, 36 A.L.R. 527; Re Ellis, 118 Wash. 484, 203 P. 957, citing R. C. L.; State ex rel Mackintosh v. Rossman, 53 Wash. 1, 101 P. 357, 21 L.R.A.(N.S.) 821, 17 Ann. Cas. 625.

Annotation: 14 L.R.A. 581; 44 L.R.A. (N.S.) 1196.

The right to practice law is not a privilege or immunity of a citizen of the United States within the provision of the Fourteenth Amendment of the Federal Constitution forbidding the abridgment of such privileges or immunities by state laws. Re Lockwood, 154 U. S. 116, 38 L. ed. 929, 14 S. Ct. 1082; Bradwell v. Illinois, 16 Wall. (U. S.) 130, 21 L. ed. 442.

[1] Re Morse, 98 Vt. 85, 126 A, 550, 36 A.L.R. 527.

[2] Re Co-operative Law Co. 198 N. Y. 479, 92 N. E. 15, 32 L.R.A.(N.S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879; Re Morse, 98 Vt. 85, 126 A. 550, 36 A.L.R. 527.

[3] Re Otterness, 181 Minn. 254, 232 N. W. 318, 73 A.L.R. 1319; Danforth v. Egan, 23 S. D. 43, 119 N. W. 1021, 139 Am. St. Rep. 1030, 20 Ann. Cas. 418.

Annotation: 24 L.R.A.(N.S.) 750.

[4] Annotation: 24 L.R.A.(N.S.) 752.

[5] Re Otterness, 181 Minn. 254, 232 N. W. 318, 73 A.L.R. 1319.

[6] Bradwell v. Illinois, 16 Wall. (U. S.) 130, 21 L. ed. 442; Re Bailey, 50 Mont. 365, 146 P. 1101, Ann. Cas. 1917B, 1198; Re Morse, 98 Vt. 85, 126 A. 550, 36 A.L.R. 527.

The Federal courts will be governed by that interpretation of a state statute controlling admission to the practice which is given by the courts of the state. Re Lockwood, 154 U. S. 116, 38 L. ed. 929, 14 S. Ct. 1082.

[7] Re Morse, 98 Vt. 85, 126 A. 550, 36 A.L.R. 527.

[8] Berk v. State, 225 Ala. 324, 142 So. 832, 84 A.L.R. 740.

Where a statute forbids, under penalty, any person to practice law in any court in the state, except in a justice's, recorder's, or municipal court, without having received a license as attorney, or counselor, such statute limits the right of appearing as an attorney before courts-martial to those who have obtained the required license. State v. Crosby, 24 Nev. 115, 50 P. 127, 77 Am. St. Rep. 786.

Such statutes are valid enactments under the police power; they constitute no usurpation of judicial power. Berk v. State, 225 Ala. 324, 142 So. 832, 84 A.L.R. 740.

The right to practice law is usually attested by a certificate of the authority [11] to which may be attached such terms, conditions, and restrictions as may be deemed necessary for the public good,[12] consistent with the nature and purpose of the right or privilege to be exercised.[13]

§ 15. Jurisdiction to Admit.—In England, though provision was made as early as the Act of 4 Hen. IV. chap. 18, for the examination and enrolment of attorneys by the judges, the courts never appoint barristers or counselors at law; they are called to the bar by the inns of court.[14] This power of admission is delegated by the judges to the inns of court, and their conduct is subject to the control of the judges as visitors. No one is called to the bar who is not a member of an inn, and on the question of admission to an inn, there is no appeal from the benchers. As visitors, the judges have jurisdiction only over actually admitted members of an inn.[15] In some of the American colonies the power of appointing attorneys was exercised by the governor of the colony, who, however, usually took advice from the court of last resort,[16] and this practice was adopted in some states.[17] But under the modern practice in the United States, although the function is administrative rather than judicial in nature, admission to practice as an attorney at law, or the licensing of attorneys, is not regarded as the exercise of a mere ministerial power, but as a judicial function, and is therefore intrusted to the courts [18] or the judicial department,[19] rather than to the legislative branch of government.[20] Admission to the practice of law is an inherent power of the court.[1] The power to prescribe all reasonable rules for the admission of persons desiring to practice, subject, of course, to the paramount authority of the Constitution and laws of the state, exists as one of its inherent privileges, necessarily incident to its control over the membership of its bar.[2]

The legislature may, however, confer on particular courts of the state the exclusive control over the admission of attorneys;[3] in a number of states this power is vested in the highest court of the state.[4]

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[9] Royall v. Virginia, 116 U. S. 572, 29 L. ed. 735, 6 S. Ct. 510.

[10] Sands v. Edmunds, 116 U. S. 585, 29 L. ed. 739, 6 S. Ct. 516; Royall v. Virginia, 116 U. S. 572, 29 L. ed. 735, 6 S. Ct. 510.

[11] Re Morse, 98 Vt. 85, 126 A. 550, 36 A.L.R. 527.

[12] Yeiser v. Dysart, 267 U. S. 540, 69 L. ed. 775, 45 S. Ct. 399; State ex rel. Mackintosh v. Rossman, 53 Wash. 1, 101 P. 357, 21 L.R.A.(N.S.) 821, 17 Ann. Cas. 625.

[13] Re Collins, 188 Cal. 701, 206 P. 990, 32 A.L.R. 1062.

[14] State v. Kirke, 12 Fla. 278, 95 Am. Dec. 314; Re Day, 181 Ill. 73, 54 N. E. 646, 50 L.R.A. 519.

[15] Ricker's Petition, 66 N. H. 207, 29 A. 559, 24 L.R.A. 740.

[16] State v. Kirke, 12 Fla. 278, 95 Am. Dec. 314.

[17] Re Hahn, 85 N. J. Eq. 510, 96 A. 589, Ann. Cas. 1918B, 830.
Annotation: 10 L.R.A.(N.S.) 289.

[18] Re Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366; Brydonjack v. State Bar, 208 Cal. 439, 281 P. 1018, 66 A.L.R. 1507; Rosenthal v. State Bar Examining Committee, 116 Conn. 409, 165 A. 211, 87 A.L.R. 991; Re Day, 181 Ill. 73, 54 N. E. 646, 50 L.R.A. 519; People ex rel. Chicago Bar Asso. v. Amos, 246 Ill. 299, 92 N. E. 857, 138 Am. St. Rep. 239; Re Leach, 134 Ind. 665, 34 N. E. 641, 21 L.R.A. 701; Hanson v. Grattan, 84 Kan. 843, 115 P. 646, 34 L.R.A.(N.S.) 240; Opinion of Justices, 279 Mass. 607, 180 N. E. 725, 81 A.L.R. 1059; Fitchette v. Taylor, 191 Minn. 582, 254 N. W. 910, 94 A.L.R. 356; Re Applicants for License, 143 N. C. 1, 55 S. E. 635, 10 L.R.A.(N.S.) 288, 10 Ann. Cas. 187; Danforth v. Egan, 23 S. D. 43, 119 N. W. 1021, 139 Am. St. Rep. 1030, 20 Ann. Cas. 418; Re Morse, 98 Vt. 85, 126 A. 550, 36 A.L.R. 527; Re Goodell, 39 Wis. 232, 20 Am. Rep. 42.

[19] Rosenthal v. State Bar Examining Committee, 116 Conn. 409, 165 A. 211, 87 A.L.R. 991.

[20] Hanson v. Grattan, 84 Kan. 843, 115 P. 646, 34 L.R.A.(N.S.) 240; Rhode Island Bar Asso. v. Automobile Serv. Asso. — R. I. —, 179 A. 139, 100 A.L.R. 226.

[1] Brydonjack v. State Bar, 208 Cal. 439, 281 P. 1018, 66 A.L.R. 1507.

An act creating a court, which grants to it the power to make rules for regulating the forms and mode of procedure before it, gives that court authority to make rules for the admission of persons to appear before it as attorneys. Manning v. French, 149 Mass. 391, 21 N. E. 945, 4 L.R.A. 339.

[2] Re Leach, 134 Ind. 665, 34 N. E. 641, 21 L.R.A. 701.

§ 16. Nonresident Practitioners.—It is the general practice of the courts of record in the several states to permit members of the bar in other states to appear as counsel on the trial or argument of causes. No license is necessary or proper for that purpose, the usual and proper practice being for the court in which the case is pending to grant leave, ex gratia, for the occasion.[5] Such right, however, exists merely by privilege and permission,[6] and it seems that in some jurisdictions, while a nonresident attorney may try or assist in the trial or conduct of a pending action or proceeding, he has no authority to commence an action therein.[7]

§ 17. Liability for Unauthorized Practice of Law.—If an attorney unlawfully practices law without a license, he may be punished as for a contempt of court,[8] or he may be subjected to a criminal prosecution.[9] A person's right to practice law may also be questioned and legally prohibited in quo warranto proceedings,[10] or it may be challenged by a suit for an injunction, notwithstanding the fact that it constitutes a violation of the criminal law.[11] The action of a corporation in practicing law may be punished by ouster from its franchise in a proceeding in quo warranto or by a fine.[12]

§ 18. Who May Challenge Right.—It is unlawful for one to undertake to practice law without a license as prescribed by the local practice and laws, and he may be prosecuted therefor; a criminal prosecution may not, however, afford adequate relief, and it is generally held that duly licensed members of the bar may invoke the jurisdiction of the courts to restrain the illegal practice of law by others.[13] In other words, attorneys, as officers of the court, may, both for themselves and all the affected members of their profession, institute and maintain a suit to challenge or enjoin the unlawful intrusion into their office and professional field by one who is not licensed to do so.[14] They may, for example, bring a petition or proceeding to have persons illegally engaged in the practice of law adjudged to be in contempt of the court.[15] It seems, however, that a party to an action cannot object to the appearance of the opposite party by attorney because such attorney has not paid for and procured the license required by law.[16]

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[3] State v. Mosher, 128 Iowa, 82, 103 N. W. 105, 5 Ann. Cas. 984; Hanson v. Grattan, 84 Kan. 843, 115 P. 646, 34 L.R.A.(N.S.) 240.

Annotation: 10 L.R.A.(N.S.) 289; 10 Ann. Cas. 198.

The matter of admission to practice law may be assumed to be a subject for legislative regulation. Gould v. State, 99 Fla. 662, 127 So. 309, 69 A.L.R. 699.

[4] Re Day, 181 Ill. 73, 54 N. E. 646, 50 L.R.A. 519; State v. Mosher, 128 Iowa, 82, 103 N. W. 105, 5 Ann. Cas. 984; Hanson v. Grattan, 84 Kan. 843, 115 P. 646, 34 L.R.A. (N.S.) 240; State Bar Commission ex rel. Williams v. Sullivan, 35 Okla. 745, 131 P. 703, L.R.A.1915D, 1218; Re Morse, 98 Vt. 85, 126 A. 550, 36 A.L.R. 527.

[5] Tuppela v. Mathison (C. C. A. 9th) 291 F. 728, citing R. C. L.; Freeling v. Tucker, 49 Idaho, 475, 289 P. 85, citing R. C. L.; Re Day, 181 Ill. 73, 54 N. E. 646, 50 L.R.A. 519; State v. Union Nat. Bank, 145 Ind. 537, 44 N. E. 585, 57 Am. St. Rep. 209; Barnes v. Verry, 154 Minn. 252, 191 N. W. 589, 31 A.L.R. 707; Re Leonard, 12 Or. 93, 6 P. 426, 53 Am. Rep. 323; Re Mosness, 39 Wis. 509, 20 Am. Rep. 55.

Annotation: 24 L.R.A.(N.S.) 754.

[6] Youmans v. Hanna, 35 N. D. 479, 160 N. W. 705, 161 N. W. 797, Ann. Cas. 1917E, 263.

[7] Barnes v. Verry, 154 Minn. 252, 191 N. W. 589, 31 A.L.R. 707.

[8] Re Eastern Idaho Loan & T. Co. 49 Idaho, 280, 288 P. 157, 73 A.L.R. 1323; Re Bailey, 50 Mont. 365, 146 P. 1101, Ann. Cas. 1917B, 1198; Rhode Island Bar Asso. v. Automobile Serv. Asso. — R. I. —, 179 A. 139, 100 A.L.R. 226; Re Morse, 98 Vt. 85, 126 A. 550, 36 A.L.R. 527.

Annotation: 36 A.L.R. 533, s. 100 A.L.R. 236; Ann. Cas. 1917B, 1200.

If a person is prevented from obtaining a license to practice, in violation of his constitutional rights, he cannot be punished for practicing without it. Royall v. Virginia, 116 U. S. 572, 29 L. ed. 735, 6 S. Ct. 510.

[9] Rhode Island Bar Asso. v. Automobile Serv. Asso. — R. I. —, 179 A. 139, 100 A.L.R. 226.

[10] Berk v. State, 225 Ala. 324, 142 So. 832, 84 A.L.R. 740.

[11] Fitchette v. Taylor, 191 Minn. 582, 254 N. W. 910, 94 A.L.R. 356; Rhode Island Bar Asso. v. Automobile Serv. Asso. — R. I. —, 179 A. 139, 100 A.L.R. 226.

Annotation: 94 A.L.R. 359.

Generally as to jurisdiction of equity to restrain criminal acts see INJUNCTIONS [Also 14 R. C. L. p. 376, § 78].

[12] Annotation: 73 A.L.R. 1336.

[13] See 4 Ohio Jur. Supplement, § 4a.

B. Qualifications and Eligibility

§ 19. Generally.—Originally the courts alone determined the qualifications of candidates for admission to the bar,[17] and this power still exists.[18] It does not depend upon either the Constitution or statutes for its existence, but exists in all courts of record, unless restricted or taken away by express legislation.[19] The courts have, however, generally acquiesced in all reasonable provisions relating to qualifications enacted by the legislature,[20] so long as the rules and regulations prescribed are not unreasonable or do not deprive the courts of their inherent power to prescribe other rules and conditions of admission to practice.[1] The exercise of such power is held not to violate any constitutional or inherent prerogative of the court.[2] There are, it is true, some courts which have taken the view that courts cannot add qualifications to those prescribed by the legislature, but must admit those shown to have the qualifications prescribed,[3] but, as a general rule, the court will itself prescribe such other qualifications as may seem necessary to it in order to protect it, as well as the public at large, from persons of bad repute.[4] In some jurisdictions the courts have even denied the existence of any power whatever in the legislature to prescribe what qualifications shall be prerequisite to admission of an attorney,[5] especially if the legislature overrides the judicial department.[6]

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[14] Fitchette v. Taylor, 191 Minn. 582, 254 N. W. 910, 94 A.L.R. 356.

[15] Rhode Island Bar Asso. v. Automobile Serv. Asso. — R. I. —, 179 A. 139, 100 A.L.R. 226.

[16] Harrington v. Edwards, 17 Wis. 586, 84 Am. Dec. 768.

[17] Re Secombe, 19 How. (U. S.) 9, 15 L. ed. 565; Hanson v. Grattan, 84 Kan. 843, 115 P. 646, 34 L.R.A.(N.S.) 240.

[18] Opinion of Justices, 279 Mass. 607, 180 N. E. 725, 81 A.L.R. 1059; Manning v. French, 149 Mass. 391, 21 N. E. 945, 4 L.R.A. 339, writ of error dismissed in 133 U. S. 186, 33 L. ed. 582, 10 S. Ct. 258.

Annotation: 10 Ann. Cas. 198.

[19] Danforth v. Egan, 23 S. D. 43, 119 N. W. 1021, 139 Am. St. Rep. 1030, 20 Ann. Cas. 418.

[20] Brydonjack v. State Bar, 208 Cal. 439, 281 P. 1018, 66 A.L.R. 1507; Ex parte Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366; Ex parte Yale, 24 Cal. 241, 85 Am. Dec. 62; Re Leach, 134 Ind. 665, 34 N. E. 641, 21 L.R.A. 701; State v. Mosher, 128 Iowa, 82, 103 N. W. 105, 5 Ann. Cas. 984; Hanson v. Grattan, 84 Kan. 843, 115 P. 646, 34 L.R.A.(N.S.) 240; Re Maddox, 93 Md. 727, 50 A. 487, 55 L.R.A. 298; Re Taylor, 48 Md. 28, 30 Am. Rep. 451; Kelley v. Judge of Recorder's Ct. (Kelley v. Boyne) 239 Mich. 204, 214 N. W. 316, 53 A.L.R. 273; Ricker's Petition, 66 N. H. 207, 29 A. 559, 24 L.R.A. 740; Re Applicants for License, 143 N. C. 1, 55 S. E. 635, 10 L.R.A. (N.S.) 288, 10 Ann. Cas. 187.

Annotation: 66 A.L.R. 1512, s. 81 A.L.R. 1064; 10 Ann. Cas. 198.

[1] Ex parte Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366; Ex parte Secombe, 19 How. (U. S.) 9, 15 L. ed. 565; Brydonjack v. State Bar, 208 Cal. 439, 281 P. 1018, 66 A.L.R. 1507; Hanson v. Grattan, 84 Kan. 843, 115 P. 646, 34 L.R.A.(N.S.) 240; Opinion of Justices, 279 Mass. 607, 180 N. E. 725, 81 A.L.R. 1059.

Annotation: 66 A.L.R. 1512, s. 81 A.L.R. 1064.

The power of the legislature to prescribe the amount of learning on which the court must admit a person to practice has never been recognized by the state courts, except in regard to statutes providing that any person who holds a diploma from a designated law school shall be granted a license thereon. Re Day, 181 Ill. 73, 54 N. E. 646, 50 L.R.A. 519.

Annotation: 10 L.R.A.(N.S.) 289.

[2] Re Applicants for License, 143 N. C. 1, 55 S. E. 635, 10 L.R.A.(N.S.) 288, 10 Ann. Cas. 187.

[3] Annotation: 10 L.R.A.(N.S.) 288.

[4] Annotation: 10 L.R.A.(N.S.) 289.

Statutes are regarded as fixing the minimum and not as setting bounds beyond which the judicial department cannot go. Opinion of Justices, 279 Mass. 607, 180 N. E. 725, 81 A.L.R. 1059.

[5] State ex rel. Clyatt v. Hocker, 39 Fla. 477, 22 So. 721, 63 Am. St. Rep. 174; Re Day, 181 Ill. 73, 54 N. E. 646, 50 L.R.A. 519;

§ 20. Eligibility to Admission or Practice Generally.—It is generally required that applicant for admission to the bar be of legal age at the time of his application,[7] or at least before the time for the next examination.[8] Eligibility is not, however, to be determined by whether the applicant is qualified to hold a public office.[9]

Membership of the bar of the court of last resort of a state is a prerequisite to admission to the bar of the United States Supreme Court.[10]

§ 21. Residence and Citizenship; Race.—It is generally required that an applicant for a license to practice law be a resident of the state in which the application is made,[11] and that he be a citizen of the United States, or eligible to naturalization,[12] and have declared his intention of becoming a citizen.[13] Such discrimination against aliens is not contrary to the Federal or state Constitutions.[14] The right to receive a license to practice law may also be limited to persons of the white race,[15] and it has been held that such a limitation does not conflict with the provisions of the Federal Constitution which give citizens of each state all privileges and immunities of citizens in the several states, and forbid the making or enforcement of any law abridging the privileges or immunities of citizens of the United States.[16]

§ 22. Sex.—Female attorneys at law were unknown in England, and it is well established by the decisions of the courts of the United States that the right to practice law is not a natural right inherently possessed by a woman as a citizen, independent of legislative authorization.[17] Many instances may be cited where the courts have denied the eligibility of women to be admitted to the bar, in the absence of express statutory authorization of their admis-

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Re Goodell, 39 Wis. 232, 20 Am. Rep. 42; Re Mosness, 39 Wis. 509, 20 Am. Rep. 55.

Annotation: 66 A.L.R. 1514, s. 81 A.L.R. 1065; 10 L.R.A.(N.S.) 289.

[6] Opinion of Justices, 279 Mass. 607, 180 N. E. 725, 81 A.L.R. 1059.

[7] Annotation: 21 L.R.A. 701.

[8] Re Applicants for License, 143 N. C. 1. 55 S. E. 635, 10 L.R.A.(N.S.) 288, 10 Ann. Cas. 187.

[9] Re Thomas, 16 Colo. 441, 27 P. 707, 13 L.R.A. 538; Ricker's Petition, 66 N. H. 207. 29 A. 559, 24 L.R.A. 740.

[10] Selling v. Radford, 243 U. S. 46, 61 L. ed. 585, 37 S. Ct. 377, Ann. Cas. 1917D, 569.

[11] Re Robinson, 82 Neb. 172, 117 N. W. 352, 17 Ann. Cas. 878; Re Leonard, 12 Or. 93, 6 P. 426, 53 Am. Rep. 323; Re Yamashita, 30 Wash. 234, 70 P. 482, 59 L.R.A. 671, 94 Am. St. Rep. 860; Re Mosness, 39 Wis. 509, 20 Am. Rep. 55.

Annotation: 21 L.R.A. 701; 17 Ann. Cas. 878.

The removal of a licensed attorney from the state, in some jurisdictions at least, takes away his right to practice in such state, at least during his nonresidence. Re Mosness, 39 Wis. 509, 20 Am. Rep. 55.

Annotation: 24 L.R.A.(N.S.) 756; 17 Ann. Cas. 878.

[12] Bosque v. United States, 209 U. S. 91, 52 L. ed. 698, 28 S. Ct. 501; Agg Large v. State Bar, 218 Cal. 334, 23 P. (2d) 288, citing R. C. L.; Re Robinson, 82 Neb. 172, 117 N. W. 352, 17 Ann. Cas. 878; Re Leonard, 12 Or. 93, 6 P. 426, 53 Am. Rep. 323; Re Yamashita, 30 Wash. 234, 70 P. 482, 59 L.R.A. 671, 94 Am. St. Rep. 860 (native of Japan not eligible to admission).

Annotation: 21 L.R.A. 701; 17 Ann. Cas. 878.

A Spanish lawyer who had previously been denied permission to practice upon the ground that he did not possess the political qualifications required by law was held not entitled to such permission by virtue of the provisions of the Philippine Islands Code of Civil Procedure, § 13, for the admission to practice of those "not specially declared ineligible," who have been duly licensed under the laws and orders of the Islands, under the sovereignty of Spain or of the United States, and are "in good and regular standing as members of the bar." Bosque v. United States, 209 U. S. 91. 52 L. ed. 698, 28 S. Ct. 501.

[13] 1 California Jur. p. 595, § 12.

[14] Templar v. State Examiners, 131 Mich. 254, 90 N. W. 1058, 100 Am. St. Rep. 610; Wright v. May, 127 Minn. 150, 149 N. W. 9, L.R.A.1915B, 151; Re Yamashita, 30 Wash. 234, 70 P. 482, 59 L.R.A. 671, 94 Am. St. Rep. 860.

Annotation: 39 A.L.R. 349.

[15] Annotation: 53 Am. Rep. 325.

[16] Re Taylor, 48 Md. 28, 30 Am. Rep. 451; Re Maddox, 93 Md. 727, 50 A. 487, 55 L.R.A. 298.

[17] Re Lockwood, 154 U. S. 116, 38 L. ed. 929, 14 S. Ct. 1082; Bradwell v. Illinois, 16 Wall. (U. S.) 130, 21 L. ed. 442; Re Maddox, 93 Md. 727, 50 A. 487, 55 L.R.A. 298; Re Robinson, 131 Mass. 376, 41 Am. Rep. 239.

Annotation: 21 L.R.A. 701.

sion.[18] Statutes which apply in terms to males only have been construed not to include females.[19] In many jurisdictions, however, the courts have admitted women to the bar on equal terms with men, in the absence of a statutory or constitutional provision to the contrary.[20] In fact, in almost all, if not all, states women may now be admitted to practise as attorneys on equal terms with men.

§ 23. Moral Character.—Satisfactory evidence of the good moral character of the applicant for admission to the bar is a usual requirement, either by virtue of express statutory regulation, or in the exercise of the power of the court to prescribe such qualifications as it may deem necessary to protect itself and the public from persons of bad repute,[1] although in some instances persons who have been admitted in other states have been admitted upon their certificates of admission in such other states without proof of good character.[2] Under some statutes an applicant for a license to practice law, who, on his examination, satisfies the court of his competent knowledge of the law, is entitled to receive a license, and no investigation into his general moral character is required or permitted. Such statutes have been held not to constitute an unwarranted exercise of judicial power by the legislature or an unlawful attempt to deprive the judicial department of a power which, of right, belongs to it.[3]

Where inquiry as to the moral character of the applicant is permissible, an absolute duty rests upon him to make a full disclosure of any charges preferred against him, irrespective of their outcome, and refusal to admit to the practice of law may be based upon the making of false statements by the applicant in his application.[4]

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[18] Re Leach, 134 Ind. 665, 34 N. E. 641, 21 L.R.A. 701; Re Robinson, 131 Mass. 376, 41 Am. Rep. 239; Re Leonard, 12 Or. 93, 6 P. 426, 53 Am. Rep. 323; Re Goodell, 39 Wis. 232, 20 Am. Rep. 42.

Annotation: 21 L.R.A. 701.

[19] Re Maddox, 93 Md. 727, 50 A. 487, 55 L.R.A. 298; Re Robinson, 131 Mass. 376, 41 Am. Rep. 239; Re Goodell, 39 Wis. 232, 20 Am. Rep. 42.

Under this view, even though a woman founds her application on a certificate of her admission in another state or territory, she cannot be admitted. Re Maddox, 93 Md. 727, 50 A. 487, 55 L.R.A. 298; Re Leonard, 12 Or. 93, 6 P. 426, 53 Am. Rep. 323.

[20] Re Hall, 50 Conn. 131, 47 Am. Rep. 625; Re Leach, 134 Ind. 665, 34 N. E. 641, 21 L.R.A. 701; Ricker's Petition, 66 N. H. 207, 29 A. 559, 24 L.R.A. 740; Re Thomas, 16 Colo. 441, 27 P. 707, 13 L.R.A. 538.

Marriage will not disqualify a woman for admission where the legal disabilities of women have been removed. Ricker's Petition, 66 N. H. 207, 29 A. 559, 24 L.R.A. 740.

[1] Selling v. Radford, 243 U. S. 46, 61 L. ed. 585, 37 S. Ct. 377, Ann. Cas. 1917D, 569; Ex parte Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366; Spears v. State Bar, 211 Cal. 183, 294 P. 697, 72 A.L.R. 923; Re Collins, 188 Cal. 701, 206 P. 990, 32 A.L.R. 1062; People ex rel. Maupin v. Keegan, 18 Colo. 237, 32 P. 424, 36 Am. St. Rep. 274; Re Durant, 80 Conn. 140, 67 A. 497, 10 Ann. Cas. 539; People ex rel. Chicago Bar Asso. v. Wheeler, 259 Ill. 99, 102 N. E. 188, 45 L.R.A. (N.S.) 1202, Ann. Cas. 1914C, 286; People ex rel. Healy v. Macauley, 230 Ill. 208, 82 N. E. 612, 120 Am. St. Rep. 287; People ex rel. Deneen v. Smith, 200 Ill. 442, 66 N. E. 27, 93 Am. St. Rep. 206; Rosencranz v. Tidrington, 193 Ind. 472, 141 N. E. 58, 28 A.L.R. 1136.

See also Re Co-operative Law Co. 198 N. Y. 479, 92 N. E. 15, 32 L.R.A.(N.S.) 35, 139 Am. St. Rep. 839, 19 Ann. Cas. 879; Re Applicants for License, 143 N. C. 1, 55 S. E. 635, 10 L.R.A.(N.S.) 288, 10 Ann. Cas. 187; Re Leonard, 12 Or. 93, 6 P. 426, 53 Am. Rep. 323; Wolfe's Disbarment, 288 Pa. 331, 135 A. 732, 50 A.L.R. 380; Re Stolen, 193 Wis. 602, 214 N. W. 379, 216 N. W. 127, 55 A.L.R. 1355; Re Richter, 187 Wis. 490, 204 N. W. 492, 41 A.L.R. 485.

Annotation: 28 A.L.R. 1140, s. 72 A.L.R. 929; 10 L.R.A.(N.S.) 288; 21 L.R.A. 701.

Good character in the members of the bar is essential to the preservation of the integrity of the courts. The duty and power of the court to guard its portals against intrusion by men and women who are mentally and morally dishonest, unfit on account of bad character, evidenced by their course of conduct, to participate in the administration of law, would seem to be unquestioned as a matter of preservation of judicial dignity and integrity. Gould v. State. 99 Fla. 662, 127 So. 309, 69 A.L.R. 699.

A charge of crime, though not followed by conviction, may justify a refusal to admit the person charged to the practice of law. Spears v. State Bar, 211 Cal. 183, 294 P. 697, 72 A.L.R. 923.

A provision of a state constitution, that all attorneys at law, licensed to practice in certain designated courts of other states or of the United States, shall be eligible to practice in any court of the state without examination, does not preclude the court from inquiring into their moral qualifications when the contingency arises requiring the exercise of such power. Re Mosher, 24 Okla. 61, 102 P. 705, 24 L.R.A.(N.S.) 530, 20 Ann. Cas. 209.

[2] Re Leonard, 12 Or. 93, 6 P. 426, 53 Am. Rep. 323.

[3] Re Applicants for License, 143 N. C. 1, 55 S. E. 635, 10 L.R.A.(N.S.) 288, 10 Ann. Cas. 187.

§ 24. **Education.**—Every attorney ought to possess learning sufficient to enable him either to ascertain the law or to determine his limitations in that respect for the purpose of giving safe advice, and a reasonable education may be required as a qualification for admission to the practice of law.[5] In nearly all the states the power to prescribe the period of study which shall be required of an applicant for admission to the bar has been exercised by the courts, either by virtue of their inherent power to control the admission of attorneys or by express statutory provision. This varies in the different states.[6] An applicant may be required to show that he is a graduate of, or has studied at, a college, high school, or school of equal grade,[7] and he may be required to pursue his study of law at designated law schools.[8] Some statutes provide that the possessors of certificates of graduation from certain designated law schools shall be admitted by the courts of the state to practice law.[9] In some jurisdictions one cannot be admitted to practice unless he has served a clerkship with some practicing attorney of the court for a specified time. Such a rule implies that the applicant, as clerk, must actually and regularly have assisted the attorney in his business during the prescribed period, and not merely have studied law in his office.[11]

§ 25. **Right of Corporations to Practice Law.**—The practice of law is not a lawful business except for members of the bar who have complied with all the conditions required by statute and the rules of the court, and cannot be engaged in by corporations; there is, accordingly, no judicial dissent from the proposition that a corporation cannot lawfully engage in the practice of law.[12] Nor can it do so indirectly by employing qualified lawyers to practice for it.[13]

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[4] Spears v. State Bar, 211 Cal. 183, 294 P. 697, 72 A.L.R. 923.

[5] Re Bergeron, 220 Mass. 472, 107 N. E. 1007, Ann. Cas. 1917A, 549.

[6] Re Applicants for License, 143 N. C. 1, 55 S. E. 635, 10 L.R.A.(N.S.) 288, 10 Ann. Cas. 187.

[7] Re Bergeron, 220 Mass. 472, 107 N. E. 1007, Ann. Cas. 1917A, 549.
Annotation: 87 A.L.R. 997.

[8] Rosenthal v. State Bar Examining Committee, 116 Conn. 409, 165 A. 211, 87 A.L.R. 991.
Annotation: 87 A.L.R. 996.
Such a requirement is not waived by permitting one who attended a nonapproved school to take an examination, and notifying him that he had satisfactorily passed it, where, had the examining committee been fully advised as to the facts, it would not have permitted the applicant to take the examination. Rosenthal v. State Bar Examining Committee, 116 Conn. 409, 165 A. 211, 87 A.L.R. 991.

[9] Re Day, 181 Ill. 73, 54 N. E. 646, 50 L.R.A. 519.
Annotation: 87 A.L.R. 998; 10 L.R.A. (N.S.) 289.
In one instance a statute overriding the rules of court respecting admission of attorneys, by requiring the admission of any person who began to study law before a specified date, provided he has obtained a diploma from a law school in the state after a specified period of attendance, or passed a satisfactory examination before an examining board, after a prescribed course of study, was held to be an unconstitutional assumption by the legislature of power properly belonging to the courts. Re Day, 181 Ill. 73, 54 N. E. 646, 50 L.R.A. 519.

[11] Re Dunn, 43 N. J. L. 359, 39 Am. Rep. 600.

[12] People v. Merchants' Protective Corp. 189 Cal. 531, 209 P. 363, citing R. C. L.; People ex rel. Los Angeles Bar Asso. v. California Protective Corp. 76 Cal. App. 354, 244 P. 1089, citing R. C. L.; Boykin v. Hopkins, 174 Ga. 511, 162 S. E. 796, citing R. C. L.; Re Eastern Idaho Loan & T. Co. 49 Idaho, 280, 288 P. 157, 73 A.L.R. 1323; Re Otterness, 181 Minn. 254, 232 N. W. 318, 73 A.L.R. 1319; Re Co-operative Law Co. 198 N. Y. 479, 92 N. E. 15, 32 L.R.A.(N.S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879; Land Title Abstract & T. Co. v. Dworken, 129 Ohio St. 23, 193 N. E. 650, citing R. C. L.; State ex rel. Lundin v. Merchants' Protective Corp. 105 Wash. 12, 177 P. 694, citing R. C. L.
Annotation: 73 A.L.R. 1328; 32 L.R.A. (N.S.) 56; 19 Ann. Cas. 889.

[13] Re Otterness, 181 Minn. 254, 232 N. W.

C. Procedure for Admission

§ 26. Generally.—Proceedings for the admission of attorneys at law to practice are in the nature of investigations by the court or its representatives to determine whether particular candidates are qualified to become its officers, the ultimate purpose of which is to assure the courts the assistance of advocates of ability, learning, and sound character, and to protect the public from incompetent and dishonest practitioners.[14] The application for admission may be made by a written motion or by a mere oral motion and sustained by evidence without any written pleadings.[15] The applicant puts his own good moral character directly in issue by asking admission to the bar and is held to assume the burden of proof on the issue.[16] If the proof offered falls short of convincing the examiners, it is their privilege and duty to refuse to recommend such applicant for admission.[17]

§ 27. Examination of Applicants.—Express provision is usually made in the various states for the examination of applicants for admission to the bar, and for the granting of a certificate of proficiency by some designated court or committee as a prerequisite to their admission.[18] The conducting of such examinations is usually performed by a special board, committee, or referee.[19]

318, 73 A.L.R. 1319; Re Co-operative Law Co. 198 N. Y. 479, 92 N. E. 15, 32 L.R.A.(N.S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879; Land Title Abstract & T. Co. v. Dworken, 129 Ohio St. 23, 193 N. E. 650, citing R. C. L.; Rhode Island Bar Asso. v. Automobile Serv. Asso. — R. I. —, 179 A. 139, 100 A.L.R. 226.

Annotation: 73 A.L.R. 1331.

[14] Rosenthal v. State Bar Examining Committee, 116 Conn. 409, 165 A. 211, 87 A.L.R. 991.

[15] Brydonjack v. State Bar, 208 Cal. 439, 281 P. 1018, 66 A.L.R. 1507; Rosencranz v. Tidrington, 193 Ind. 472, 141 N. E. 58, 28 A.L.R. 1136.

[16] Spears v. State Bar, 211 Cal. 183, 294 P. 697, 72 A.L.R. 923; Rosencranz v. Tidrington, 193 Ind. 472, 141 N. E. 58, 28 A.L.R. 1136.

Annotation: 28 A.L.R. 1142, s. 72 A.L.R. 930.

The presentation of a certificate of good moral character embracing all the requirements prescribed by law or the rules of court establishes this fact prima facie, but not conclusively. Annotation: 28 A.L.R. 1145, s. 82 A.L.R. 933.

The fact that a Federal court has adjudged in a proceeding, to which an applicant for admission to a state bar was not a party, that certain acts in alleged violation of the state law were not an offense against the Federal law, does not exclude from evidence proof of his admission in a prosecution in a Federal court that he had done the acts in violation of the state law. Rosencranz v. Tidrington, 193 Ind. 472, 141 N. E. 58, 28 A.L.R. 1136.

[17] Spears v. State Bar, 211 Cal. 183, 294 P. 697, 72 A.L.R. 923.

Evidence of bad moral character may be sufficient to reject the application even though it would not be enough to sustain a disbarment proceeding. Annotation: 28 A.L.R. 1144, s. 72 A.L.R. 932.

[18] Re Applicants for License, 143 N. C. 1, 55 S. E. 635, 10 L.R.A.(N.S.) 288, 10 Ann. Cas. 187; St. Louis v. Meyrose Lamp Mfg. Co. 139 Mo. 560, 41 S. W. 244, 61 Am. St. Rep. 474; Re Dunn, 43 N. J. L. 359, 39 Am. Rep. 600; Re Applicants for License, 143 N. C. 1, 55 S. E. 635, 10 L.R.A.(N.S.) 288, 10 Ann. Cas. 187.

Annotation: 10 L.R.A.(N.S.) 289.

The Constitution of Indiana forbids examination as to legal attainments. Re Applicants for License, 143 N. C. 1, 55 S. E. 635, 10 L.R.A.(N.S.) 288, 10 Ann. Cas. 187, (referring to the Constitution of Indiana); the legislature has, however, given the Supreme Court of that state exclusive jurisdiction to admit attorneys to practice law in all courts of the state under such rules and regulations as it may prescribe (Laws, 1931, Ch. 64), pursuant to which rules have been adopted requiring applicants to submit to examination.

A court rule providing for admission to practice of candidates who have passed a bar examination applies only to persons admitted to the examination in accordance with rules limiting those who may take it. Rosenthal v. State Bar Examining Committee, 116 Conn. 409, 165 A. 211, 87 A.L.R. 991.

[19] In Rosenthal v. State Bar Examining Committee, 116 Conn. 409, 165 A. 211, 87 A.L.R. 991, it is held that the employment of members of the bar to ascertain the character and qualifications of applicants is reasonable and involves no unlawful delegation of judicial power.

In State ex rel. Clyatt v. Hocker, 39 Fla. 477, 22 So. 721, 63 Am. St. Rep. 174, on the other hand, it is held that members of a board of legal examiners created by the legislature are such officers as the state Constitution requires the legislature to provide either for their election by the people or their appointment by the governor, and that, consequently, a statute purporting to authorize the state supreme court to appoint such a board to examine and grant certificates to applicants is unconstitutional and void.

Whether such examination shall be wholly written or oral, or partly written or oral, who shall mark the examination papers, and what relative weight shall be given to the result thereof are matters for the determination of the judicial department.[20]

Rules made by the examiners will generally be sustained if they are reasonable.[1] Nor will the court ordinarily review the decision of the board, committee, or referee on character and fitness against granting the certificate,[2] unless a convincing showing is made that such recommendation is not based upon sound premises and valid reasoning.[3] Generally, however, the courts have plenary power to admit those who in its opinion meet the test, whether the investigators do or do not agree with its conclusion.[4]

Members of the bar of another state who have taken a residence in the state where application for admission is made are in most states, under certain prescribed conditions, relating usually to the length of practice in the state where they were originally admitted, admitted without examination.[5]

§ 28. **Administration of Oath.**—Provisions usually exist in the statutes of the various states requiring as a condition precedent to an attorney's admission to practice, or to his continuance in practice, the taking of a prescribed oath, and, in the absence of constitutional restriction, such a requirement is a valid exercise of the power of the legislature to impose conditions on the admission of attorneys.[6] However, an attempt to require as a condition of admission to practice, or of continuance therein, an oath to the effect that the affiant had not voluntarily borne arms against the United States or otherwise supported the organized enemies thereof violates the constitutional inhibitions against bills of attainder and ex post facto laws.[7]

III. CREATION AND TERMINATION OF RELATION OF ATTORNEY AND CLIENT

A. Creation of Relation

§ 29. **Necessity of Retainer or Contract of Employment.**—An attorney at law has no power to act as legal representative or counsel for a person by virtue of his license alone; there must be a contract of employment, express or implied, between him and the party for whom he purports to act or some one authorized to represent such party.[8] The authority of an attorney begins with his retainer.[9] The relationship in a particular case cannot be established by the fact that it exists in some other case or has existed at some remote time, even though the subject-matter of the two cases bears some relation to each other.[10]

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[20] Opinion of Justices, 279 Mass. 607, 180 N. E. 725, 81 A.L.R. 1059.

[1] Annotation: Ann. Cas. 1917A, 552.

[2] Annotation: 28 A.L.R. 1146.

[3] Spears v. State Bar, 211 Cal. 183, 294 P. 697, 72 A.L.R. 923.

[4] Brydonjack v. State Bar, 208 Cal. 439, 281 P. 1018, 66 A.L.R. 1507.

[5] Re Day, 181 Ill. 73, 54 N. E. 646, 50 L.R.A. 519; Re Maddox, 93 Md. 727, 50 A. 487, 55 L.R.A. 298; Re Mosher, 24 Okla. 61, 102 P. 705, 24 L.R.A.(N.S.) 530, 20 Ann. Cas. 209; Re Yamashita, 30 Wash. 234, 70 P. 482, 59 L.R.A. 671, 94 Am. St. Rep. 860; Re Mosness, 39 Wis. 509, 20 Am. Rep. 55.

[6] Ex parte Yale, 24 Cal. 241, 85 Am. Dec. 62; Re Applicants for License, 143 N. C. 1, 55 S. E. 635, 10 L.R.A.(N.S.) 288, 10 Ann. Cas. 187; Langen v. Borkowski, 188 Wis. 277, 206 N. W. 181, 43 A.L.R. 622.

Some statutory provisions authorizing a court to permit an attorney who is not a resident of the state to practice law therein during any term of such court require that such attorney take an oath for the faithful discharge of his duties. State v. Union Nat. Bank, 145 Ind. 537, 44 N. E. 585, 57 Am. St. Rep. 209.

The fact that a state constitution prescribes the oath to be taken as a qualification for any office or public trust has been held not to affect the power of the legislature to prescribe an oath which shall be taken by attorneys. Ex parte Yale, 24 Cal. 241, 85 Am. Dec. 62.

[7] Ex parte Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366; Cummings v. Missouri, 4 Wall. (U. S.) 277, 18 L. ed. 356.

In Ex parte Yale, 24 Cal. 241, 85 Am. Dec. 62, however, it was held that the legislature might require of attorneys the oath prescribed in an "act to exclude traitors and alien enemies from the courts of justice in civil cases."

[8] M'Alexander v. Wright, 3 T. B. Mon.

§ 30. Who May Employ Attorney.—Generally speaking, anyone who has the legal capacity to contract [11] may employ an attorney. No attempt, therefore, is made in this article to treat of the capacity of particular persons or classes of persons, natural or artificial, to employ attorneys at law or to bind themselves to compensate such attorneys for their services.[12]

One may, as agent for another, employ counsel on behalf of his principal.[13]

§ 31. Sufficiency of Retainer.—The relation of attorney and client is not dependent upon the payment of a fee,[14] although this is the usual and most weighty item of evidence to establish the relation. The essential feature of the relation is the fact of an employment agreement, express or implied, for compensation, but whether payment is made in part or in whole by retainer in advance is not material; nor is it even indispensable that the compensation should be assumed by the client.[15] The relation of attorney and client may be created by the employment of an attorney to prepare a deed of trust [16] or by consultation concerning a title to land.[17] It is not, however, established by the fact that a party to a contract is an attorney and offers to, and does, draw the necessary writings gratuitously.[18]

The employment of a firm of lawyers is equivalent to the retainer of each of the partners, although only one of them is consulted.[19] However, a general contract with a firm of attorneys for services does not give the client the right to demand that any particular member of the firm shall render the services or conduct the litigation.[20]

(Ky.) 190, 16 Am. Dec. 93; Lawall v. Groman, 180 Pa. 532, 37 A. 98, 57 Am. St. Rep. 662; Ewing v. Haas, 132 Va. 215, 111 S. E. 255, citing R. C. L.

Annotation: 132 Am. St. Rep. 150.

In order to consummate the relation of attorney and client there must be a retainer, or an offer to retain, or a fee paid. De Wolf v. Strader, 26 Ill. 225, 79 Am. Dec. 371.

The relation of attorney and client cannot exist between an attorney employed by a corporation to practice law for it and a client of the corporation. Re Co-operative Law Co. 198 N. Y. 479, 92 N. E. 15, 32 L.R.A. (N.S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879.

[9] Stone v. Bank of Commerce, 174 U. S. 412, 43 L. ed. 1028, 19 S. Ct. 747.

[10] Sandall v. Sandall, 57 Utah, 150, 193 P. 1093, 15 A.L.R. 620.

[11] See generally CONTRACTS [Also 6 R. C. L. p. 593, § 13].

[12] See CORPORATIONS [Also 7 R. C. L. p. 631, § 631]; EXECUTORS AND ADMINISTRATORS [Also 11 R. C. L. p. 233, § 260]; GUARDIAN AND WARD [Also 12 R. C. L. p. 1135, § 32]; HUSBAND AND WIFE [Also 13 R. C. L. p. 1286, § 324]; INFANTS [Also 14 R. C. L. p. 258, § 35]; INSANE AND OTHER INCOMPETENT PERSONS [Also INSANITY, 14 R. C. L. p. 586, § 41]; MUNICIPAL CORPORATIONS [Also 19 R. C. L. p. 774, § 79]; RECEIVERS [Also 23 R. C. L. p. 116, § 124]; TRUSTS [Also 26 R. C. L. p. 1340, § 205]; and other specific titles.

[13] M'Alexander v. Wright, 3 T. B. Mon. (Ky.) 190, 16 Am. Dec. 93; Swartz v. D. S. Morgan & Co. 163 Pa. 195, 29 A. 974, 975, 43 Am. St. Rep. 786; and see Eoff v. Irvine, 108 Mo. 378, 18 S. W. 907, 32 Am. St. Rep. 609.

A general agent, with authority to make collections for his principal, has power to direct an attorney at law to bring suit. Swartz v. D. S. Morgan & Co. 163 Pa. 195, 29 A. 974, 975, 43 Am. St. Rep. 786.

[14] Pyeatt v. Estus, 72 Okla. 160, 179 P. 42, 4 A.L.R. 1570.

[15] Eoff v. Irvine, 108 Mo. 378, 18 S. W. 907, 32 Am. St. Rep. 609; Lawall v. Groman, 180 Pa. 532, 37 A. 98, 57 Am. St. Rep. 662.

The fact that one who selects an attorney to make an examination of title for the purpose of a contemplated loan requires the borrower to furnish an abstract of title and to pay the attorney for his services does not constitute the lawyer the attorney of the borrower. Wittenbrock v. Parker, 102 Cal. 93, 36 P. 374, 24 L.R.A. 197, 41 Am. St. Rep. 172.

[16] Davis v. Kline, 96 Mo. 401, 9 S. W. 724, 2 L.R.A. 78,

[17] Eoff v. Irvine, 108 Mo. 378, 18 S. W. 907, 32 Am. St. Rep. 609.

[18] Stout v. Smith, 98 N. Y. 25, 50 Am. Rep. 632.

[19] Annotation: Ann. Cas. 1917B, 16.

[20] Clifton v. Clark, 83 Miss. 446, 36 So. 251, 66 L.R.A. 821, 102 Am. St. Rep. 458, 1 Ann. Cas. 396.

§ 32. **—Necessity of Writing or Warrant of Attorney.**—The usual contract of employment of an attorney by a client does not fall within the statute of frauds and need not be in writing; particular contracts may, however, come within the meaning of provisions requiring a contract which is not to be performed within a specified time to be in writing.[1] Under the English practice the fact of employment is evidenced by the warrant of attorney, to be produced when rightfully demanded by the opposite party.[2] In the United States, however, it is not the usual practice to require a warrant of attorney, and the English rules in relation to that subject are not applicable.[3]

§ 33. **Assignment of Counsel by the Court.**—It is within the power, in fact it is the duty, of the trial judge, where the accused in a criminal case is without counsel and without means to employ counsel, to assign counsel to him;[4] and the attorney appointed is bound to render service when required by such an appointment,[5] although there is some authority to the effect that such services cannot be demanded without just compensation.[6]

The power to appoint counsel for an indigent accused has been said to be an inherent power,[7] although in some jurisdictions the power emanates from the legislature and its exercise is subject to the regulation and control of that department.[8] Some courts have construed statutes granting power to appoint counsel for the defense of indigent persons to include any proceeding in the course of a criminal prosecution from the return of the indictment or information to final acquittal or conviction,[9] and some apply the rule to all criminal prosecutions, while others limit it to the more serious crimes, or even to capital cases.[10]

A court in lunacy proceedings may be required to appoint an attorney to represent the person alleged to be insane,[11] and juvenile courts may appoint counsel to represent juvenile offenders tried before them.[12]

In appointing counsel for an indigent accused, the court should act in such a way that both the individual and the state will be impartially protected.[13] Where the trial court does not limit the number of lawyers assisting the prosecuting attorney, it has been held that additional experienced counsel should be appointed to represent the defendant.[14]

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[1] McPherson v. Cox, 96 U. S. 404, 24 L. ed. 746.
Annotation: 15 L.R.A.(N.S.) 326.

[2] M'Alexander v. Wright, 3 T. B. Mon. (Ky.) 190, 16 Am. Dec. 93.

[3] Harshey v. Blackmarr, 20 Iowa, 161, 89 Am. Dec. 520; Henck v. Todhunter, 7 Harr. & J. (Md.) 275, 16 Am. Dec. 300.
Annotation: 88 A.L.R. 29.

[4] Powell v. Alabama, 287 U. S. 45, 77 L. ed. 158, 53 S. Ct. 55, 84 A.L.R. 527; Pardee v. Salt Lake County, 39 Utah, 482, 118 P. 122, 36 L.R.A.(N.S.) 377, Ann. Cas. 1913E, 200.
Annotation: 36 L.R.A.(N.S.) 377.
The failure of the court to assign counsel to an indigent accused is a denial of due process of law within the meaning of the Fourteenth Amendment if the prosecution is a capital case. Powell v. Alabama, 287 U. S. 45, 77 L. ed. 158, 53 S. Ct. 55, 84 A.L.R. 527.

[5] Powell v. Alabama, 287 U. S. 45, 77 L. ed. 158, 53 S. Ct. 55, 84 A.L.R. 527.

[6] See infra, § 157.

[7] State v. Hudson, — R. I. —, 179 A. 130, 100 A.L.R. 313.

[8] Clay County v. McGregor, 171 Ind. 634, 87 N. E. 1, 17 Ann. Cas. 333.
Annotation: 36 L.R.A.(N.S.) 377.

[9] State v. Hudson, — R. I. —, 179 A. 130, 100 A.L.R. 313.

[10] Powell v. Alabama, 287 U. S. 45, 77 L. ed. 158, 53 S. Ct. 55, 84 A.L.R. 527.

[11] Re Moynihan, 332 Mo. 1022, 62 S. W. (2d) 410, 91 A.L.R. 74.

[12] Annotation: Ann. Cas. 1916E, 1016.

[13] State v. Hudson, — R. I. —, 179 A. 130, 100 A.L.R. 313.
The court may refuse the request of the accused that a certain attorney be assigned, on the ground that a person of more legal experience ought to be assigned. Com. v. Knapp, 9 Pick. (Mass.) 496, 20 Am. Dec. 491.

[14] People v. Blevins, 251 Ill. 381, 96 N. E. 214, Ann. Cas. 1912C, 451.
Annotation: Ann. Cas. 1912C, 451.

B. Termination of Relation

§ 34. By Act of Client.—The authorities universally recognize the right of a client to terminate the relation between himself and his attorney at his election, with or without cause,[15] at any time by paying for his services in full to the date of discharge, particularly if the employment is on a general retainer basis,[16] the existence or nonexistence of valid cause for the discharge of the attorney bearing only on his right to compensation or damages.[17] This right of a client is an implied term of every contract of employment of counsel, at least when the latter is not vested in some way with an interest in the cause of action or its subject-matter,[18] and is based on necessity, in view both of the delicate and confidential nature of the relation between them and of the evil engendered by friction or distrust.[19] The power cannot be affected by a previous arrangement between the parties, as, for instance, by a contract for a contingent fee.[20]

§ 35. —Necessity of Notice of Discharge.—An attorney is, of course, entitled to notice of his discharge, although such notice need not be formal; any act which shows an intention to sever the relation being sufficient.[1] An undisclosed discharge of an attorney will not, however, affect the right of third persons who are ignorant of that fact and rely upon acts done by such attorney ostensibly by virtue of his retainer.[2]

§ 36. —When Attorney's Power Is Coupled with an Interest.—An exception to the general rule as to the power of the client to discharge his attorney at will exists where the power of the attorney is coupled with an interest in the cause of action.[3] Generally speaking, this interest must be in the thing itself; the power must be ingrafted on an estate in the thing, and the power and interest must be united in the same person.[4] The interest must be such a beneficial interest in the power itself that if the power were revoked, the attorney would be deprived of a substantial right.[5] Thus, while an attorney employed on a contingent fee may be vested with such interest in the cause of action as will entitle him to intervene in the action to protect it after he has been dismissed without cause,[6] he has no such interest as will prevent the client from discharging him.[7]

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[15] Baker v. Humphrey, 101 U. S. 494, 25 L. ed. 1065; O'Connell v. Superior Ct. 2 Cal. (2d) 418, 41 P. (2d) 334, 97 A.L.R. 918; Regan v. Chicago, M. & St. P. R. Co. 204 Ill. App. 115, citing R. C. L.; Louque v. Dejan, 129 La. 519, 56 So. 427, 38 L.R.A. (N.S.) 389; Lawler v. Dunn, 145 Minn. 281, 176 N. W. 989, citing R. C. L.; Robinson v. Rogers, 237 N. Y. 467, 143 N. E. 647, 33 A.L.R. 1291; Martin v. Camp, 219 N. Y. 170, 114 N. E. 46, L.R.A.1917F, 402; Re Dunn, 205 N. Y. 398, 98 N. E. 914, Ann. Cas. 1913E, 536; Tenney v. Berger, 93 N. Y. 524, 45 Am. Rep. 263; Ritz v. Carpenter, 43 S. D. 236, 178 N. W. 877, 19 A.L.R. 840; Price v. Western Loan & Sav. Co. 35 Utah, 379, 100 P. 677, 19 Ann. Cas. 589; Fidelity & D. Co. v. Madson, 201 Wis. 609, 231 N. W. 170, 70 A.L.R. 832; Enos v. Keating, 39 Wyo. 217, 271 P. 6, 275 P. 131, 67 A.L.R. 430.
Annotation: 19 Ann. Cas. 592.

[16] Puffer v. Merton, 168 Wis. 366, 170 N. W. 368, 5 A.L.R. 1288.

[17] See infra, §§ 153 et seq.

It is both the right and the duty of a client to discharge an attorney who violates his duty to the court and obstructs justice, as, for example, when he attempts to secure a postponement of the trial by suggesting simulation of illness to a material witness. Duffy v. Colonial Trust Co. 287 Pa. 348, 135 A. 204, 49 A.L.R. 406, writ of certiorari denied in 273 U. S. 765, 71 L. ed. 880, 47 S. Ct. 570.

[18] Marquam v. Vachon (C. C. A. 9th) 7 F. (2d) 607, citing R. C. L.; Enos v. Keating, 39 Wyo. 217, 271 P. 6, 275 P. 131, 67 A.L.R. 430.

[19] Martin v. Camp, 219 N. Y. 170, 114 N. E. 46, L.R.A.1917F, 402; Price v. Western Loan & Sav. Co. 35 Utah, 379, 100 P. 677, 19 Ann. Cas. 589.
Annotation: 19 Ann. Cas. 592.

[20] Fletcher v. Kellogg, 55 App. D. C. 351, 6 F. (2d) 476, 40 A.L.R. 1525, writ of certiorari denied in 269 U. S. 555, 70 L. ed. 409, 46 S. Ct. 18; Louque v. Dejan, 129 La. 519, 56 So. 427, 38 L.R.A.(N.S.) 389.
Annotation: 97 A.L.R. 927; 38 L.R.A. (N.S.) 389; 19 Ann. Cas. 592.

[1] Annotation: 19 Ann. Cas. 592.

[2] Beliveau v. Amoskeag Mfg. Co. 68 N. H. 225, 40 A. 734, 44 L.R.A. 167, 73 Am. St. Rep. 577.
Annotation: 19 Ann. Cas. 592.

Citation or notice of appeal may be served on the appellee's attorney of record while his name remains upon the docket of the court below, even though he has in fact been discharged by his client. Powers v. Manning, 154 Mass. 370, 28 N. E. 290, 13 L.R.A. 258.

[3] O'Connell v. Superior Ct. 2 Cal. (2d) 418, 41 P. (2d) 334, 97 A.L.R. 918; Todd v. Superior Ct. 181 Cal. 406, 184 P. 684, 7 A.L.R. 938; Louque v. Dejan, 129 La. 519, 56 So. 427, 38 L.R.A.(N.S.) 389.
Annotation: 97 A.L.R. 923.

[4] O'Connell v. Superior Ct. 2 Cal. (2d) 418, 41 P. (2d) 334, 97 A.L.R. 918; Todd v.

§ 37. **By Death of Client.**—It is a well-established general rule that the relation of attorney and client is terminated by the death of the client.[8] In the absence of a retainer from the personal representatives of his deceased client, the attorney has thereafter no further power or authority to appear or take any further action on behalf of the deceased.[9]

An exception to this general rule as to the termination of the relation by the client's death seems to exist, however, in the case of a special contract to conduct a suit to judgment, or some agreement on a fee for the entire case,[10] as upon a contingent fee.[11]

§ 38. **By Dissolution of Corporation or Partnership, or Receivership.**—The dissolution of a corporation or a partnership terminates a relationship of attorney and client and revokes the authority of the attorney.[12] So too, the appointment of a receiver for the client terminates the contract of the attorney,[13] at least if the attorney refuses to accept the new relationship.[14]

§ 39. **By Act of Attorney.**—Among the fundamental rules of ethics is the principle that an attorney who undertakes to conduct an action impliedly stipulates to carry it to its termination, and he is not at liberty to abandon it without reasonable cause.[15] When, however, reasonable cause or sufficient reason exists, an attorney may, previous to the termination of the suit, terminate the

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Superior Ct. 181 Cal. 406, 184 P. 684, 7 A.L.R. 938.

Annotation: 97 A.L.R. 923.

[5] Todd v. Superior Ct. 181 Cal. 406, 184 P. 684, 7 A.L.R. 938.

[6] Kellogg v. Winchell, 51 App. D. C. 17, 273 F. 745, 16 A.L.R. 1159.

[7] O'Connell v. Superior Ct. 2 Cal. (2d) 418, 41 P. (2d) 334, 97 A.L.R. 918; Louque v. Dejan, 129 La. 519, 56 So. 427, 38 L.R.A. (N.S.) 389; Plummer v. Great Northern R. Co. 60 Wash. 214, 110 P. 989, 31 L.R.A.(N.S.) 1215.

Annotation: 97 A.L.R. 926.

[8] Moyle v. Landers, 78 Cal. 99, 20 P. 241, 12 Am. St. Rep. 22; Brickell v. McCaskill, 90 Fla. 441, 106 So. 470, citing R. C. L.; McCornick v. Shaughnessy, 19 Idaho, 465, 114 P. 22, 34 L.R.A.(N.S.) 1188; Kelley v. Riley, 106 Mass. 339, 8 Am. Rep. 336; State v. District Ct. 42 Mont. 496, 113 P. 472, Ann. Cas. 1912B, 246; Re Dunn, 205 N. Y. 398, 98 N. E. 914, Ann. Cas. 1913E, 536; Cisna v. Beach, 15 Ohio, 300, 45 Am. Dec. 576; Piukkula v. Pillsbury Astoria Flouring Mills Co. 150 Or. 304, 42 P. (2d) 921, 44 P. (2d) 162, 99 A.L.R. 244; Teter v. Irwin, 69 W. Va. 200, 71 S. E. 115, Ann. Cas. 1913A, 707.

Annotation: 5 L. ed. 590; 8 L. ed. 61; 23 L.R.A. 710; 34 L.R.A.(N.S.) 1188; 12 Am. St. Rep. 22; Ann. Cas. 1913A, 712.

[9] McCornick v. Shaughnessy, 19 Idaho, 465, 114 P. 22, 34 L.R.A.(N.S.) 1188; Teter v. Irwin, 69 W. Va. 200, 71 S. E. 115, Ann. Cas. 1913A, 707.

Annotation: 34 L.R.A.(N.S.) 1188; Ann. Cas. 1913A, 712.

Service of notice of appeal on an attorney after the death of his client cannot bind the decedent's representatives. Moyle v. Landers, 78 Cal. 99, 20 P. 241, 12 Am. St. Rep. 22; Cisna v. Beach, 15 Ohio, 300, 45 Am. Dec. 576.

Where a party to an action dies after judgment, the attorney must obtain his employment and authority from a legal representative of the estate of such deceased person before he can prosecute an appeal in the case. McCornick v. Shaughnessy, 19 Idaho, 465, 114 P. 22, 34 L.R.A.(N.S.) 1188.

[10] Re Mallory, 99 Cal. App. 96, 278 P. 488, citing R. C. L.

Annotation: 34 L.R.A.(N.S.) 1189; Ann. Cas. 1913A, 714.

A contract to defend a suit for a third person from "the beginning to the end" is not annulled by the death of the person employing the attorney, because in such case the relation between the employer and the attorney is not strictly that of attorney and client. Barrett v. Towne, 196 Mass. 487, 82 N. E. 698, 13 L.R.A.(N.S.) 643.

Annotation: 13 L.R.A.(N.S.) 643.

[11] Jeffries v. Mutual L. Ins. Co. 110 U. S. 305, 28 L. ed. 156, 4 S. Ct. 8; Wylie v. Coxe, 15 How. (U. S.) 415, 14 L. ed. 753; Re Agee, 69 Utah, 130, 252 P. 891, 50 A.L.R. 641.

[12] Teter v. Irwin, 60 W. Va. 200, 71 S. E. 115, Ann. Cas. 1913A, 707.

Annotation: Ann. Cas. 1913A, 712.

[13] City Bank v. Bryan, 76 W. Va. 481, 86 S. E. 8, L.R.A.1915F, 1219.

[14] Re Dunn, 205 N. Y. 398, 98 N. E. 914, Ann. Cas. 1913E, 536.

[15] Stark County v. Mischel, 42 N. D. 332, 173 N. W. 817, 6 A.L.R. 174.

relation without the consent of the client, upon giving reasonable notice;[16] as between attorneys and clients, leave of court is not required,[17] although as to the adverse party who may be entitled to serve papers on the attorney of record, the attorney may be required to obtain leave of court in order to withdraw from a case after he has entered an appearance of record.[18]

In any case, however, the attorney should give his client reasonable notice before withdrawing,[19] so as to afford the latter an opportunity to procure other counsel.[20] Whether the notice given is reasonable is to be determined from the circumstances in the particular case.[1]

§ 40. —What Is Sufficient Cause for Withdrawal.—What constitutes a sufficient cause to justify an attorney in abandoning a case in which he has been retained depends largely upon the peculiar circumstances of the individual case.[2] Sufficient cause may be furnished by the failure or refusal of a client to advance money for the expenses of the suit, to recognize liability for attorneys' fees, or to make payments to his attorney, during the progress of a long litigation, to apply on his compensation,[3] or by conduct on the part of a client during the progress of a litigation which would tend to degrade or humiliate his attorney,[4] such as attempting to sustain his case by the subornation of witnesses or any other unjustifiable means.[5] An attorney may withdraw from the case without criticism when it becomes apparent that he may be called as a witness.[6] The mere fact of employment by the client of associate counsel is not a sufficient ground to justify an attorney in abandoning a case,[7] unless he has personal and professional objections to such associate counsel and is unwilling to be associated with him.[8]

§ 41. By Death of Attorney or Acceptance of Incompatible Office.—A contract of employment for legal services is personal in its nature and terminates upon the death of the attorney employed.[9] Even the death of a member of a firm may terminate a contract for the employment of the firm, if the contract was made with the understanding that the services were to be rendered by the deceased member. However, one member of a law firm cannot, upon the death of another member, refuse to carry to completion executory contracts which do not call for the individual personal services of the deceased partner.[10]

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[16] People ex rel. Chicago Bar Asso. v. Sullivan, 279 Ill. 634, 117 N. E. 134, L.R.A. 1918A, 1136; Eliot v. Lawton, 7 Allen (Mass.) 274, 83 Am. Dec. 683; Re Dunn, 205 N. Y. 398, 98 N. E. 914, Ann. Cas. 1913E, 536.

As to effect of withdrawal on right to compensation, see infra, § 171.

[17] Powers v. Manning, 154 Mass. 370, 28 N. E. 290, 13 L.R.A. 258.

[18] Tripp v. Santa Rosa Street R. Co. 144 U. S. 126, 36 L. ed. 371, 12 S. Ct. 655; United States v. Curry, 6 How. (U. S.) 106, 12 L. ed. 363.

Annotation: 45 A.L.R. 1136.

[19] Eliot v. Lawton, 7 Allen (Mass.) 274, 83 Am. Dec. 683; Powers v. Manning, 154 Mass. 370, 28 N. E. 290, 13 L.R.A. 258; Tenney v. Berger, 93 N. Y. 524, 45 Am. Rep. 263.

Annotation: 45 A.L.R. 1136.

[20] People ex rel. Chicago Bar Asso. v. Sullivan, 279 Ill. 634, 117 N. E. 134, L.R.A. 1918A, 1136.

[1] Powers v. Manning, 154 Mass. 370, 28 N. E. 290, 13 L.R.A. 258.

Annotation: 35 L.R.A.(N.S.) 960.

[2] Genrow v. Flynn, 166 Mich. 564, 131 N. W. 1115, 35 L.R.A.(N.S.) 960, Ann. Cas. 1912D, 638; Tenney v. Berger, 93 N. Y. 524, 45 Am. Rep. 263.

Annotation: 45 A.L.R. 1142; 35 L.R.A. (N.S.) 960; Ann. Cas. 1912D, 640.

Discovery that the client's case had no foundation in fact and could be supported only through perjury not only justifies, but requires, the attorney's prompt withdrawal from the case. Gebhardt v. United R. Co. (Mo.) 220 S. W. 677, 9 A.L.R. 1076.

[3] Eliot v. Lawton, 7 Allen (Mass.) 274, 83 Am. Dec. 683; Powers v. Manning, 154 Mass. 370, 28 N. E. 290, 13 L.R.A. 258; Genrow v. Flynn, 166 Mich. 564, 131 N. W. 1115, 35 L.R.A.(N.S.) 960, Ann. Cas. 1912D, 638; Tenney v. Berger, 93 N. Y. 524, 45 Am. Rep. 263.

Annotation: 45 A.L.R. 1145; 35 L.R.A. (N.S.) 960; Ann. Cas. 1912D, 640.

[4] Genrow v. Flynn, 166 Mich. 564, 131 N. W. 1115, 35 L.R.A.(N.S.) 960; State v. Bersch, 276 Mo. 397, 207 S. W. 809, citing R. C. L.

[5] Tenney v. Berger, 93 N. Y. 524, 45 Am. Rep. 263.

[6] Allen v. Ross, 199 Wis. 162, 225 N. W. 831, 64 A.L.R. 180.

[7] Annotation: 45 A.L.R. 1148; 35 L.R.A. (N.S.) 960; Ann. Cas. 1912D, 640.

[8] Re Dunn, 205 N. Y. 398, 98 N. E. 914, Ann. Cas. 1913E, 536; Tenney v. Berger, 93 N. Y. 524, 45 Am. Rep. 263.

[9] Bacon v. Hart, 1 Black (U. S.) 38, 17 L. ed. 52; Cox v. Martin, 75 Miss. 238, 21 So. 611, 36 L.R.A. 607, 65 Am. St. Rep. 604; Clifton v. Clark, 83 Miss. 446, 36 So. 251, 66 L.R.A. 821, 102 Am. St. Rep. 458, 1 Ann. Cas. 396; Barrett v. Towne, 196 Mass. 487, 82 N. E. 698, 13 L.R.A.(N.S.) 643; Puffer v.

An attorney who accepts the office of judge of a court effects, by operation of law, a termination of an existing relation of attorney and client.[11]

§ 42. By Outbreak of War.—While there is some authority to the contrary, the better rule seems to be that the existence of war between the country of which the client is a citizen and that in which the attorney resides operates to terminate the relation of attorney and client, and steps then taken in the case by the attorney will not affect the client.[12]

§ 43. By Accomplishment of Purpose.—While it may be stated in general terms that the relation of attorney and client is terminated by the accomplishment of the purpose of its creation, and that no act of the attorney can bind his client thereafter, yet the question what constitutes such an accomplishment of the purpose for which the attorney was employed must necessarily depend to a great extent on the facts in each case.[13] However, it is safe to state that where an attorney has been employed to conduct litigation, his authority to represent his client ceases with the termination of the particular litigation.[14] The fact that the agreed compensation of an attorney retained in a criminal case related only to the preliminary hearing does not show that his relation to his client ceased when such hearing was over.[15]

C. SUBSTITUTION OF ATTORNEYS

§ 44. Generally.—One has, subject to exception in a case where the attorney has an interest in the subject-matter of the suit,[16] the right to change his attorney of record at any stage of the cause, and substitute another,[17] provided

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Merton, 168 Wis. 366, 170 N. W. 368, 5 A.L.R. 1288.

Annotation: 66 L.R.A. 821; Ann. Cas. 1914D, 210.

[10] Clifton v. Clark, 83 Miss. 446, 36 So. 251, 66 L.R.A. 821, 102 Am. St. Rep. 458, 1 Ann. Cas. 396.

Annotation: 1 Ann. Cas. 396.

[11] Justice v. Lairy, 19 Ind. App. 272, 49 N. E. 459, 65 Am. St. Rep. 405.

[12] Blackwell v. Willard, 65 N. C. 555, 6 Am. Rep. 749.

Annotation: 8 B. R. C. 733.

The rule seems to be limited to cases of general agency and is held not to extend to relationships involving a special agency, as where the attorney is given authority to sell land (Tingley v. Muller [1917] 2 Ch. 144, 8 B. R. C. 681, Ann. Cas. 1918C, 726—C. A.) or to collect a claim for his client (Annotation: 8 B. R. C. 733).

[13] Sandall v. Sandall, 57 Utah, 150, 193 P. 1093, 15 A.L.R. 620.

[14] Orwig v. Chicago, R. I. & P. R. Co. 217 Iowa, 521, 250 N. W. 148, 90 A.L.R. 258; Sandall v. Sandall, 57 Utah, 150, 193 P. 1093, 15 A.L.R. 620.

Annotation: 8 L. ed. 61.

If, however, the action is dismissed through accident, inadvertence, neglect, or oversight on the part of the attorney, no new employment is necessary to enable him to continue to act. Rhodes v. Rhodes (Todd v. Rhodes) 108 Kan. 64, 193 P. 894, 16 A.L.R. 423.

[15] Ritz v. Carpenter, 43 S. D. 236, 178 N. W. 877, 19 A.L.R. 840.

[16] Todd v. Superior Ct. 181 Cal. 406, 184 P. 684, 7 A.L.R. 938.

As to when the attorney has such an interest, see supra, § 44.

[17] Texas v. Peabody, 131 U. S. xcvi. Appx. and 19 L. ed. 886; Re Paschal (Texas v. White) 10 Wall. (U. S.) 483, 19 L. ed. 992; O'Connell v. Superior Ct. 2 Cal. (2d) 418, 41 P. (2d) 334, 97 A.L.R. 918; Todd v. Superior Ct. 181 Cal. 406, 184 P. 684, 7 A.L.R. 938; People's Home Sav. Bank v. Superior Ct. 104 Cal. 649, 38 P. 452, 43 Am. St. Rep. 147, 29 L.R.A. 844; Funded Debt Comrs. v. Younger, 29 Cal. 147, 87 Am. Dec. 164; Curtis v. Richards, 4 Idaho, 434, 40 P. 57, 95 Am. St. Rep. 134; Robinson v. Rogers, 237 N. Y. 467, 143 N. E. 647, 33 A.L.R. 1291.

The fact that the attorney has rendered valuable services or that the client is indebted to him therefor or for moneys advanced in the prosecution or defense of the action does not deprive the client of this right. O'Connell v. Superior Ct. 2 Cal. (2d) 418, 41 P. (2d) 334, 97 A.L.R. 918.

The substitution of an attorney for a corporation, in a proceeding to restrain a receiver, cannot be prevented by the prior attorney on the ground of disqualification he secures the consent of the court,[18] which must be obtained by a proper proceeding for the purpose, as by motion,[19] and provided further that he pays the attorney or secures to him the fees he has already earned [20] and to which he is rightfully entitled.[1] If it is impossible in a given case to comply with this rule as to payment or security, the fact must be shown by the party moving the discharge and substitution, and it should appear that justice to the client or attorney demands the change.[2] In England and also in some states of this country an attorney cannot be changed without an order of court.[3]

After the rendition of a final judgment in an action, a new attorney may be employed to take out execution, without the necessity of a formal substitution.[4] In some jurisdictions no order of substitution is necessary where a new attorney is employed to prosecute an appeal,[5] while in others it is.[6] Clearly, after an attorney regularly employed to prosecute an action has docketed an appeal from an adverse judgment, a client has no authority, without permission of the court, to substitute another attorney.[7]

IV. NATURE, OBLIGATIONS, AND DISABILITIES OF RELATION

A. Character of, and Duties Attaching to, Relation

§ 45. Nature of Relationship.—The relation between attorney and client is highly fiduciary in its nature and of a very delicate, exacting, and confidential character, requiring a very high degree of fidelity and good faith.[8] It is pure-

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by reason of business relations with the receiver, so long as the parties do not object. People's Home Sav. Bank v. Superior Ct. 104 Cal. 649, 38 P. 452, 29 L.R.A. 844, 43 Am. St. Rep. 147.

[18] Kellogg v. Winchell, 51 App. D. C. 17, 273 F. 745, 16 A.L.R. 1159; Funded Debt Comrs. v. Younger, 29 Cal. 147, 87 Am. Dec. 164; Curtis v. Richards, 4 Idaho, 434, 40 P. 57, 95 Am. St. Rep. 134; De Armond v. Fine, 111 Miss. 737, 72 So. 145, citing R. C. L.; Walton v. Sugg, 61 N. C. (Phill. L.) 98, 93 Am. Dec. 580.

No reason need be given to the court for a party's desire to substitute another attorney, if he has paid his attorney for services rendered. Funded Debt Comrs. v. Younger, 29 Cal. 147, 87 Am. Dec. 164.

[19] Funded Debt Comrs. v. Younger, 29 Cal. 147, 87 Am. Dec. 164; Curtis v. Richards, 4 Idaho, 434, 40 P. 57, 95 Am. St. Rep. 134; De Armond v. Fine, 11 Miss. 737, 72 So. 145, citing R. C. L.

Where a party desires to change his counsel in an action in the Federal courts, a rule nisi will be granted to such counsel to show cause why such change should not be made. Texas v. Peabody, 131 U. S. xcvi. Appx. and 19 L. ed. 886.

The law forbids the arbitrary discharge of the attorney in the midst of the performance of his duties, and requires a proper proceeding for such purpose, in the course of which the court examines the reasons for the proposed change. Curtis v. Richards, 4 Idaho, 434, 40 P. 57, 95 Am. St. Rep. 134.

Where the attorney has been guilty of misconduct, a petition for substitution is usually granted as a matter of course. Kellogg v. Winchell, 51 App. D. C. 17, 273 F. 745, 16 A.L.R. 1159.

Some statutes authorize the substitution of attorneys on such terms as are just. Robinson v. Rogers, 237 N. Y. 467, 143 N. E. 647, 33 A.L.R. 1291.

[20] Funded Debt Comrs. v. Younger, 29 Cal. 147, 87 Am. Dec. 164; Kellogg v. Winchell, 51 App. D. C. 17, 273 F. 745, 16 A.L.R. 1159; Curtis v. Richards, 4 Idaho, 434, 40 P. 57, 95 Am. St. Rep. 134; Horvath v. Vasvary, 246 Mich. 231, 224 N. W. 365, citing R. C. L.; Re Dunn, 205 N. Y. 398, 98 N. E. 914, Ann. Cas. 1913E, 536; Robinson v. Rogers, 237 N. Y. 467, 143 N. E. 647, 33 A.L.R. 1291.

Annotation: 33 A.L.R. 1297.

[1] **If an attorney is guilty of negligence or misconduct** in the management of the case, or if he refuses to go on with his client's cause, the court may make an order changing him, even though his fees have not been paid or secured. Re Dunn, 205 N. Y. 398, 98 N. E. 914, Ann. Cas. 1913E, 536.

Annotation: 87 Am. Dec. 166.

[2] Curtis v. Richards, 4 Idaho, 434, 40 P. 57, 95 Am. St. Rep. 134.

[3] Annotation: 87 Am. Dec. 169.

The safe and orderly conduct of the litigation is facilitated by making the fact of substitution a matter of record by formal order. Fidelity & D. Co. v. Madson, 201 Wis. 609, 231 N. W. 170, 70 A.L.R. 832.

[4] Funded Debt Comrs. v. Younger, 29 Cal. 147, 87 Am. Dec. 164.

[5] Annotation: 70 A.L.R. 834.

[6] Fidelity & D. Co. v. Madson, 201 Wis. 609, 231 N. W. 170, 70 A.L.R. 832.

Annotation: 70 A.L.R. 834.

[7] Kellogg v. Winchell, 51 App. D. C. 17, 273 F. 745, 16 A.L.R. 1159.

[8] Re Paschal (Texas v. White) 10 Wall. (U. S.) 483, 19 L. ed. 992; Stockton v. Ford, 11 How. (U. S.) 232, 13 L. ed. 676; Heffren v. Jayne, 39 Ind. 463, 13 Am. Rep. 281 (within the meaning of Bankruptcy Act); Ber-

ly a personal relation, involving the highest personal trust and confidence,[9] which cannot be delegated without consent.[10] In a limited and dignified sense, the relation of attorney and client is that of principal and agent or master and servant;[11] that is, apart from his connection with existing litigation, an attorney is a mere agent.[12] An attorney is not, however, so completely subordinate to his client as the ordinary agent is to his principal,[13] nor is an attorney an employee within the meaning of statutes giving wages of employees a preferred status over other debts of an insolvent employer.[14]

§ 46. Duties Owed to Client by Attorney.—An attorney must faithfully, honestly, and consistently represent the interests,[15] and protect the rights, of his client.[16] He is bound to discharge his duties to his client with the strictest fidelity,[17] to observe the highest and utmost good faith towards him,[18] and to obey his lawful directions.[19] He is not allowed to divulge confidential communications, information, and secrets imparted to him by the client or acquired during their professional relation, unless he is authorized to do so by the client himself.[20]

The usual office and duty of an attorney at law is the representation of parties litigant in courts of justice.[1] In the discharge of this duty he should make

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man v. Coakley, 243 Mass. 348, 137 N. E. 667, 26 A.L.R. 92; Re Dunn, 205 N. Y. 398, 98 N. E. 914, Ann. Cas. 1913E, 536; White Earth Creamery Co. v. Edwardson, 49 N. D. 394, 191 N. W. 622, citing R. C. L.; Okfuskee County v. Hazelwood, 79 Okla. 185, 192 P. 217, 11 A.L.R. 709; Re Rempfer, 51 S. D. 393, 216 N. W. 355, 55 A.L.R. 1346; Cooper v. Bell, 127 Tenn. 142, 153 S. W. 844, Ann. Cas. 1914B, 980; Flanagan v. Pearson, 42 Tex. 1, 19 Am. Rep. 40.

Annotation: Ann. Cas. 1915A, 1297.

The parties have been held to sustain to each other the relation of trustee and cestui que trust, and their dealings with each other are subject to the same intendments and imputations as obtain between other trustees and beneficiaries. Kidd v. Williams, 132 Ala. 140, 31 So. 458, 56 L.R.A. 879; Dickinson v. Bradford, 59 Ala. 581, 31 Am. Rep. 23; Armstrong v. Morrow, 166 Wis. 1, 163 N. W. 179, Ann. Cas. 1918E, 1156; Ott v. Hood, 152 Wis. 97, 139 N. W. 762, 44 L.R.A.(N.S.) 524, Ann. Cas. 1914C, 636.

[9] Rust v. Larue, 4 Litt. (Ky.) 412, 14 Am. Dec. 172; Hightomer v. Detroit Edison Co. 262 Mich. 1, 247 N. W. 97, 86 A.L.R. 509; Eoff v. Irvine, 108 Mo. 378, 18 S. W. 907, 32 Am. St. Rep. 609; Re Dunn, 205 N. Y. 398, 98 N. E. 914, Ann. Cas. 1913E, 536; Re Co-operative Law Co. 198 N. Y. 479, 92 N. E. 15, 32 L.R.A.(N.S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879; Re Evans, 22 Utah, 366, 62 P. 913, 53 L.R.A. 952, 83 Am. St. Rep. 794; Ott v. Hood, 152 Wis. 97, 139 N. W. 762, 44 L.R.A.(N.S.) 524.

Tyrrell v. Bank of London, 10 H. L. Cas. 26, 11 Eng. Reprint, 934, 2 Eng. Rul. Cas. 496, 507.

[10] Re Co-operative Law Co. 198 N. Y. 479, 92 N. E. 15, 32 L.R.A.(N.S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879.

[11] Paul v. Stuckey, 126 Ark. 389, 189 S. W. 676, L.R.A.1917B, 888; Wood v. Claiborne, 82 Ark. 514, 102 S. W. 219, 11 L.R.A.(N.S.) 913, 118 Am. St. Rep. 89; Farnsworth v. Hazelett, 197 Iowa, 1367, 199 N. W. 410, 38 A.L.R. 814; Re Co-operative Law Co. 198 N. Y. 479, 92 N. E. 15, 32 L.R.A.(N.S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879; Seawell v. Parsons Lumber Co. 172 N. C. 320, 90 S. E. 241, citing R. C. L.; Allen v. Allen, 96 Wash. 689, 165 P. 889, citing R. C. L.

[12] Brown v. Hebb, 167 Md. 535, 175 A. 602, 97 A.L.R. 366.

[13] Judd & Detweiler v. Gittings, 43 App. D. C. 304, Ann. Cas. 1917B, 518.

[14] Latta v. Lonsdale (C. C. A. 8th) 107 F. 585, 52 L.R.A. 479; Lewis v. Fisher, 80 Md. 139, 30 A. 608, 26 L.R.A. 278, 45 Am. St. Rep. 327.

Annotation: 54 A.L.R. 569.

[15] Langen v. Borkowski, 188 Wis. 277, 206 N. W. 181, 43 A.L.R. 622.

[16] Re Macy, 109 Kan. 1, 196 P. 1095, 14 A.L.R. 848.

[17] People v. Gerold, 265 Ill. 448, 107 N. E. 165, Ann. Cas. 1916A, 636; People v. Beattie, 137 Ill. 553, 27 N. E. 1096, 31 Am. St. Rep. 384; Berman v. Coakley, 243 Mass. 348, 137 N. E. 667, 26 A.L.R. 92; Re Evans, 22 Utah, 366, 62 P. 913, 53 L.R.A. 952, 83 Am. St. Rep. 794.

[18] Stark County v. Mischel, 42 N. D. 332, 173 N. W. 817, 6 A.L.R. 174; Cooper v. Bell, 127 Tenn. 142, 153 S. W. 844, Ann. Cas 1914B, 980.

Annotation: Ann. Cas. 1917B, 11.

[19] Am. Law Inst. Restatement, Agency, p. 48, § 14.

[20] People v. Gerold, 265 Ill. 448, 107 N. E. 165, Ann. Cas. 1916A, 636; Murphy v. Riggs, 238 Mich. 151, 213 N. W. 110, 51 A.L.R. 1303.

Am. Law Inst. Restatement, Agency, p. 848, § 381.

[1] Brewer v. Watson, 71 Ala. 299, 46 Am. Rep. 318; Seawell v. Parsons Lumber Co. 172 N. C. 320, 90 S. E. 241, citing R. C. L.; Williams v. Johnson, 112 N. C. 424, 17 S. E. 496, 21 L.R.A. 848, 34 Am. St. Rep. 513.

When an attorney undertakes the collection of a debt, it becomes his duty to sue out all process, both mesne and final, necessary to effect that object. He is not, however, imperiously bound to institute new collateral suits without special instructions to do so, for example, he is not an effective presentation of the rights of his client, take proper exception to erroneous rulings of the court, and remain there in attendance until the whole subject of litigation is disposed of.[2]

It is likewise the duty of an attorney to advise his client promptly whenever he has any information to give which it is important that the client receive.[3] He should notify his client forthwith of the collection of money on his account, and remit it to the client, less proper charges, as soon as he can reasonably do so, or notify him of his readiness to pay.[4]

§ 47. —Exercise of Reasonable Care and Skill.—An attorney owes to his client the duty of exercising that knowledge, skill, and ability ordinarily possessed and exercised by members of his profession.[5] He is impliedly bound to act diligently and skilfully in the conduct of his client's case,[6] and to possess such reasonable knowledge of well-settled rules of law as will enable him to perform the duties he undertakes.[7] He is not, however, bound to extraordinary diligence,[8] in the absence of special contract therefor;[9] he is required only to exercise a reasonable degree of care and skill, in view of the character of the business he undertakes to do.[10]

The degree of care and skill required is in no manner affected by the fact that the attorney's services are rendered gratuitously.[11] Nor does the fact that an attorney intrusts to another the performance of a duty undertaken by him relieve him from his obligation to exercise reasonable care, skill, and diligence in the performance of the duty.[12]

B. Dealings between Attorney and Client

§ 48. Generally.—An attorney and his client are not under any legal disabilities to contract with each other, nor are all dealings between them neces-

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bound to institute an action against the sheriff or clerk for the failure of his duty in the issuance or service of process. Nor is the attorney bound to attend in person to the levy of an execution, or to search for property out of which to make the debt; this is the business of the sheriff. Pennington v. Yell, 11 Ark. 212, 52 Am. Dec. 262.

[2] Ward v. Todd, 103 U. S. 327, 26 L. ed. 339; Ex parte Crenshaw, 96 Tex. Crim. Rep. 654, 259 S. W. 587, 31 A.L.R. 1181.

[3] Baker v. Humphrey, 101 U. S. 494, 25 L. ed. 1065; Wittenbrock v. Parker, 102 Cal. 93, 36 P. 374, 24 L.R.A. 197, 41 Am. St. Rep. 172; Selover v. Hedwall, 149 Minn. 302, 184 N. W. 180, citing R. C. L.; James v. Steere, 16 R. I. 367, 16 A. 143, 2 L.R.A. 164; Holland v. Brown (Tex. Civ. App.) 66 S. W. (2d) 1095, citing R. C. L.

An attorney cannot withhold from his client information acquired by him in the exercise of such attorneyship, in order to use the same to extort an increased compensation from his client, or coerce him into a contract he would not enter into upon full information. Dorr v. Camden, 55 W. Va. 226, 46 S. E. 1014, 65 L.R.A. 348.

[4] Re Paschal (Texas v. White) 10 Wall. (U. S.) 483, 19 L. ed. 992; People ex rel. Black v. Smith, 290 Ill. 241, 124 N. E. 807, 9 A.L.R. 183; Goodyear Metallic Rubber Co. v. Baker (Goodyear Metallic Rubber Shoe Co. v. Carpenter) 81 Vt. 39, 69 A. 160, 17 L.R.A.(N.S.) 667, 15 Ann. Cas. 1207; Otto v. Hood, 152 Wis. 97, 139 N. W. 762, 44 L.R.A.(N.S.) 524, Ann. Cas. 1914C, 636; Cotton v. Sharpstein, 14 Wis. 226, 80 Am. Dec. 774.

Annotation: Ann. Cas. 1917B, 36.

Am. Law Inst. Restatement, Agency, p. 983, § 427.

[5] Hampel-Lawson Mercantile Co. v. Poe, 169 Ark. 840, 277 S. W. 29, citing R. C. L.; People v. Gerold, 265 Ill. 448, 107 N. E. 165, Ann. Cas. 1916A, 636; Babbitt v. Bumpus, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585; McCullough v. Sullivan, 102 N. J. L. 381, 132 A. 102, 43 A.L.R. 928.

Annotation: Ann. Cas. 1917B, 5.

[6] Wilcox v. Plummer, 4 Pet. (U. S.) 172, 7 L. ed. 821.

[7] Re Woods, 158 Tenn. 383, 13 S. W. (2d) 800, 62 A.L.R. 904.

Fletcher & Son v. Jubb [1920] 1 K. B. (Eng.) 275, 10 B. R. C. 1.

[8] Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134; Pennington v. Yell, 11 Ark. 212, 52 Am. Dec. 262; Cox v. Sullivan, 7 Ga. 144, 50 Am. Dec. 386.

[9] Cox v. Sullivan, 7 Ga. 144, 50 Am. Dec. 386.

[10] Cox v. Sullivan, 7 Ga. 144, 50 Am. Dec. 386; Babbitt v. Bumpus, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585; Hill v. Mynatt (Tenn.) 59 S. W. 163, 52 L.R.A. 883.

Annotation: Ann. Cas. 1917B, 5, 6.

[11] Lawall v. Groman, 180 Pa. 532, 37 A. 98, 57 Am. St. Rep. 662.

Annotation: Ann. Cas. 1917B, 6.

[12] Antrobus v. Sherman, 65 Iowa, 230, 21 N. W. 579, 54 Am. Rep. 7; Cummins v.

sarily voidable on the ground of the relationship,[13] although the measure of good faith which an attorney is required to exercise in his dealings with his client is a much higher standard than is required in business dealings where the parties trade at "arm's length." [14] All dealings between attorneys and clients will be closely scrutinized by the courts,[15] and transactions between the two are often declared to be voidable which would be deemed unobjectionable between other persons.[16] The attorney cannot allow his private interests to conflict with those of his client [17] or take any personal advantage of,[18] or any benefit from, his client unless he first advises him to take independent advice.[19] Nor is an attorney permitted to withhold from his client information acquired by him in the exercise of such attorneyship and use the same to his own advantage.[20]

§ 49. Transactions Concerning Subject-matter of Retainer.—The law will not permit an attorney to take advantage of his relations with his client to make a contract in reference to the property in litigation, or in regard to which he has advised his client; [1] in such cases he is permitted to contract for his own benefit only upon making full communication to his client of all facts known to him respecting the property, as well as any opinion or belief that he may have found respecting his client's rights. Hence, assignments or conveyances which an attorney takes from his client while the relation of attorney and client exists

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Heald, 24 Kan. 600, 36 Am. Rep. 264; Dickson v. Wright, 52 Miss. 585, 24 Am. Rep. 677; Bradstreet v. Everson, 72 Pa. 124, 13 Am. Rep. 665; Rhines v. Evans, 66 Pa. 192, 5 Am. Rep. 364; Krause v. Dorrance, 10 Pa. 462, 51 Am. Dec. 496.

Annotation: Ann. Cas. 1917B, 18.

[13] Kidd v. Williams, 132 Ala. 140, 31 So. 458, 56 L.R.A. 879; Kisling v. Shaw, 33 Cal. 425, 91 Am. Dec. 644; Post v. Mason, 91 N. Y. 539, 43 Am. Rep. 689; Okfuskee County v. Hazelwood, 79 Okla. 185, 192 P. 217, 11 A.L.R. 709; Peirce v. Palmer, 31 R. I. 432, 77 A. 201, Ann. Cas. 1912B, 181; Miles v. Ervin, 6 S. C. Eq. (1 M'Cord) 524, 16 Am. Dec. 623; Bruce v. Bibb, 129 Va. 45, 105 S. E. 570, citing R. C. L.

Annotation: 140 Am. St. Rep. 85, 86.

[14] Gould v. State, 99 Fla. 662, 127 So. 309, 69 A.L.R. 699.

[15] Lecatt v. Sallee, 3 Port. (Ala.) 115, 29 Am. Dec. 249; Cassem v. Heustis, 201 Ill. 208, 66 N. E. 283, 94 Am. St. Rep. 160; Elmore v. Johnson, 143 Ill. 513, 32 N. E. 413, 21 L.R.A. 366, 36 Am. St. Rep. 401; Donaldson v. Eaton, 136 Iowa, 650, 114 N. W. 19, 14 L.R.A.(N.S.) 1168, 125 Am. St. Rep. 275; Merryman v. Euler, 59 Md. 588, 43 Am. Rep. 564; Bingham v. Salene, 15 Or. 208, 14 P. 523, 3 Am. St. Rep. 152; Peirce v. Palmer, 31 R. I. 432, 77 A. 201, Ann. Cas. 1912B, 181; Miles v. Ervin, 6 S. C. Eq. (1 M'Cord) 524, 16 Am. Dec. 623; Bruce v. Bibb, 129 Va. 45, 105 S. E. 570, citing R. C. L.

Annotation: 9 L.R.A. 90; 1 Am. St. Rep. 259; 83 Am. St. Rep. 159; 18 Eng. Rul. Cas. 356, 357.

[16] Cassem v. Heustis, 201 Ill. 208, 66 N. E. 283, 94 Am. St. Rep. 160; Elmore v. Johnson, 143 Ill. 513, 32 N. E. 413, 21 L.R.A. 366, 36 Am. St. Rep. 401; Merryman v. Euler, 59 Md. 588, 43 Am. Rep. 564; Darlington's Estate, 147 Pa. 624, 23 A. 1046, 30 Am. St. Rep. 776; Conner v. Hodgdon, 120 Wash. 426, 207 P. 675, citing R. C. L.

Annotation: 83 Am. St. Rep. 159; 116 Am. St. Rep. 498.

[17] Re Rempfer, 51 S. D. 393, 216 N. W. 355, 55 A.L.R. 1346.

[18] Kidd v. Williams, 132 Ala. 140, 31 So. 458, 56 L.R.A. 879; Manhattan Cloak & Suit Co. v. Dodge, 120 Ind. 1, 21 N. E. 344, 6 L.R.A. 369; Berman v. Coakley, 243 Mass. 348, 137 N. E. 667, 26 A.L.R. 92; Americus v. McGinnis, 128 Wash. 28, 221 P. 987, citing R. C. L.; Armstrong v. Morrow, 166 Wis. 1, 163 N. W. 179, Ann. Cas. 1918E, 1156.

[19] Egan v. Burnight, 34 S. D. 473, 149 N. W. 176, Ann. Cas. 1917A, 539.

Lloyd v. Coote & Ball [1915] 1 K. B. (Eng.) 242, Ann. Cas. 1916E, 434—Div. Ct.

Annotation: Ann. Cas. 1916E, 436.

[20] Crocheron v. Savage, 75 N. J. Eq. 589, 73 A. 33, 23 L.R.A.(N.S.) 679; Dorr v. Camden, 55 W. Va. 226, 46 S. E. 1014, 65 L.R.A. 348.

Tyrrell v. Bank of London, 10 H. L. Cas. 26, 11 Eng. Reprint, 934, 2 Eng. Rul. Cas. 496.

Annotation: 2 Eng. Rul. Cas. 518.

[1] Stark v. Starr, 94 U. S. 477, 24 L. ed. 276; Elmore v. Johnson, 143 Ill. 513, 32 N. E. 413, 21 L.R.A. 366, 36 Am. St. Rep. 401; Cunningham v. Jones, 37 Kan. 477, 15 P. 572, 1 Am. St. Rep. 257; Burnham v. Heselton, 82 Me. 495, 20 A. 80, 9 L.R.A. 90; Crocheron v. Savage, 75 N. J. Eq. 589, 73 A. 33, 23 L.R.A.(N.S.) 679; Miles v. Ervin, 6 S. C. Eq. (1 M'Cord) 524, 16 Am. Dec. 623.

Annotation: 23 L.R.A.(N.S.) 679; 28 L.R.A.(N.S.) 723; 1 Am. St. Rep. 257; 36 Am. St. Rep. 413; 24 Eng. Rul. Cas. 692.

An attorney in hac re cannot sustain a purchase from a client of the subject-matter of the retainer, where it appears that during the course of his employment he formed an opinion that the property was more valuable than had theretofore been assumed, which opinion he failed to disclose. Crocheron v. Savage, 75 N. J. Eq. 589, 73 A. 33, 23 L.R.A.(N.S.) 679.

A constructive trust arises where the attorney procures a deed to property from the client, to be used in the litigation. Annotation: 35 A.L.R. 310, s. 45 A.L.R. 854.

are presumptively invalid or fraudulent.[2] The doctrine is founded on public policy. It arises from the necessity of protecting proper relations of trust and confidence wherever they exist.[3] No presumption of innocence or improbability of wrongdoing can be considered in the attorney's favor.[4] However, according to the weight of authority, a contract between attorney and client concerning property in litigation is not absolutely void unless the relationship appears to have been used to the prejudice of the client. An examination of most of the cases in which relief has been given shows that some circumstances entered into them demonstrating the influence which the relationship between the parties had over the contract, either furnished by some positive act of fraud or deducible from its inequality.[5]

§ 50. Burden of Proof.—When a transaction between an attorney and his client is attacked, the burden is cast upon the attorney to prove that it was not influenced by the relationship.[6] He must show that it was made in the best of faith and without disadvantage to the client, that it was fair [7] and equitable, and that the client was fully informed of his rights and interests in the subject-matter of the transaction, of the nature and effect of the transaction itself, and was so placed as to be able to deal with the attorney at arm's length.[8] This is especially true in the case of an assignment or conveyance from the client to the attorney,[9] or where the attorney takes a mortgage from the client.[10]

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[2] Kidd v. Williams, 132 Ala. 140, 31 So. 458, 56 L.R.A. 879; Kisling v. Shaw, 33 Cal. 425, 91 Am. Dec. 644; Warner v. Flack, 278 Ill. 303, 116 N. E. 197, 2 A.L.R. 423; Reeder v. Lund, 213 Iowa, 300, 236 N. W. 40, citing R. C. L.; Phipps v. Willis, 53 Or. 190, 96 P. 866, 99 P. 935, 18 Ann. Cas. 119; Bingham v. Salene, 15 Or. 208, 14 P. 523, 3 Am. St. Rep. 152; Armstrong v. Morrow, 166 Wis. 1, 163 N. W. 179, Ann. Cas. 1918E, 1156.

Annotation: 18 Ann. Cas. 123.

The close scrutiny with which transactions between attorney and client are viewed does not lead to a presumption of unfairness on the part of an attorney in obtaining a voluntary payment of a just claim for professional services. Peirce v. Palmer, 31 R. I. 432, 77 A. 201, Ann. Cas. 1912B, 181.

[3] Powell v. Griffin, 178 Ark. 788, 13 S. W. (2d) 18, citing R. C. L.; Hamilton v. Allen, 86 Neb. 401, 125 N. W. 610, 28 L.R.A.(N.S.) 723.

[4] Powell v. Griffin, 178 Ark. 788, 13 S. W. (2d) 18, citing R. C. L.; Burnham v. Heselton, 82 Me. 495, 20 A. 80, 9 L.R.A. 90.

Annotation: 9 L.R.A. 90.

[5] Kisling v. Shaw, 33 Cal. 425, 91 Am. Dec. 644; Elmore v. Johnson, 143 Ill. 513, 32 N. E. 413, 21 L.R.A. 366, 36 Am. St. Rep. 401; Miles v. Ervin, 6 S. C. Eq. (1 M'Cord) 524, 16 Am. Dec. 623.

[6] Okfuskee County v. Hazelwood, 79 Okla. 185, 192 P. 217, 11 A.L.R. 709.

[7] Williams v. Bailey, 69 Fla. 225, 67 So. 877, citing R. C. L.; Warner v. Flack, 278 Ill. 303, 116 N. E. 197, 2 A.L.R. 423; Okfuskee County v. Hazelwood, 79 Okla. 185, 192 P. 217, 11 A.L.R. 709; Armstrong v. Morrow, 166 Wis. 1, 163 N. W. 179, Ann. Cas. 1918E, 1156.

[8] Kisling v. Shaw, 33 Cal. 425, 91 Am. Dec. 644; St. Leger's Appeal, 34 Conn. 434, 91 Am. Dec. 735; Cassem v. Heustis, 201 Ill. 208, 66 N. E. 283, 94 Am. St. Rep. 160; Elmore v. Johnson, 143 Ill. 513, 32 N. E. 413, 21 L.R.A. 366, 36 Am. St. Rep. 401; Donaldson v. Eaton, 136 Iowa, 650, 114 N. W. 19, 14 L.R.A.(N.S.) 1168, 125 Am. St. Rep. 275; Burnham v. Heselton, 82 Me. 495, 20 A. 80, 9 L.R.A. 90; Hamilton v. Allen, 86 Neb. 401, 125 N. W. 610, 28 L.R.A.(N.S.) 723; Crocheron v. Savage, 75 N. J. Eq. 589, 73 A. 33, 23 L.R.A.(N.S.) 679; Post v. Mason, 91 N. Y. 539, 43 Am. Rep. 689; Phipps v. Willis, 53 Or. 190, 96 P. 866, 99 P. 935, 18 Ann. Cas. 119; Bingham v. Salene, 15 Or. 208, 14 P. 523, 3 Am. St. Rep. 152; Re Dick, 166 Okla. 114, 26 P. (2d) 412, citing R. C. L.; Darlington's Estate, 147 Pa. 624, 23 A. 1046, 30 Am. St. Rep. 776; James v. Steere, 16 R. I. 367, 16 A. 143, 2 L.R.A. 164; Miles v. Ervin, 6 S. C. Eq. (1 M'Cord) 524, 16 Am. Dec. 623.

Annotation: 28 L.R.A.(N.S.) 723; 3 Am. St. Rep. 152; 36 Am. St. Rep. 413; 83 Am. St. Rep. 159.

[9] Kidd v. Williams, 132 Ala. 140, 31 So. 458, 56 L.R.A. 879; Kisling v. Shaw, 33 Cal. 425, 91 Am. Dec. 644; Williams v. Bailey, 69 Fla. 225, 67 So. 877, citing R. C. L.; Warner v. Flack, 278 Ill. 303, 116 N. E. 197, 2 A.L.R. 423; Elmore v. Johnson, 143 Ill. 513, 32 N. E. 413, 21 L.R.A. 366, 36 Am. St. Rep. 401; Merryman v. Euler, 59 Md. 588, 43 Am. Rep. 564 (assignment of mortgage); Phipps v. Willis, 53 Or. 190, 96 P. 866, 99 P. 935, 18 Ann. Cas. 119; Bingham v. Salene, 15 Or. 208, 14 P. 523, 3 Am. St. Rep. 152.

Annotation: 18 Ann. Cas. 123.

He must show payment of an adequate consideration for the property, or that a gratuity was intended. Armstrong v. Morrow, 166 Wis. 1, 163 N. W. 179, Ann. Cas. 1918E, 1156.

A conveyance to a third person with whom the attorney is interested falls within this rule. Miles v. Ervin, 6 S. C. Eq. (1 M'Cord) 524, 16 Am. Dec. 623.

The rule applies to an assignment by a client to his attorney of a judgment, an interest in the subject-matter of the litigation, a claim held by the client, an in-

§ 51. **Gifts or Bequests.**—A gift to an attorney from his client is presumptively nugatory, and the burden of proof is on the attorney to show that there was no undue influence or undue advantage because of the relation, that he fully and faithfully discharged his duty to the client, and that the client was fully informed as to the nature and effect of the gift.[11] Thus, if a lawyer, in drawing a will, drafts himself a bequest, he must explain the circumstances and show that the gift was freely and willingly made; he must, in other words, show that he did not embrace the opportunity of exerting undue influence over the testator.[12]

§ 52. **Transactions after Termination of Relations.**—In order that the above rules may apply, it is essential that the relationship of attorney and client shall actually exist.[13] Transactions taking place after the termination of the relation of attorney and client are generally sustained,[14] although the disability to purchase from the client continues so long as the reason for the rule continues to operate.[15] Thus, in some instances, an attorney is not permitted to purchase the subject-matter of his retainer without clearly showing the fairness and equity of so doing, as well as the adequacy of the consideration.[16]

§ 53. **Effect of Laches upon Client's Right to Relief.**—In the case of a voidable conveyance between an attorney and client, the client must, if he desires to have it set aside, take steps to do so within a reasonable time. What is a reasonable time depends upon the facts of particular cases. Parties may be required to assert their rights within a shorter time where their values are rapidly increasing than in other communities. One cannot, however, be charged with laches unless he has full knowledge of the facts and freedom of action.[17]

C. Illegal Transactions between Attorney and Client

§ 54. **Generally.**—There are numerous classes of contracts between an attorney and client which are held to be in contravention of public policy and

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terest in an estate or a lease, the execution by a client to his attorney of a trust deed or bill of sale, or the confession of judgment by the client to the attorney. Annotation: 18 Ann. Cas. 125.

[10] Phipps v. Willis, 53 Or. 190, 96 P. 866, 99 P. 935, 18 Ann. Cas. 119; Armstrong v. Morrow, 166 Wis. 1, 163 N. W. 179, Ann. Cas. 1918E, 1156.

Annotation: 18 Ann. Cas. 125; Ann. Cas. 1918E, 1159; 18 Eng. Rul. Cas. 356.

[11] Kisling v. Shaw, 33 Cal. 425, 91 Am. Dec. 644; Armstrong v. Morrow, 166 Wis. 1, 163 N. W. 179, Ann. Cas. 1918E, 1156.

Annotation: 9 L.R.A. 90; 16 L.R.A.(N.S.) 1087; 1 Am. St. Rep. 259.

A promise by a prisoner, during the relation of attorney and client, to give his attorney a gratuity in addition to a stipulated fee for defending him is not binding and will not be enforced. Annotation: 83 Am. St. Rep. 182.

[12] Re Putnam, 257 N. Y. 140, 177 N. E. 399, 79 A.L.R. 1423.

The presumption is one of fact—a badge of fraud—and may be rebutted by any evidence which shows that in the particular case it is untrue. St. Leger's Appeal, 34 Conn. 434, 91 Am. Dec. 735. See also Post v. Mason, 91 N. Y. 539, 43 Am. Rep. 689.

Annotation: 2 Am. St. Rep. 361; 21 Am. St. Rep. 95.

[13] Stout v. Smith, 98 N. Y. 25, 50 Am. Rep. 632; Bingham v. Salene, 15 Or. 208, 14 P. 523, 3 Am. St. Rep. 152.

[14] Elmore v. Johnson, 143 Ill. 513, 32 N. E. 413, 21 L.R.A. 366, 36 Am. St. Rep. 401.

Annotation: 28 L.R.A.(N.S.) 723; 18 Eng. Rul. Cas. 356, 357.

If an attorney has purchased from his client after the confidential relation has terminated, the client cannot avoid the contract without showing that it was procured by fraud. Annotation: 28 L.R.A. (N.S.) 723; 83 Am. St. Rep. 187.

Where an attorney purchases from his client the subject of litigation, he must, before doing so, divest himself of the character of attorney, so that his former client may deal with him as a stranger. Cunningham v. Jones, 37 Kan. 477, 15 P. 572, 1 Am. St. Rep. 257.

[15] Luddy v. Peard, L. R. 33 Ch. Div. 500, 24 Eng. Rul. Cas. 670.

[16] Annotation: 23 L.R.A.(N.S.) 679.

An agreement between a mortgagor and mortgagee to extinguish the equity of redemption cannot stand when the latter for years was the legal adviser of the former in reference to the lands involved and other property. Cassem v. Heustis, 201 Ill. 208, 66 N. E. 283, 94 Am. St. Rep. 160.

[17] Elmore v. Johnson, 143 Ill. 513, 32 N. E. 413, 21 L.R.A. 366, 36 Am. St. Rep. 401.

unenforceable[18] by either party.[19] In the determination of whether a contract between an attorney and his client contravenes public policy, the usual test is that if the contract in question can by its terms be performed lawfully, it will be treated as legal, even if performed in an illegal manner, whereas if it was entered into with intent to violate the law, it is illegal, even if the parties may, in performing it, depart from the contract and keep within the law.[20] Examples of contracts between attorney and client that have been declared void as against public policy include contracts to procure a divorce or facilitate its procurement,[21] especially those in consideration of a certain portion of the alimony awarded;[22] contracts made by relatives of a property owner for services of an attorney in advising the property owner as to the disposition of his property, so as to prevent the disinheriting of such relatives;[23] contracts with private employers to assist in the prosecution of a criminal case;[1] and lobbying contracts or contracts to obstruct justice or shield or promote crime, which are discussed in the succeeding sections.

Many courts hold that contracts between attorney and client, by which the latter agrees not to settle or discontinue his suit without the consent of his attorney, are void as against public policy because of their tendency to foster and encourage litigation.[2] Some courts, however, have taken the position that such agreements are not necessarily void but are to be condemned or not according to the circumstances of the case.[3] And a mere stipulation which is separable from the remainder of the contract will not render the entire contract invalid.[4]

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[18] Chreste v. Louisville R. Co. 167 Ky. 75, 180 S. W. 49, L.R.A.1917B, 1123, Ann. Cas. 1917E, 867.

[19] Flack v. Warner, 278 Ill. 368, 116 N. E. 202, L.R.A.1917F, 464; Bowman v. Phillips, 41 Kan. 364, 21 P. 230, 3 L.R.A. 631, 13 Am. St. Rep. 292; Jones v. Henderson, 189 Ky. 412, 225 S. W. 34, 20 A.L.R. 1471; Berman v. Coakley, 243 Mass. 348, 137 N. E. 667, 26 A.L.R. 92.

Annotation: 20 A.L.R. 1477, s. 26 A.L.R. 98.

As to recovery of compensation, see infra, §§ 180 et seq.

As to recovery of damages for breach, see infra, § 182.

[20] Herrick v. Barzee, 96 Or. 357, 190 P. 141, citing R. C. L.; Stansell v. Roach, 147 Tenn. 183, 246 S. W. 520, 29 A.L.R. 143; Arlington Hotel Co. v. Ewing, 124 Tenn. 536, 138 S. W. 954, 38 L.R.A.(N.S.) 842, Ann. Cas. 1913A, 121.

Annotation: 38 L.R.A.(N.S.) 842.

[21] Re Sylvester, 195 Iowa, 1329, 192 N. W. 442, 30 A.L.R. 180; Donaldson v. Eaton, 136 Iowa, 650, 114 N. W. 19, 14 L.R.A.(N.S.) 1168, 125 Am. St. Rep. 275; Barngrover v. Pettigrew, 128 Iowa, 533, 104 N. W. 909, 2 L.R.A.(N.S.) 260, 111 Am. St. Rep. 206; Overstreet v. Barr, 255 Ky. 82, 72 S. W. (2d) 1014, citing R. C. L.

[22] Chreste v. Louisville R. Co. 167 Ky. 75, 180 S. W. 49, L.R.A.1917B, 1123, Ann. Cas. 1917C, 867.

[23] Flack v. Warner, 278 Ill. 368, 116 N. E. 202, L.R.A.1917F, 464.

[1] Rock v. Ekern, 162 Wis. 291, 156 N. W. 197, L.R.A.1916D, 459.

[2] Davis v. Webber, 66 Ark. 190, 49 S. W. 822, 45 L.R.A. 196, 74 Am. St. Rep. 81; Nichols v. Orr, 63 Colo. 333, 166 P. 561, 2 A.L.R. 449; Cameron v. Boeger, 200 Ill. 84, 65 N. E. 690, 93 Am. St. Rep. 165; North Chicago Street R. Co. v. Ackley, 171 Ill. 100, 49 N. E. 222, 44 L.R.A. 177; Davis v. Chase, 159 Ind. 242, 64 N. E. 88, 853, 95 Am. St. Rep. 294; Kansas City Elev. R. Co. v. Service, 77 Kan. 316, 94 P. 262, 14 L.R.A. (N.S.) 1105; Chreste v. Louisville R. Co. 167 Ky. 75, 180 S. W. 49, L.R.A.1917B, 1123, Ann. Cas. 1917C, 867; Burho v. Carmichiel, 117 Minn. 211, 135 N. W. 386, Ann. Cas. 1913D, 305; Huber v. Johnson, 68 Minn. 74, 70 N. W. 806, 64 Am. St. Rep. 456; Re Snyder, 190 N. Y. 66, 82 N. E. 742, 14 L.R.A. (N.S.) 1101, 123 Am. St. Rep. 533, 13 Ann. Cas. 441; Paulson v. Lyson, 12 N. D. 354, 94 N. W. 533, 1 Ann. Cas. 245; Davy v. Fidelity & C. Ins. Co. 78 Ohio St. 256, 85 N. E. 504, 17 L.R.A.(N.S.) 443, 125 Am. St. Rep. 694 (contract champertous); Pennsylvania Co. v. Lombardo, 49 Ohio St. 1, 29 N. E. 573, 14 L.R.A. 785; Jackson v. Stearns, 48 Or. 25, 84 P. 798, 5 L.R.A.(N.S.) 390.

Annotation: 5 L.R.A.(N.S.) 390; 14 L.R.A.(N.S.) 1101; 83 Am. St. Rep. 181; 93 Am. St. Rep. 174; 13 Ann. Cas. 444; Ann. Cas. 1913D, 306.

An agreement to pay damages for dropping a lawsuit without the attorney's consent will be held void as against public policy. Andrews v. Haas, 214 N. Y. 255, 108 N. E. 423, 3 A.L.R. 458.

A stipulation that the client shall have the assistance and advice of his attorney on any compromise that may be made is however not illegal. Burho v. Carmichiel, 117 Minn. 211, 135 N. W. 386, Ann. Cas. 1913D, 305.

[3] Lipscomb v. Adams, 193 Mo. 530, 91 S. W. 1046, 112 Am. St. Rep. 500. And see Kusterer v. Beaver Dam, 56 Wis. 471, 14 N. W. 617, 43 Am. Rep. 725.

Annotation: 13 Ann. Cas. 445; Ann. Cas. 1913D, 307.

[4] Greenleaf v. Minneapolis, St. P. & S.

§ 55. Lobbying Contracts.—All agreements between attorney and client which tend to introduce personal solicitation and influence on the part of the attorney in procuring or influencing legislative action [5] or action by any department of the government,[5a] particularly those in which a contingent fee is involved,[6] are invalid as against public policy.[7] An attorney may, of course, contract for purely professional services, such as drafting a petition for an act, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them to the committee or other proper authority, etc.,[8] for professional services in preparing and advocating just claims for compensation against the government [9] or in presenting claims before governmental departments,[10] even though such services are to be performed for a contingent fee.[11] But if such a contract also includes lobby services, it has been held that the entire contract will be vitiated.[12]

§ 56. Contracts to Obstruct Justice or to Shield or Promote Crime.—Contracts for legal services to obstruct or prevent the administration of justice are invalid.[13] It is against public policy and illegal for an attorney to agree to protect a client in the commission of crime,[14] to agree to defend his client or clients against prosecutions for future wrongs and violations of law contemplated when the contract was executed; [15] to agree to render services to prevent the finding of an indictment against one accused or suspected of crime; [16] or to agree to procure, for a contingent fee, the quashing of a crim-

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Ste. M. R. Co. 30 N. D. 112, 151 N. W. 879, Ann. Cas. 1917D, 908.

[5] Weed v. Black, 2 MacArth. (D. C.) 268, 29 Am. Rep. 618; Stroemer v. Van Orsdel, 74 Neb. 132, 103 N. W. 1053, 107 N. W. 125, 4 L.R.A.(N.S.) 212, 121 Am. St. Rep. 713; Richardson v. Scott's Bluff County, 59 Neb. 400, 81 N. W. 309, 48 L.R.A. 294, 80 Am. St. Rep. 682; Mills v. Mills, 40 N. Y. 543, 100 Am. Dec. 535; Ormerod v. Dearman, 100 Pa. 561, 45 Am. Rep. 391; Clippinger v. Hepbaugh, 5 Watts & S. (Pa.) 315, 40 Am. Dec. 519.

Annotation: 4 L.R.A.(N.S.) 213; 13 Am. St. Rep. 298; 40 Am. Dec. 524.

An agreement to take charge of a claim before Congress and prosecute it as agent or attorney for the claimant, by lobby service is void. Trist v. Child (Burke v. Child) 21 Wall. (U. S.) 441, 22 L. ed. 623.

Annotation: 13 Am. St. Rep. 298.

Generally, as to lobbying contracts, see CONTRACTS [Also 6 R. C. L. p. 731, § 137].

[5a] Ormerod v. Dearman, 100 Pa. 561, 45 Am. Rep. 391 (contract for services before the war department in procuring the discharge of a drafted man).

Annotation: 13 Am. St. Rep. 299.

[6] Trist v. Child (Burke v. Child) 21 Wall. (U. S.) 441, 22 L. ed. 623.

Annotation: 29 A.L.R. 166, s. 67 A.L.R. 689; L.R.A.1915C, 824.

[7] Chreste v. Louisville R. Co. 167 Ky. 75, 180 S. W. 49, L.R.A.1917B, 1123, Ann. Cas. 1917C, 867; Spaulding v. Maillet, 57 Mont. 318, 188 P. 377, citing R. C. L.; Houlton v. Nichol, 93 Wis. 393, 67 N. W. 715, 33 L.R.A. 166, 57 Am. St. Rep. 928.

Annotation: L.R.A.1915C, 824.

[8] Trist v. Child (Burke v. Child) 21 Wall. (U. S.) 441, 22 L. ed. 623; Stroemer v. Van Orsdel, 74 Neb. 132, 103 N. W. 1053, 107 N. W. 125, 4 L.R.A.(N.S.) 212, 121 Am. St. Rep. 713; West v. Coos County, 115 Or. 409, 237 P. 961, 40 A.L.R. 1362; Spalding v. Erving, 149 Pa. 375, 24 A. 219, 15 L.R.A. 727, 34 Am. St. Rep. 608. See also Barry v. Capen, 151 Mass. 99, 23 N. E. 735, 6 L.R.A. 808.

Annotation: 29 A.L.R. 173, s. 67 A.L.R. 689; 46 A.L.R. 214; 13 Am. St. Rep. 298, 299; 121 Am. St. Rep. 726.

[9] Stanton v. Embrey, 93 U. S. 548, 23 L. ed. 983.

[10] Shouse v. Consolidated Flour Mills Co. 128 Kan. 174, 277 P. 54, 64 A.L.R. 606.

[11] Stroemer v. Van Orsdel, 74 Neb. 132, 103 N. W. 1053, 107 N. W. 125, 4 L.R.A. (N.S.) 212, 121 Am. St. Rep. 713.

Annotation: 121 Am. St. Rep. 726.

[12] Trist v. Child (Burke v. Child) 21 Wall. (U. S.) 441, 22 L. ed. 623; Weed v. Black, 2 MacArth. (D. C.) 268, 29 Am. Rep. 618; McBratney v. Chandler, 22 Kan. 692, 31 Am. Rep. 213.

Annotation: 29 A.L.R. 173, s. 67 A.L.R. 689; 4 L.R.A.(N.S.) 213.

[13] Chreste v. Louisville R. Co. 167 Ky. 75, 180 S. W. 49, L.R.A.1917B, 1123, Ann. Cas. 1917C, 867.

The law looks with disfavor upon any contract the tendency of which is to promote or cause litigation, even though the litigation is of a civil character, and there are still greater reasons why such a contract should be regarded by the courts with disfavor where promotive of the violation of the criminal law. Annotation: 38 L.R.A. (N.S.) 842.

[14] Annotation: 83 Am. St. Rep. 183.

[15] Bowman v. Phillips, 41 Kan. 364, 21 P. 230, 3 L.R.A. 631, 13 Am. St. Rep. 292.

[16] Weber v. Shay, 56 Ohio St. 116, 46 N. E. 377, 37 L.R.A. 230, 60 Am. St. Rep. 743; Bradley v. Gilliam (Tex. Civ. App.) 260 S. W. 289, citing R. C. L.

inal prosecution.[17] It is also a well-established principle that contracts between attorney and client which have for their subject-matter any interference with the due enforcement of laws are against public policy and therefore void,[18] as is a contract to secure the suspension of a criminal statute.[19] However, a mere contract to test the constitutionality of a statute is not against public policy.[20]

§ 57. Contracts to Procure Liberation or Pardon of Convict.—There is nothing unlawful or opposed to public policy, as a general rule, in simply employing an attorney to endeavor, by proper means, to secure a pardon.[1] Nor is it to be inferred that an unlawful course of conduct was intended from the mere fact that payment is contingent upon success in procuring a pardon,[2] although a contract founded upon a promise or engagement to procure signatures and obtain a pardon from the governor for one convicted of a criminal offense and sentenced to punishment has been held to be unlawful.[3] Moreover, generally speaking, all contracts to change the course of trials or the effects of trials, whether to obtain the liberation of a prisoner by money to the jailer, or to obtain a pardon by the use of money directly or indirectly, must be deemed void.[4]

D. Acquiring Adverse Interest in Subject-matter of Employment

§ 58. Generally.—It is well established that an attorney cannot deal for himself in the subject-matter of the litigation to the prejudice of his client's interest,[5] and can in no case, without the client's consent, buy and hold, otherwise than in trust, any adverse title or interest touching the thing to which his employment relates;[6] all such purchases inure to the benefit of the client.[7] It is contrary to the policy of the law, and also contrary to the principles of equity, to permit an attorney at law to occupy at the same time and in the same transaction the antagonistic and wholly incompatible position of adviser of his client concerning a pending litigation threatening the title to his property and that of the purchaser of such property in opposition to the title of his client.[8]

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[17] Ormerod v. Dearman, 100 Pa. 561, 45 Am. Rep. 391.

[18] Spalding v. Ewing, 149 Pa. 375, 24 A. 219, 15 L.R.A. 727, 34 Am. St. Rep. 608; Ormerod v. Dearman, 100 Pa. 561, 45 Am. Rep. 391.
Annotation: 13 Am. St. Rep. 297.

[19] Arlington Hotel Co. v. Ewing, 124 Tenn. 536, 138 S. W. 954, 38 L.R.A.(N.S.) 842, Ann. Cas. 1913A, 121.
Annotation: 38 L.R.A.(N.S.) 842.

[20] Kagey v. Fox West Coast Theatres Corp. 139 Kan. 301, 31 P. (2d) 67, 92 A.L.R. 286; Arlington Hotel Co. v. Ewing, 124 Tenn. 536, 138 S. W. 954, 38 L.R.A.(N.S.) 842, Ann. Cas. 1913A, 121.
Annotation: Ann. Cas. 1913A, 126.

[1] Gordon v. Gordon, 168 Ky. 409, 182 S. W. 220, L.R.A.1916D, 576, Ann. Cas. 1917D, 886; Chadwick v. Knox, 31 N. H. 226, 64 Am. Dec. 329. Annotation: 46 A.L.R. 215.

[2] Annotation: 13 Am. St. Rep. 298.

[3] Hatzfield v. Gulden, 7 Watts (Pa.) 152, 31 Am. Dec. 750. And see Buck v. First Nat. Bank, 27 Mich. 293, 15 Am. Rep. 189.

[4] Newbold v. McCrorey, 103 S. C. 299, 87 S. E. 542, 1103, citing R. C. L.
Annotation: 46 A.L.R. 217.

[5] Parks v. Skipper, 164 Md. 388, 165 A. 319, citing R. C. L.; Okfuskee County v. Hazelwood, 79 Okla. 185, 192 P. 217, 11 A.L.R. 709.

[6] Baker v. Humphrey, 101 U. S. 494, 25 L. ed. 1065; Marsh v. Whitmore, 21 Wall. (U. S.) 178, 22 L. ed. 482; Manhattan Cloak & Suit Co. v. Dodge, 120 Ind. 1, 21 N. E. 344, 6 L.R.A. 369; Cunningham v. Jones, 37 Kan. 477, 15 P. 572, 1 Am. St. Rep. 257; Oviatt v. Smith, 226 Mich. 253, 197 N. W. 535, citing R. C. L.; Bucher v. Hohl, 199 Mo. 320, 97 S. W. 922, 116 Am. St. Rep. 492; Eoff v. Irvine, 108 Mo. 378, 18 S. W. 907, 32 Am. St. Rep. 609; Davis v. Kline, 96 Mo. 401, 9 S. W. 724, 2 L.R.A. 78; Olson v. Lamb, 56 Neb. 104, 76 N. W. 433, 71 Am. St. Rep. 670; Mebane v. Broadnax, 183 N. C. 333, 111 S. E. 627, citing R. C. L.; Wade v. Pettibone, 11 Ohio, 57, 37 Am. Dec. 408; Harrison v. Murphey, 39 Okla. 548, 135 P. 1137, 49 L.R.A.(N.S.) 1059; Henry v. Raiman, 25 Pa. 354, 64 Am. Dec. 703; Stephens v. Dubois, 31 R. I. 138, 76 A. 656, 140 Am. St. Rep. 741.
Annotation: 9 L.R.A. 90; 1 Am. St. Rep. 259; 32 Am. St. Rep. 614; 71 Am. St. Rep. 680; Ann. Cas. 1915C, 953.
If the attorney has title to the property conveyed to his brother, the latter stands in the same position as the attorney. Baker v. Humphrey, 101 U. S. 494, 25 L. ed. 1065.

[7] Mebane v. Broadnax, 183 N. C. 333, 111 S. E. 627, citing R. C. L.; Henry v. Raiman, 25 Pa. 354, 64 Am. Dec. 703.
Even the client's subsequent recognition of his attorney's title to property thus acquired is not binding on him where the evidence shows a case of implicit trust and confidence reposed by him in the attorney. Bucher v. Hohl, 199 Mo. 320, 97 S. W. 922, 116 Am. St. Rep. 492.

The rule applies to everyone who acts for another in the capacity of attorney and acquires by his relationship the influence ordinarily exerted by an attorney over his client.[9]

§ 59. Purchase of Outstanding Titles or Claims.—An attorney employed to sustain his client's rights or title to property cannot purchase for himself any outstanding or opposing title against the interests of his client, either before or after the cause is ended, whether during the time the client holds for himself or after he has conveyed his interest; any such purchase will inure to the benefit of the client or his vendee or assignee.[10] In such case the attorney can obtain, at most, no more than the sum actually paid by him for such property.[11] Nor will an attorney retained in litigation to enforce a claim against a certain estate be permitted to purchase the residue of the estate to the prejudice of his client.[12] It has been held, however, that a person is not disqualified, because of his being an attorney at law, from purchasing a mortgage, with the intention of foreclosing it if not paid, where no violation of duty is disclosed;[13] or from acquiring an interest in property he is under no duty to acquire for his client.[14]

§ 60. Purchase at Tax or Judicial Sale.—A tax deed made to an attorney has been held to be void if the owner of the land was the client of such attorney at the time.[15] An attorney cannot buy and hold property sold at a judicial sale in which his client is interested, where the purchase would result in any injury or disadvantage to the client,[16] without the consent of his client.

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[8] Fisher v. McInerney, 137 Cal. 28, 69 P. 622, 907, 92 Am. St. Rep. 68; Cunningham v. Jones, 37 Kan. 477, 15 P. 572, 1 Am. St. Rep. 257.

[9] **The rule applies as against the attorney of an assignee** of an insolvent who purchases an outstanding claim against the estate. Manhattan Cloak & Suit Co. v. Dodge, 120 Ind. 1, 21 N. E. 344, 6 L.R.A. 369.

An attorney selling property at public auction on another's account cannot become the buyer on his own account. Marsh v. Whitmore, 21 Wall. (U. S.) 178, 22 L. ed. 482.

An attorney who has prepared deeds of trust and been consulted as to the purposes for which they were made cannot afterwards, on purchasing the land included therein on an execution sale, maintain a suit to set aside such deeds as fraudulent. Davis v. Kline, 96 Mo. 401, 9 S. W. 724, 2 L.R.A. 78.

[10] Eoff v. Irvine, 108 Mo. 378, 18 S. W. 907, 32 Am. St. Rep. 609; Davis v. Kline, 96 Mo. 401, 9 S. W. 724, 2 L.R.A. 78; Strever v. Sinclair, 66 Mont. 258, 213 P. 253, citing R. C. L.; White Earth Creamery Co. v. Edwardson, 49 N. D. 394, 191 N. W. 622, citing R. C. L.; Henry v. Raiman, 25 Pa. 354, 64 Am. Dec. 703.

Annotation: 47 L.R.A.(N.S.) 567; 1 Am. St. Rep. 259; 32 Am. St. Rep. 614; Ann. Cas. 1915C, 955.

The attorney of an assignee for the benefit of creditors has no right to borrow the trust funds, paying interest, and use them to buy claims against the debtor below their face value, and then file such claims and have them allowed by the assignee, nor can he use his own funds for that purpose; in case he does so, the assignee must account for the profits realized by the attorney if he had knowledge of his action. Manhattan Cloak & Suit Co. v. Dodge, 120 Ind. 1, 21 N. E. 344, 6 L.R.A. 369.

[11] Cassem v. Heustis, 201 Ill. 208, 66 N. E. 283, 94 Am. St. Rep. 160; Manhattan Cloak & Suit Co. v. Dodge, 120 Ind. 1, 21 N. E. 344, 6 L.R.A. 369; Olson v. Lamb, 56 Neb. 104, 76 N. W. 433, 71 Am. St. Rep. 670; McKenna v. Van Blarcom, 109 Wis. 271, 85 N. W. 322, 83 Am. St. Rep. 895.

Annotation: Ann. Cas. 1915C, 955.

[12] Manhattan Cloak & Suit Co. v. Dodge, 120 Ind. 1, 21 N. E. 344, 6 L.R.A. 369; Stephens v. Dubois, 31 R. I. 138, 76 A. 656, 140 Am. St. Rep. 741.

Annotation: Ann. Cas. 1915C, 955.

[13] McKenna v. Van Blarcom, 109 Wis. 271, 85 N. W. 322, 83 Am. St. Rep. 895.

[14] Annotation: 47 L.R.A.(N.S.) 569.

[15] Cunningham v. Jones, 37 Kan. 477, 15 P. 572, 1 Am. St. Rep. 257.

[16] Byers v. Surget, 19 How. (U. S.) 303, 15 L. ed. 670; Stockton v. Ford, 11 How. (U. S.) 232, 13 L. ed. 676; Cunningham v. Jones, 37 Kan. 477, 15 P. 572, 1 Am. St. Rep. 257; Olson v. Lamb, 56 Neb. 104, 76 N. W. 433, 71 Am. St. Rep. 670; Wade v. Pettibone, 11 Ohio, 57, 37 Am. Dec. 408; Leisenring v. Black, 5 Watts (Pa.) 303, 30 Am. Dec. 322;

unless he bids a sufficient amount to discharge the judgment debt.[17] In all such cases the client may elect to treat him as a trustee and the act as done for his benefit, and claim the advantage derived from the sale,[18] providing such right of election is exercised within a reasonable time [19] and before the client has, with knowledge of the facts, dealt with the attorney as owner, in such a way as to ratify the purchase and estop himself from claiming the benefit thereof.[20]

§ 61. Effect of Prior Termination of Relation.—In general it may be said that if the relation of attorney and client has ceased and the attorney does not use any information obtained as counsel or take an unfair advantage, a purchase of a right or claim against the client does not constitute the attorney a trustee, where he has no duty to perform inconsistent with the purchase.[1] However, owing to the confidential and fiduciary relation between attorney and client, the courts closely scrutinize all such transactions,[2] and will not permit the attorney to avail himself of information acquired during his employment to purchase an interest in the subject of his employment without first disclosing the facts to his client and obtaining his consent.[3] Other courts hold that the disability of an attorney to purchase continues as long as the reason on which it is founded continues to exist, and deny him the right to purchase after the termination of the employment.[4]

§ 62. Effect of Good Faith.—The question of good faith on the part of an attorney in acquiring an interest adverse to that of his client, the fairness of the transaction, or the adequacy of consideration will not as a general rule be inquired into where the client seeks to secure the benefit of a purchase made by his attorney for his own interest or benefit and without the knowledge or consent of the client.[5] Such a transaction is vitiated by the law, irrespective of its merits, fairness, or good faith, and without regard to whether it is injurious to the client.[6] If, however, the client intended that the attorney should make the purchase for himself and acquiesced in his action, the

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Roger v. Whitham, 56 Wash. 190, 105 P. 628, 134 Am. St. Rep. 1105, 21 Ann. Cas. 272.

Annotation: 9 L.R.A. 90; 21 Ann. Cas. 274; 71 Am. St. Rep. 680.

An attorney by whom judgment was recovered and who was also attorney for the assignee of the judgment is not at liberty to purchase it on sale under execution against the assignor; if he does so, equity will impress upon it a trust in favor of the assignee. Stockton v. Ford, 11 How. (U. S.) 232, 13 L. ed. 676.

[17] Douglass v. Blount, 95 Tex. 369, 67 S. W. 484, 58 L.R.A. 699.

As to attorney's authority to purchase for client at a judicial sale, see infra, § 114.

[18] Stockton v. Ford, 11 How. (U. S.) 232, 13 L. ed. 676; Bucher v. Hohl, 199 Mo. 320, 97 S. W. 922, 116 Am. St. Rep. 492; Davis v. Kline, 96 Mo. 401, 9 S. W. 724, 2 L.R.A. 78; Olson v. Lamb, 56 Neb. 104, 76 N. W. 433, 71 Am. St. Rep. 670; Beardsley v. Root, 11 Johns. (N. Y.) 464, 6 Am. Dec. 386; Wade v. Pettibone, 11 Ohio, 57, 37 Am. Dec. 408, bill of review dismissed in 14 Ohio, 557; Leisenring v. Black, 5 Watts (Pa.) 303, 30 Am. Dec. 322; Roger v. Whitham, 56 Wash. 190, 105 P. 628, 134 Am. St. Rep. 1105, 21 Ann. Cas. 272.

Annotation: 1 Am. St. Rep. 259; 71 Am. St. Rep. 680; 21 Ann. Cas. 276.

[19] Wade v. Pettibone, 11 Ohio, 57, 37 Am. Dec. 408 (twenty-five months held too long a delay).

Annotation: 1 Am. St. Rep. 259; 71 Am. St. Rep. 680; 21 Ann. Cas. 277.

[20] Olson v. Lamb, 56 Neb. 104, 76 N. W. 433, 71 Am. St. Rep. 670.

[1] Harrison v. Murphey, 39 Okla. 548, 135 P. 1137, 49 L.R.A.(N.S.) 1059.

Annotation: 21 Ann. Cas. 277; Ann. Cas. 1915C, 956.

[2] Garceau v. McNamara, 125 Minn. 130, 145 N. W. 809, Ann. Cas. 1915C, 951, holding that the burden is on the attorney to establish the fairness and good faith of the transaction.

[3] Henry v. Raiman, 25 Pa. 354, 64 Am. Dec. 703.

Annotation: Ann. Cas. 1915C, 957.

[4] Eoff v. Irvine, 108 Mo. 378, 18 S. W. 907, 32 Am. St. Rep. 609.

Annotation: Ann. Cas. 1915C, 956, 957.

[5] Baker v. Humphrey, 101 U. S. 494, 25 L. ed. 1065; Stockton v. Ford, 11 How. (U. S.) 232, 13 L. ed. 676; Okfuskee County v. Hazelwood, 79 Okla. 185, 192 P. 217, 11 A.L.R. 709; Stephens v. Dubois, 31 R. I. 138, 76 A. 656, 140 Am. St. Rep. 741.

[6] Okfuskee County v. Hazelwood, 79 Okla. 185, 192 P. 217, 11 A.L.R. 709.

transaction will be upheld if open, honest, and fair.[7] Moreover, authorities are not wanting to the effect that an attorney may buy and hold property sold at a judicial sale, where he acts in good faith and not against the interest of the client, and no injustice is done.[8]

§ 63. Effect of Laches upon Right to Relief.—A client who, with full knowledge of all the facts, has acquiesced for a long time in a purchase made by his attorney will be denied relief in a proceeding to have the purchase declared to be for his benefit.[9] He cannot, however, be charged with laches unless he has had full knowledge of all the facts, and perfect freedom of action.[10]

E. Representing Conflicting Interests

§ 64. Generally.—An attorney owes to his client an undivided allegiance, and after he has been retained by, and received the confidence of, a client, he cannot, without the free and intelligent consent of his client, given after full knowledge of all the facts and circumstances, act both for his client and for one whose interest is adverse to or conflicting with that of his client in the same general matter,[11] however slight such adverse interest may be;[12] nor is it material that the intention and motive of the attorney may have been honest.[13] The rule is particularly applicable to prosecuting attorneys or city counsel, precluding them from representing individuals having an interest adverse to, or dissociated from, the public interest, or undertaking the defense of one whom they are charged by their public office with prosecuting upon a criminal charge.[14] Nor can an attorney be employed by others in matters so closely related to those of his client as in effect to be a part thereof.[15] If the attorney is employed with reference to a claim against his own personal debtor, he must not, unknown to the client, give his own claim preference over his client's in the pursuit of the debtor.[16]

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[7] Garceau v. McNamara, 125 Minn. 130, 145 N. W. 809, Ann. Cas. 1915C, 951; Watts v. Jackson, 75 Okla. 123, 182 P. 508, citing R. C. L.

Annotation: Ann. Cas. 1915C, 956.

An execution sale to the attorney of the defendant is not unlawful if made in good faith with the consent of the defendant and without any purpose of defrauding his creditors, and no presumption arises that such purchase was made for the benefit of the client or with his funds. Fisher v. McInerney, 137 Cal. 28, 69 P. 622, 907, 92 Am. St. Rep. 68.

Annotation: 21 Ann. Cas. 276.

[8] Pacific R. Co. v. Ketchum, 101 U. S. 289, 25 L. ed. 932; Roger v. Whitham, 56 Wash. 190, 105 P. 628, 134 Am. St. Rep. 1105, 21 Ann. Cas. 272.

Annotation: 1 Am. St. Rep. 260; 136 Am. St. Rep. 814, 815.

[9] Marsh v. Whitmore, 21 Wall. (U. S.) 178, 22 L. ed. 482; Tomblin v. Hill, 206 Cal. 689, 275 P. 941, citing R. C. L.; Stephens v. Dubois, 31 R. I. 138, 76 A. 656, 140 Am. St. Rep. 741.

[10] Tomblin v. Hill, 206 Cal. 689, 275 P. 941, citing R. C. L.; Elmore v. Johnson, 143 Ill. 513, 32 N. E. 413, 21 L.R.A. 366, 36 Am. St. Rep. 401; Stephens v. Dubois, 31 R. I. 138, 76 A. 656, 140 Am. St. Rep. 741.

Annotation: Ann. Cas. 1915C, 955.

[11] Parker v. Parker, 99 Ala. 239, 13 So. 520, 42 Am. St. Rep. 48; Wassell v. Reardon, 11 Ark. 705, 54 Am. Dec. 245; Re Cowdery, 69 Cal. 32, 10 P. 47, 58 Am. Rep. 545; Jones v. Lamont, 118 Cal. 499, 50 P. 766, 62 Am. St. Rep. 251; People v. Gerold, 265 Ill. 448, 107 N. E. 165, Ann. Cas. 1916A, 636; Strong v. International Bldg. L. & Invest. Union (Strong v. Brennan) 183 Ill. 97, 55 N. E. 675, 47 L.R.A. 792; Derlin v. Derlin, 142 Md. 352, 121 A. 27, citing R. C. L.; Hightower v. Detroit Edison Co. 262 Mich. 1, 247 N. W. 97, 86 A.L.R. 509; Walker v. Hill, 90 Mont. 111, 300 P. 260, citing R. C. L.; Lawall v. Groman, 180 Pa. 532, 37 A. 98, 57 Am. St. Rep. 662; Peirce v. Palmer, 31 R. I. 432, 77 A. 201, Ann. Cas. 1912B, 181; Hosford v. Eno, 41 S. D. 65, 168 N. W. 764, L.R.A.1918F, 831; Bryant v. Lewis (Tex. Civ. App.) 27 S. W. (2d) 604, citing R. C. L.; Ramsey v. Brooke County Bldg. & L. Asso. 102 W. Va. 119, 135 S. E. 249, 49 A.L.R. 668.

Annotation: 51 A.L.R. 1320; Ann. Cas. 1912B, 181, 217; 57 Am. St. Rep. 662; 59 Am. St. Rep. 237; 62 Am. St. Rep. 255.

Am. Law Inst. Restatement, Agency, p. 891, § 394.

An attorney may, however, have a duty to act for clients with adverse interests, as where he undertakes the collection of separate claims against the same debtor, in which case he must protect both equally. Am. Law Inst. Restatement, Agency, p. 892, § 394.

[12] Parker v. Parker, 99 Ala. 239, 13 So. 520, 42 Am. St. Rep. 48.

[13] People ex rel. Livers v. Hanson, 290 Ill. 370, 125 N. E. 268, citing R. C. L.; People v. Gerold, 265 Ill. 448, 107 N. E. 165, Ann. Cas. 1916A, 636; Strong v. International Bldg. Loan & Invest. Asso. 183 Ill. 97, 55 N. E. 675, 47 L.R.A. 792; Peirce v. Palmer, 31 R. I. 432, 77 A. 201, Ann. Cas. 1912B, 181.

The rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent. Strong v. International Bldg. L. & Invest. Union (Strong v. Brennan) 183 Ill. 97, 55 N. E. 675, 47 L.R.A. 792.

§ 65. Where Interests Are Not Adverse or Both Clients Consent.—The rule prohibiting an attorney retained by a client from acting for another applies only in the case of conflicting interests; it is generally conceded that an attorney may represent his client's adversary with perfect propriety whenever their interests are not hostile to each other. The test of inconsistency is whether acceptance of the new retainer will require the attorney to do anything which will injuriously affect his first client in any matter in which he represents him, and also whether he will be called upon, in his new relation, to use against his first client any knowledge or information acquired through their connection.[17] An attorney may also properly represent at the same time parties whose interests conflict, where he acts with the full knowledge and consent of both.[18] And an attorney who acts for both parties in the preparation of a mortgage may act as agent of the mortgagee to accept the delivery of the mortgage.[19]

§ 66. Effect of Former Retainer.—Even after the relation of attorney and client terminates, the obligation of the attorney to preserve inviolate the confidence reposed in him by his former client continues.[20] Hence, an attorney cannot, upon the termination of an employment, represent one whose interest in the transaction is adverse to that of his former client,[1] even though, while

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[14] Hosford v. Eno, 41 S. D. 65, 168 N. W. 764, L.R.A.1918F, 831.

Annotation: L.R.A.1918F, 832.

[15] People v. Gerold, 265 Ill. 448, 107 N. E. 165, Ann. Cas. 1916A, 636.

[16] Am. Law Inst. Restatement, Agency, p. 889, § 393.

[17] Wutchumna Water Co. v. Bailey, 216 Cal. 564, 15 P. (2d) 505, citing R. C. L.; Peirce v. Palmer, 31 R. I. 432, 77 A. 201, Ann. Cas. 1912B, 181.

Annotation: Ann. Cas. 1912B, 212.

The same attorney may represent both borrower and lender upon mortgage or similar security, upon a mutual understanding between the parties, although the former only is expected to pay the fees. Lawall v. Groman, 180 Pa. 532, 37 A. 98, 57 Am. St. Rep. 662.

Annotation: 59 Am. St. Rep. 237.

Several creditors in proceedings to realize upon the assets of a bankrupt may be represented by one attorney. Am. Law Inst. Restatement, Agency, p. 893, § 394.

Whether an attorney who represents an administrator may act for one of the heirs as against other heirs, in an adversary proceeding relating to the property of the estate, is a question which would depend on the circumstances of the particular case. Jones v. Lamont, 118 Cal. 499, 50 P. 766, 62 Am. St. Rep. 251.

[18] Rhodes v. Rhodes (Todd v. Rhodes) 108 Kan. 64, 193 P. 894, 16 A.L.R. 423.

Where an attorney employed to collect a note is appointed by the defendant, with knowledge of the fact, as his attorney in fact to confess judgment on the note, his exercise of such power is consistent with fair dealing. Wassell v. Reardon, 11 Ark. 705, 54 Am. Dec. 245.

[19] Jones v. Howard, 99 Ga. 451, 27 S. E. 765, 59 Am. St. Rep. 231.

Annotation: 59 Am. St. Rep. 237.

[20] Peirce v. Palmer, 31 R. I. 432, 77 A. 201, Ann. Cas. 1912B, 181.

[1] Re Cowdery, 69 Cal. 32, 10 P. 47, 58 Am. Rep. 545; Fairfield County Bar v. Taylor, 60 Conn. 11, 22 A. 441, 13 L.R.A. 767; People v. Gerold, 265 Ill. 448, 107 N. E. 165, Ann. Cas. 1916A, 636; Re Marron, 22 N. M. 252, 160 P. 391, L.R.A.1917B, 378; State v. Osborne, 54 Or. 289, 103 P. 62, 20 Ann. Cas. 627; Peirce v. Palmer, 31 R. I. 432, 77 A. 201, Ann. Cas. 1912B, 181; Hosford v. Eno, 41 S. D. 65, 168 N. W. 764, L.R.A.1918F, 831.

Annotation: 51 A.L.R. 1307; Ann. Cas. 1912B, 212; Ann. Cas. 1916A, 651.

This is the rule in England. Annotation: 51 A.L.R. 1321.

An attorney representing a litigant will not be allowed to change sides in a case and accept a retainer from the adverse party. Re Cowdery, 69 Cal. 32, 10 P. 47, 58 Am. Rep. 545; Weidekind v. Tuolumne Water Co. 74 Cal. 386, 19 P. 173, 5 Am. St. Rep. 445.

Annotation: Ann. Cas. 1912B, 212.

A change of sides in the same suit, though at different trials, if permitted, has been held to be an irregularity on account acting for his former client, he acquired no knowledge which could operate to the client's disadvantage in the subsequent adverse employment.[2] It is both the right and the duty of the court to prohibit or restrain an attorney from acting for one whose interest is adverse to that of a former client.[3]

A former attorney for a defendant in criminal proceedings cannot, after withdrawing from the case, be permitted to associate himself with the prosecuting attorney [4] to assist in the prosecution, if, by reason of his professional relations with the accused, he has acquired a knowledge of the facts upon which the prosecution is predicated or which are closely interwoven therewith.[5]

The general rule stated above does not, however, prevent an attorney from representing a subsequent client against a former client, where the duties required of him do not conflict with those required in the first employment.[6] Nor does the fact that an attorney has given voluntary advice to one party on the matter involved in the litigation without an offer of employment make improper his acceptance of employment by the other party.[7]

V. AUTHORITY OF ATTORNEY TO ACT FOR OR BIND CLIENT

A. In General

§ 67. Power to Bind Client as Agent.—Where a relation of attorney and client exists, the client is bound, according to the ordinary rules of agency, by the acts of his attorney within the scope of the latter's authority,[8] even though the attorney is without a license.[9] Accordingly, a client may be responsible for a trespass committed by his attorney that he in no way authorized except by his general employment of the attorney,[10] or for the tortious institution, continuation, or prosecution of legal proceedings to enforce the client's claim.[11] So also, notice given by an attorney is the act of the client.[12] The attorney may properly observe the usages of his profession in the locality, so far as he reasonably believes that the client knows of them and intends that he should do so.[13]

§ 68. Authority in Litigation and in Special Employment Distinguished.—There is a well-recognized distinction between the powers implied in the gen-

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of which a new trial should be granted. Weidekind v. Tuolumne Water Co. 74 Cal. 386, 19 P. 173, 5 Am. St. Rep. 445.

[2] People v. Gerold, 265 Ill. 448, 107 N. E. 165, Ann. Cas. 1916A, 636; Peirce v. Palmer, 31 R. I. 432, 77 A. 201, Ann. Cas. 1912B, 181.

[3] Weidekind v. Tuolumne County Water Co. 74 Cal. 386, 19 P. 173, 5 Am. St. Rep. 445; People v. Gerold, 265 Ill. 448, 107 N. E. 165, Ann. Cas. 1916A, 636; Boyd v. Second Judicial Dist. Ct. 51 Nev. 264, 274 P. 7, citing R. C. L.

Annotation: 51 A.L.R. 1315; Ann. Cas. 1912B, 214.

[4] Annotation: Ann. Cas. 1912B, 212.

[5] People v. Gerold, 265 Ill. 448, 107 N. E. 165, Ann. Cas. 1916A, 636.

Annotation: Ann. Cas. 1916A, 651.

[6] Shaw v. Bill, 95 U. S. 10, 24 L. ed. 333; Wutchumna Water Co. v. Bailey, 216 Cal. 564, 15 P. (2d) 505, citing R. C. L.; Murphy v. Riggs, 238 Mich. 151, 213 N. W. 110, 51 A.L.R. 1303.

Annotation: 51 A.L.R. 1312; Ann. Cas. 1912B, 212.

An attorney, when discharged by his client, can make no use of secrets in relation to the cause, obtained from his former client. Re Cowdery, 69 Cal. 32, 10 P. 47, 58 Am. Rep. 545.

[7] Lester v. Gay, 217 Ala. 585, 117 So. 211, 59 A.L.R. 1561.

[8] Epperson v. Helbron, 145 Ark. 566, 225 S. W. 345, 15 A.L.R. 597; Bank of Glade Spring v. McEwen, 160 N. C. 414, 76 S. E. 222, Ann. Cas. 1914C, 542.

Annotation: 47 A.L.R. 208.

The opposite party may safely treat with the attorney on all matters within the scope of his apparent authority until notice to the contrary. Annotation: 132 Am. St. Rep. 153.

[9] Am. Law Inst. Restatement, Agency, p. 64, § 21.

[10] Gibson v. Holmes, 78 Vt. 110, 62 A. 11, 4 L.R.A.(N.S.) 451.

[11] Am. Law Inst. Restatement, Agency, p. 564, § 253.

[12] Epperson v. Helbron, 145 Ark. 566, 225 S. W. 345, 15 A.L.R. 597.

[13] Am. Law Inst. Restatement, Agency, p. 93, § 36.

eral retainer of an attorney to commence, prosecute, and control a cause until judgment is rendered, and those arising from employment for a special purpose.[14] Under a general retainer, an attorney, by virtue of his employment, has authority to perform all acts in or out of court, necessary or incident to the prosecution and management of the suit, which affect the remedy only, and not the cause of action,[15] but where an attorney is called on to perform specific services, and does not identify himself with the record of the cause, and performs only the particular services which he has been retained to perform, his implied authority to bind his client seems limited to the proper conduct of the specific work intrusted to him.[16] In such cases the presumption of authority obtaining in court, arising from his license and because he is an officer of the court, cannot be claimed. Strangers cannot safely deal with him on the faith of such representation, and they have the right to demand from him some reasonable and satisfactory evidence of his authority—evidence other than his mere assertion. Thus, for instance, while an attorney at law, as the representative of his client, has the right to inspect public records where his client would have such right, he may be required to show evidence of his authority as such attorney.[17]

§ 69. **Collection of Client's Claim.**—The authority of an attorney to receive the payment of a debt or claim which he is employed to recover by suit or to collect is well settled,[18] but generally speaking, his authority extends no further than the collection of such claims.[19] The debtor is bound to take notice of the attorney's authority.[20]

An attorney who holds a claim for collection has no authority to receive anything in payment of such claim except lawful and generally accepted money or currency, unless especially authorized to do so by his principal, and hence cannot ordinarily take promissory notes, drafts, warrants,[1] deeds of trust,[2] or land in satisfaction of the claim.[3] It is clear that the attorney cannot credit his own indebtedness to the client's debtor against his client's claim,[4] nor can he transfer his client's securities in payment of such debt.[5] If negotiable paper payable to the client is rightly received in payment of the claim, he has no authority to indorse it,[6] even though he has an interest in it by way of fees which he is authorized to retain.[7] Nor can he release the debtor without an actual payment of the full amount of the debt in money,[8] since this would amount to a compromise of his client's rights[9] which he has no authority to make,[10] though he may accept a partial payment of a debt as such, and receipt therefor.[11] Also, it has been held that even though an attorney has authority to receive payment of an obligation, this does not authorize him to receive such payment before it is due.[12]

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[14] Annotation: 132 Am. St. Rep. 153.

[15] See infra, § 85.

[16] United States v. Sloat (D. C.) 56 F. (2d) 434, citing R. C. L.; Anderson v. Storie, 208 Iowa, 1172, 227 N. W. 93, 66 A.L.R. 1410; Mosher v. Beselin, 129 Neb. 541, 261 N. W. 126, citing R. C. L.

Annotation: 132 Am. St. Rep. 153.

[17] Randolph v. State, 82 Ala. 527, 2 So. 714, 60 Am. Rep. 761; Brewer v. Watson, 71 Ala. 299, 46 Am. Rep. 318; Doeller v. Mortgage Guarantee Co. 166 Md. 500, 171 A. 856, citing R. C. L.

[18] Chapman v. Cowles, 41 Ala. 103, 91 Am. Dec. 508; Pace v. Reid, 158 Miss. 145, 130 So. 294, citing R. C. L.; Garrett v. Hanshue, 53 Ohio St. 482, 42 N. E. 256, 35 L.R.A. 321; Clark v. Randall, 9 Wis. 135, 76 Am. Dec. 252.

Annotation: 21 Eng. Rul. Cas. 37.

As to the authority of attorneys to receive payment of a judgment or moneys collected under execution, see infra, §§ 103, 112.

[19] Chapman v. Cowles, 41 Ala. 103, 91 Am. Dec. 508.

[20] Cram v. Sickel, 51 Neb. 828, 71 N. W. 724, 66 Am. St. Rep. 478; Hall v. Presnell, 157 N. C. 290, 72 S. E. 985, 39 L.R.A.(N.S.) 62, Ann. Cas. 1913B, 1293.

For a discussion of the authority of agents generally to collect and receive payment, see AGENCY, Vol. 2, p. 127, §§ 159 et seq.

[1] Ball v. State Bank, 8 Ala. 590, 42 Am. Dec. 649; Chapman v. Cowles, 41 Ala. 103, 91 Am. Dec. 508 (receipt of depreciated Confederate currency); Herriman v. Shomon, 24 Kan. 387, 36 Am. Rep. 261; Mangum v. Ball, 43 Miss. 288, 5 Am. Rep. 488; Cram v. Sickel, 51 Neb. 828, 71 N. W. 724, 66 Am. St. Rep. 478; Smith v. Jones, 47 Neb. 108, 66 N. W. 19, 53 Am. St. Rep. 519; Bank of Glade Spring v. McEwen, 160 N. C. 414, 76 S. E. 222, Ann. Cas. 1914C, 542; Huston v. Mitchell, 14 Serg. & R. (Pa.) 307, 16 Am. Dec. 506; Davis v. Home Ins. Co. 127 Tenn. 330, 155 S. W. 131, 44 L.R.A.(N.S.) 626; Smock v. Dade, 5 Rand. (Va.) 639, 16 Am. Dec. 780.

Annotation: 66 A.L.R. 116; 35 L.R.A. (N.S.) 53; 66 Am. St. Rep. 483; 21 Ann. Cas. 581; Ann. Cas. 1915B, 833; 21 Eng. Rul. Cas. 36.

It has been held that when the attorney realizes on securities or collects claims placed in his hands by the debtor, the proceeds so collected should be considered as a payment pro tanto of the claim of his original client. Smock v. Dade, 5 Rand. (Va.) 639, 16 Am. Dec. 780.

Annotation: 21 Ann. Cas. 583.

[2] Davis v. Home Ins. Co. 127 Tenn. 330, 155 S. W. 131, 44 L.R.A.(N.S.) 626.

§ 70. Surrender or Waiver of Client's Rights.—It is a general principle that an attorney cannot, by virtue of his general authority as attorney, bind his client by any act which amounts to a surrender or waiver in whole or in part of any substantial right of the client, or do any act which will either release his client's debtor or his surety or substantially jeopardize his interests in any way. If he does, the client is not barred, without ratification or something which amounts to an estoppel, to deny his attorney's authority.[13] Authority to bind the client by an extrinsic agreement to alter or vary the terms of a written instrument must be special, and cannot be implied.[14] In the absence of express authority from his client, an attorney cannot compound a debt, extend the time of payment of a claim intrusted to him for payment, or bind his principal by assenting to an assignment.[15]

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[3] Huston v. Mitchell, 14 Serg. & R. (Pa.) 307, 16 Am. Dec. 506.
Annotation: 66 A.L.R. 118.

[4] Annotation: 66 A.L.R. 118; 21 Eng. Rul. Cas. 37.

[5] Annotation: 76 Am. Dec. 261; 21 Eng. Rul. Cas. 37.

[6] Brown v. People's Nat. Bank, 170 Mich. 416, 136 N. W. 506, 40 L.R.A.(N.S.) 657; Rosacker v. Commercial State Bank, 191 Minn. 553, 254 N. W. 824, 94 A.L.R. 551.

[7] Rosacker v. Commercial State Bank, 191 Minn. 553, 254 N. W. 824, 94 A.L.R. 551.

[8] Ball v. State Bank, 8 Ala. 590, 42 Am. Dec. 649; Smith v. Jones, 47 Neb. 108, 66 N. W. 19, 53 Am. St. Rep. 519; Hall v. Presnell, 157 N. C. 290, 72 S. E. 985, 39 L.R.A.(N.S.) 62, Ann. Cas. 1913B, 1293; Granger v. Batchelder, 54 Vt. 248, 41 Am. Rep. 846; Watt v. Brookover, 35 W. Va. 323, 13 S. E. 1007, 29 Am. St. Rep. 811; Chilton v. Willford, 2 Wis. 1, 60 Am. Dec. 399.
Annotation: 53 Am. St. Rep. 520, 55 Am. St. Rep. 763.

[9] Annotation: 21 Ann. Cas. 581.

[10] See infra, § 98.

[11] Garrett v. Hanshue, 53 Ohio St. 482, 42 N. E. 256, 35 L.R.A. 321.

[12] Smith v. Kidd, 68 N. Y. 130, 23 Am. Rep. 157.

[13] San Francisco v. Le Roy, 138 U. S. 656, 34 L. ed. 1096, 11 S. Ct. 364; Pomeroy v. Prescott, 106 Me. 401, 76 A. 898, 138 Am. St. Rep. 347, 21 Ann. Cas. 574; Hall v. Presnell, 157 N. C. 290, 72 S. E. 985, 39 L.R.A.(N.S.) 62, Ann. Cas. 1913B, 1293; Turner v. Fleming, 37 Okla. 75, 130 P. 551, 45 L.R.A.(N.S.) 265, Ann. Cas. 1915B, 831; Davis v. Home Ins. Co. 127 Tenn. 330, 155 S. W. 131, 44 L.R.A.(N.S.) 626; Rhoades v. Banking Trust & Mtg. Co. 125 Va. 320, 99 S. E. 673, citing R. C. L.
Annotation: 9 Am. St. Rep. 546; 132 Am. St. Rep. 156, 163.
An attorney for a city has no right to relinquish rights reserved for the public by ordinance. San Francisco v. Le Roy, 138 U. S. 656, 34 L. ed. 1096, 11 S. Ct. 364.
An attorney has no power to release one of two joint debtors in consideration of the other's giving security for the debt. Cram v. Sickel, 51 Neb. 828, 71 N. W. 724, 66 Am. St. Rep. 478.
An attorney has no general power to release a lien upon property held by his principal and take a lien upon other property, without express authority from his principal. Ludden & B. Southern Music House v. Sumter, 45 S. C. 186, 22 S. E. 738, 55 Am. St. Rep. 761.

[14] Falkenstein v. Gibson, 108 N. J. Eq. 251, 154 A. 876, 76 A.L.R. 1457.
Annotation: 76 A.L.R. 1461.

[15] Lockhart v. Wyatt, 10 Ala. 231, 44 Am. Dec. 481; Dorchester Trust Co. v. Casey (Mass.) 167 N. E. 915, 71 A.L.R. 1, corrected opinion in 268 Mass. 494, 176 N. E. 178; Hall v. Presnell, 157 N. C. 290, 72 S. E. 985, 39 L.R.A.(N.S.) 62, Ann. Cas. 1913B, 1293; Ohio County v. Clemens, 85 W. Va. 11, 100 S. E. 680, 7 A.L.R. 373.
Annotation: 39 L.R.A.(N.S.) 62; Ann. Cas. 1913B, 1295.
One dealing with an attorney employed solely to collect a debt must take notice of such attorney's lack of authority to grant extensions of time to the debtor. Hall v. Presnell, 157 N. C. 290, 72 S. E. 985, 39 L.R.A.(N.S.) 62, Ann. Cas. 1913B, 1293.

§ 71. Ratification of, or Estoppel to Deny, Unauthorized Acts.—With regard to the effect upon a client of acts of his attorney done without express authority, the usual rule as to such acts of agents applies,[16] and under some circumstances the client will be held to have ratified the unauthorized acts of his attorney or to be estopped to deny the latter's authority.[17] Ratification may, of course, arise from an adoption and approval of the attorney's act,[18] or it may be inferred from circumstances, as, for instance, from the silent acquiescence of the client for a long period,[19] or from his acceptance and retention of the fruits of the unauthorized act,[20] provided the client so acted or remained silent after having obtained full knowledge of the facts. If a client repudiates the unauthorized contract of his attorney within a reasonable time after being informed thereof, and restores to the owner all fruits which have come into his hands as the result of such unauthorized contract, he cannot be held liable thereon.[1] The ratification must be that of the client himself, and not merely that of his agent.[2] Whether a client has ratified the acts of his attorney, or has been so guilty of laches as to be precluded from disclaiming such act, is usually a question of fact, to be determined by the jury under all the facts in the case.[3]

§ 72. Delegation of Authority.—It is a well-established rule that the confidence reposed in counsel is personal and cannot be delegated to another without the client's consent [4] unless, from the facts of a particular case it may fairly be inferred that power to delegate his authority was given,[5] as where the business in question was to be transacted at a place so remote from the business residence of the attorney that it must have been understood by his client that he was not to attend to it in person.[6] The general rule applies where a claim or debt is intrusted to an attorney for collection.[7]

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[16] See Agency, Vol. 2, p. 165, § 208.

[17] Robb v. Vos, 155 U. S. 13, 39 L. ed. 52, 15 S. Ct. 4; Stark v. Starr, 94 U. S. 477, 24 L. ed. 276; Bank of Glade Spring v. McEwen, 160 N. C. 414, 76 S. E. 222, Ann. Cas. 1914C, 542; Hall v. Presnell, 157 N. C. 290, 72 S. E. 985, 39 L.R.A.(N.S.) 62, Ann. Cas. 1913B, 1293; Foxworth v. Murchison Nat. Bank, 136 S. C. 458, 134 S. E. 428, citing R. C. L.

[18] Stark v. Starr, 94 U. S. 477, 24 L. ed. 276; Erwin v. Blake, 8 Pet. (U. S.) 18, 8 L. ed. 852; August v. Collins, 265 Mich. 389, 251 N. W. 565, citing R. C. L.

[19] Gardner v. Mobile & N. W. R. Co. 102 Ala. 635, 15 So. 271, 48 Am. St. Rep. 84 (acquiescence as raising inference of consent to attorney's assignment of judgment); Cram v. Sickel, 51 Neb. 828, 71 N. W. 724, 66 Am. St. Rep. 478; Gray v. Richmond Bicycle Co. 167 N. Y. 348, 60 N. E. 663, 82 Am. St. Rep. 720 (laches as affecting right to enjoin enforcement of foreign judgment); Bacon v. Mitchell, 14 N. D. 454, 106 N. W. 129, 4 L.R.A.(N.S.) 244 (failure to disclaim authority to represent client).

Annotation: 66 Am. St. Rep. 478.

[20] Robb v. Vos, 155 U. S. 13, 39 L. ed. 52, 15 S. Ct. 4; Florence Cotton & Iron Co. v. Louisville Bkg. Co. 138 Ala. 588, 36 So. 456, 100 Am. St. Rep. 50; Julier v. Julier, 62 Ohio St. 90, 56 N. E. 661, 78 Am. St. Rep. 697; Wheeler v. Alderman, 34 S. C. 533, 13 S. E. 673, 27 Am. St. Rep. 842.

Annotation: 9 Am. St. Rep. 546.

Ratification of an attorney's appearance in a case is established where it is shown that the client subsequently commenced another action which was based upon the judgment or decree obtained in the first action. Robb v. Vos, 155 U. S. 13, 39 L. ed. 52, 15 S. Ct. 4.

[1] Cram v. Sickel, 51 Neb. 828, 71 N. W. 724, 66 Am. St. Rep. 478; Smith v. Kidd, 68 N. Y. 130, 23 Am. Rep. 157.

Annotation: 66 Am. St. Rep. 483.

[2] Bank of Glade Spring v. McEwen, 160 N. C. 414, 76 S. E. 222, Ann. Cas. 1914C, 542.

[3] Gray v. Richmond Bicycle Co. 167 N. Y. 348, 60 N. E. 663, 82 Am. St, Rep. 720; Campbell's Appeal, 29 Pa. 401, 72 Am. Dec. 641 (receipt of money from sale of judgment).

The making of a criminal complaint or the seeking of civil remedy against the attorney for the act constituting the breach of authority cannot, as to third persons, be construed as a ratification of it. Rosacker v. Commercial State Bank, 191 Minn. 553, 254 N. W. 824, 94 A.L.R. 551.

[4] Sloan v. Williams, 138 Ill. 43, 27 N. E. 531, 12 L.R.A. 496; Cornelius v. Wash, Breese (Ill.) 63, 12 Am. Dec. 145; Sloan v. Williams, 138 Ill. 43, 27 N. E. 531, 12 L.R.A. 496; Smalley v. Greene, 52 Iowa, 241, 3 N. W. 78, 35 Am. Rep. 267; Antrobus v. Sherman, 65 Iowa, 230, 21 N. W. 579, 54 Am. Rep. 7; Rust v. Larue, 4 Litt. (Ky.) 412, 14 Am. Dec. 172; Dickson v. Wright, 52 Miss. 585, 24 Am. Rep. 677; Bentley v. Fidelity & D. Co. 75 N. J. L. 828, 69 A. 202, 127 Am. St. Rep. 837, 15 Ann. Cas. 1178; Re Cooperative Law Co. 198 N. Y. 479, 92 N. E. 15, 32 L.R.A.(N.S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879.

Annotation: 132 Am. St. Rep. 160.

[5] Annotation: 76 Am. Dec. 256.

§ 73. —**Employment of Assistant or Associate Counsel.**—An attorney ordinarily has no implied authority, by virtue of his employment, to employ assistant or associate counsel at his client's expense,[8] although it seems that he may employ others to assist him and charge his client with the reasonable value of the entire labor,[9] especially where the employment of the original attorney is general in its character and amounts to an agency in the legal business of the client.[10] Of course, there may be coupled with an attorney's retainer an express authority to engage other counsel, or the client may be held bound by his attorney's act in this regard on the doctrine of ratification.[11]

B. Liability of Client through Imputations Arising from Relation

§ 74. **Imputation of Attorney's Knowledge to Client.**—The well-established general rule that notice or knowledge of an agent, while the agency exists and while he is acting within the scope of his authority, is imputed to his principal [12] is applicable to the relation of attorney and client; notice to the attorney is notice to his client, at least where the attorney receives such notice in the course of the transaction in which he is acting for his client,[13] and where it comes in such a manner that he may communicate it to the client or act on it without any violation of duty.[14] The test is whether the information is of a character which it is the duty of the attorney to communicate.[15] Thus, an attorney's knowledge of an infirmity in a note,[16] or his knowledge that payment of the claim he was employed to collect was assumed by a third person, is chargeable to his client.[17] There are, however, some limitations upon the general rule stated, where the attorney is acting for his own interest or in fraud of his client's rights.[18]

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[6] Annotation: L.R.A.1918F, 16.

Where an attorney is employed to conduct a case in another county, he may employ local counsel to attend to formal matters connected with the court. Annotation: 90 A.L.R. 273; 23 L.R.A.(N.S.) 705; 132 Am. St. Rep. 160.

[7] Smalley v. Greene, 52 Iowa, 241, 3 N. W. 78, 35 Am. Rep. 267; Bradstreet v. Everson, 72 Pa. 124, 13 Am. Rep. 665.

Although money made on execution can, by virtue of a statute, be paid to an attorney of record of the execution creditor, such attorney has no authority as such to authorize the clerk of the Circuit Court, in his official capacity, to accept money on a judgment. Hendry v. Benlisa, 37 Fla. 609, 20 So. 800, 34 L.R.A. 283.

[8] Orwig v. Chicago, R. I. & P. R. Co. 217 Iowa, 521, 250 N. W. 148, 90 A.L.R. 258; Orozem v. McNeill, 103 Kan. 429, 175 P. 633, 3 A.L.R. 1598, on rehearing in 103 Kan. 694, 176 P. 106, 3 A.L.R. 1601; Bentley v. Fidelity & D. Co. 75 N. J. L. 828, 69 A. 202, 127 Am. St. Rep. 837, 15 Ann. Cas. 1178; Forman v. Sewerage & Water Bd. 119 La. 49, 43 So. 908, 12 Ann. Cas. 773.

Annotation: 90 A.L.R. 266; L.R.A.1918F, 16; 12 Ann. Cas. 776.

[9] Annotation: 132 Am. St. Rep. 160.

[10] Annotation: 90 A.L.R. 272.

[11] Orwig v. Chicago, R. I. & P. R. Co. 217 Iowa, 521, 250 N. W. 148, 90 A.L.R. 258; Bentley v. Fidelity & D. Co. 75 N. J. L. 828, 69 A. 202, 127 Am. St. Rep. 837, 15 Ann. Cas. 1178.

Annotation: 15 Ann. Cas. 1180.

The general counsel of a railroad company will not be deemed to have ratified the employment of an attorney to defend a suit against the railroad company, by agreeing to pay for certain models for use on a trial of the case and the witness fees of the person making them, where it is not shown that he knew that the attorney claimed to have been employed by the railroad company. Orwig v. Chicago, R. I. & P. R. Co. 217 Iowa, 521, 250 N. W. 148, 90 A.L.R. 258.

[12] See Agency, Vol. 2, p. 286, § 368.

[13] Armstrong v. Ashley, 204 U. S. 272, 51 L. ed. 482, 27 S. Ct. 270; Rogers v. Palmer, 102 U. S. 263, 26 L. ed. 164; Smith v. Ayer, 101 U. S. 320, 25 L. ed. 955; May v. Le Claire, 11 Wall. (U. S.) 217, 20 L. ed. 50; Bogart v. George K. Porter Co. 193 Cal. 197, 223 P. 959, 31 A.L.R. 1045; Wittenbrock v. Parker, 102 Cal. 93, 36 P. 374, 24 L.R.A. 197, 41 Am. St. Rep. 172; Hunter v. Watson, 12 Cal. 363, 73 Am. Dec. 543; Sweeney v. Pratt, 70 Conn. 274, 39 A. 182, 66 Am. St. Rep. 101; Johnson v. McKinnon, 54 Fla. 221, 45 So. 23, 13 L.R.A.(N.S.) 874, 127 Am. St. Rep. 135, 14 Ann. Cas. 180; Farnsworth v. Hazelett, 197 Iowa, 1367, 199 N. W. 410, 38 A.L.R. 814; Allen v. McCalla, 25 Iowa, 464, 96 Am. Dec. 56; DeLouis v. Meek, 2 G. Greene (Iowa) 55, 50 Am. Dec. 491; Hess v. Conway, 92 Kan. 787, 142 P. 253, 4 A.L.R. 1580, on rehearing in 93 Kan. 246, 144 P. 205, 4 A.L.R. 1587, affirmed in 241 U. S. 624, 60 L. ed. 1211, 36 S. Ct. 681; Barnes v. Com. 179 Ky. 725, 201 S. W. 318, citing R. C. L.; Allen v. Frank Janes Co. 142 La. 1056, 78 So. 115, citing R. C. L.; Vietor v. Spalding, 199 Mass. 52, 84 N. E. 1016, 127 Am. St. Rep. 472; Littauer v. Houck, 92 Mich. 162, 52 N. W. 464, 31 Am. St. Rep. 572; Riley v. Pearson, 120 Minn. 210, 139 N. W. 361, L.R.A.1916D, 7; Trentor v. Pothen, 46 Minn. 298, 49 N. W. 129, 24 Am. St. Rep. 225; Bank of Commerce v. Hoeber, 88 Mo. 37, 57 Am. Rep. 359; Constant v. University of Rochester, 111 N. Y. 604, 19 N. E. 631, 2 L.R.A. 734, 7 Am. St. Rep. 769; United States v. Sumner, 127 Misc. 907, 217 N. Y. S. 645, citing R. C. L.; Pyeatt v. Estus, 72 Okla. 160, 179 P. 42, 4 A.L.R. 1570; Lambert v. Smith, 53 Okla. 606, 157 P. 909, 18 A.L.R. 1; Hood v. Fahnestock, 8 Watts (Pa.) 489, 34 Am. Dec. 489; Barnes v. M'Clinton, 3 Penr. & W. (Pa.) 67, 23 Am. Dec. 62; Scot-

A client may be charged with knowledge acquired by an attorney whom he subsequently discharged and replaced with another.[19]

In the case of attorneys practicing as copartners, notice to either partner is notice to the client.[20] But if an attorney is the agent of another, engaged by the creditor to collect a claim, his knowledge is not imputed to the creditor.[1]

§ 75. Knowledge Acquired in Another Transaction or Outside Employment.—In order for a client to be affected by his attorney's notice or knowledge of facts, such notice must have been acquired in and during the transaction in which the attorney is engaged; the client will not be chargeable with notice of facts acquired by the attorney prior to the relation of attorney and client [2] or with knowledge not received in the course [3] or within the scope of the employment.[4] Under this rule, one who employs an attorney for some special purpose is not chargeable with knowledge acquired by the attorney in another transaction.[5] Nor does the general rule always hold as to an attor-

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tish American Mortg. Co. v. Clowney, 70 S. C. 229, 49 S. E. 569, 3 Ann. Cas. 437; Riordan v. Britton, 69 Tex. 198, 7 S. W. 50, 5 Am. St. Rep. 37; Melms v. Pabst Brewing Co. 93 Wis. 153, 66 N. W. 518, 57 Am. St. Rep. 899.

Kennedy v. Green, 3 Myl. & K. 699, 724, 21 Eng. Rul. Cas. 820.

Annotation: 4 A.L.R. 1594, s. 38 A.L.R. 821; 2 L.R.A. 734; 31 Am. St. Rep. 574; 127 Am. St. Rep. 475; 3 Ann. Cas. 441; 21 Eng. Rul. Cas. 842, 847.

It is immaterial that the attorney may have wilfully withheld information of the facts from his client, or that the client was ignorant of the peculiar facilities possessed by the attorney for acquiring his knowledge. Annotation: 24 Am. St. Rep. 232; 3 Ann. Cas. 441.

[14] See infra, §§ 76, 77.

An attorney is conclusively presumed to have performed his duty of communicating to his client whatever information he acquires in relation to the subject-matter involved in the transaction. Wittenbrock v. Parker, 102 Cal. 93, 36 P. 374, 24 L.R.A. 197, 41 Am. St. Rep. 172; Hess v. Conway, 92 Kan. 787, 142 P. 253, 4 A.L.R. 1580, on rehearing in 93 Kan. 246, 144 P. 205, 4 A.L.R. 1587, affirmed in 241 U. S. 624, 60 L. ed. 1211, 36 S. Ct. 681.

[15] Annotation: 31 Am. St. Rep. 574.

[16] Smith v. Ayer, 101 U. S. 320, 25 L. ed. 955; Lambert v. Smith, 53 Okla. 606, 157 P. 909, 18 A.L.R. 1.

[17] Bogart v. George K. Porter Co. 193 Cal. 197, 223 P. 959, 31 A.L.R. 1045.

[18] See infra, § 77.

[19] Farnsworth v. Hazelett, 197 Iowa, 1367, 199 N. W. 410, 38 A.L.R. 814.

Annotation: 38 A.L.R. 824.

[20] Wittenbrock v. Parker, 102 Cal. 93, 36 P. 374, 24 L.R.A. 197, 41 Am. St. Rep. 172.

Annotation: 3 Ann. Cas. 441.

[1] Hoover v. Wise, 91 U. S. 308, 23 L. ed. 392.

[2] Scotch Lumber Co. v. Sage, 132 Ala. 598, 32 So. 607, 90 Am. St. Rep. 932; Moore v. Webb, 219 Cal. 304, 26 P. (2d) 22, 89 A.L.R. 925; Bogart v. George K. Porter Co. 193 Cal. 197, 223 P. 959, 31 A.L.R. 1045; McCormick v. Wheeler, 36 Ill. 114, 85 Am. Dec. 388; Drury v. Franke, 247 Ky. 758, 57 S. W. (2d) 969, 88 A.L.R. 917; Vietor v. Spalding, 199 Mass. 52, 84 N. E. 1016, 127 Am. St. Rep. 472; Trentor v. Pothen, 46 Minn. 298, 49 N. W. 129, 24 Am. St. Rep. 225; Martin v. Jackson, 27 Pa. 504, 67 Am. Dec. 489; Hood v. Fahnestock, 8 Watts (Pa.) 489, 34 Am. Dec. 489; Scottish American Mortg. Co. v. Clowney, 70 S. C. 229, 49 S. E. 569, 3 Ann. Cas. 437.

Annotation: 4 A.L.R. 1600, 1614, s. 38 A.L.R. 823; 39 Am. Rep. 323; 127 Am. St. Rep. 475.

[3] Puffer v. Badley, 92 Or. 360, 181 P. 1, 4 A.L.R. 1561; Strickland v. Capital City Mills, 74 S. C. 16, 54 S. E. 220, 7 L.R.A.(N.S.) 426.

Annotation: 4 A.L.R. 1602, s. 38 A.L.R. 822.

[4] Trentor v. Pothen, 46 Minn. 298, 49 N. W. 129, 24 Am. St. Rep. 225; Florence v. De Beaumont, 101 Wash. 356, 172 P. 340, 4 A.L.R. 1565.

Annotation: 4 A.L.R. 1605, s. 38 A.L.R. 822.

[5] Howard Ins. Co. v. Halsey, 8 N. Y. 271, 59 Am. Dec. 478.

Annotation: 4 A.L.R. 1603, s. 38 A.L.R. 822; 127 Am. St. Rep. 475.

One who employs an attorney for the

ney retained generally by a client to render such legal services as he may from time to time require.[6] Many cases have held that a client may be charged with knowledge acquired by the attorney before the relation was created, some apparently without making any qualification;[7] but the better-considered cases have followed the English courts in recognizing a modification to the general rule above set forth to the effect that where one transaction is closely followed by, and connected with, another, or where it is clear that the previous transaction was present to the mind of the attorney when engaged in another transaction, there is no ground for relieving the client for whom the attorney is acting in the second transaction of notice thus acquired by his attorney.[8] Still others have restricted the operation of this exception to such matters as are so material to the transaction as to make it the attorney's duty to communicate them to his client.[9]

§ 76. Knowledge Acquired in Employment of Another Client.—In order that notice to an attorney may be imputed to his client it must come to the attorney in such a manner that he may communicate it to his client without any violation of duty.[10] Hence, knowledge obtained by an attorney in transacting business for one client is not imputable to another where it would be a breach of professional confidence for him to disclose the knowledge thus acquired and possessed,[11] even though the second employment is with reference to the same subject-matter.[12] If, however, knowledge is acquired by the

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special purpose of examining an abstract of title to property and giving an opinion thereon is not chargeable with the attorney's knowledge, acquired in another transaction, of the pendency of a suit which may affect the title to such property. Trentor v. Pothen, 46 Minn. 298, 49 N. W. 129, 24 Am. St. Rep. 225.

[6] Vietor v. Spalding, 199 Mass. 52, 84 N. E. 1016, 127 Am. St. Rep. 472, approved on second appeal in 202 Mass. 234, 88 N. E. 846; Akers v. Rowan, 33 S. C. 451, 11 S. E. 389, 12 S. E. 165, 10 L.R.A. 705.

Annotation: 4 A.L.R. 1621, s. 38 A.L.R. 824.

[7] Fairfield Sav. Bank v. Chase, 72 Me. 226, 39 Am. Rep. 319; Littauer v. Houck, 92 Mich. 162, 52 N. W. 464, 31 Am. St. Rep. 572.

Annotation: 4 A.L.R. 1615, s. 38 A.L.R. 823.

[8] Moore v. Webb, 219 Cal. 304, 26 P. (2d) 22, 89 A.L.R. 925; Bogart v. George K. Porter Co. 193 Cal. 197, 223 P. 959, 31 A.L.R. 1045; Wittenbrock v. Parker, 102 Cal. 93, 36 P. 374, 24 L.R.A. 197, 41 Am. St. Rep. 172; Drury v. Franke, 247 Ky. 758, 57 S. W. (2d) 969, 88 A.L.R. 917; Constant v. University of Rochester, 111 N. Y. 604, 19 N. E. 631, 2 L.R.A. 734, 7 Am. St. Rep. 769; Melms v. Pabst Brewing Co. 93 Wis. 153, 66 N. W. 518, 57 Am. St. Rep. 899.

Annotation: 2 L.R.A. 734; 4 A.L.R. 1616, s. 38 A.L.R. 823; 3 Ann. Cas. 441.

Even this modification is expressly disapproved in some of the states, the courts holding that the principle underlying the general rule is just in itself and founded on wise considerations of policy. McCormick v. Wheeler, 36 Ill. 114, 85 Am. Dec. 388.

[9] Fairfield Sav. Bank v. Chase, 72 Me. 226, 39 Am. Rep. 319.

Annotation: 4 A.L.R. 1618, s. 38 A.L.R. 822.

[10] Wittenbrock v. Parker, 102 Cal. 93, 36 P. 374, 24 L.R.A. 197, 41 Am. St. Rep. 172; Brown v. Wilson, 21 Colo. 309, 40 P. 688, 52 Am. St. Rep. 228; Sebald v. Citizens Deposit Bank, 31 Ky. L. Rep. 1244, 105 S. W. 130, 14 L.R.A.(N.S.) 376; Littauer v. Houck, 92 Mich. 162, 52 N. W. 464, 31 Am. St. Rep. 572; Hood v. Fahnestock, 8 Watts (Pa.) 489, 34 Am. Dec. 489; Akers v. Rowan, 33 S. C. 451, 12 S. E. 165, 10 L.R.A. 705.

Annotation: 4 A.L.R. 1609, s. 38 A.L.R. 822; 31 Am. St. Rep. 574; 41 Am. St. Rep. 181.

[11] Moore v. Webb, 219 Cal. 304, 26 P. (2d) 22, 89 A.L.R. 925; McCormick v. Wheeler, 36 Ill. 114, 85 Am. Dec. 388; Farnsworth v. Hazelett, 197 Iowa, 1367, 199 N. W. 410, 38 A.L.R. 814; Drury v. Franke, 247 Ky. 758, 57 S. W. (2d) 969, 88 A.L.R. 917; Sebald v. Citizens Deposit Bank, 31 Ky. L. Rep. 1244, 105 S. W. 130, 14 L.R.A.(N.S.) 376; Hood v. Fahnestock, 8 Watts (Pa.) 489, 34 Am. Dec. 489; Melms v. Pabst Brewing Co. 93 Wis. 153, 66 N. W. 518, 57 Am. St. Rep. 899.

Annotation: 4 A.L.R. 1607, s. 38 A.L.R. 822.

See Am. Law Inst. Restatement, Agency, § 281, p. 623.

[12] Brown v. Wilson, 21 Colo. 309, 40 P. 688, 52 Am. St. Rep. 228.

Annotation: 4 A.L.R. 1608, s. 38 A.L.R. 822.

The constructive notice to an attorney of knowledge of his partner of matters pertaining to the firm business does not extend to a distinct transaction at a subsequent time in which he is acting for a different client to charge such client. Wittenbrock v. Parker, 102 Cal. 93, 36 P. 374, 24 L.R.A. 197, 41 Am. St. Rep. 172.

Annotation: 4 A.L.R. 1621, s. 38 A.L.R. 822.

attorney in such a way that he may communicate it to another client without a violation of duty, it may be imputed to the latter,[13] especially if it appears that the knowledge obtained in acting for such other client was present to his mind at the very time of the transaction in question.[14] For example, where the attorney is acting for several clients at the same time and in the same business,[15] as when he represents both a vendor and a purchaser[16] or a mortgagor and a mortgagee,[17] knowledge which he acquires in the transaction may be imputed to all. However, a contrary view has been taken,[18] particularly in cases where the attorney's agency for the client to whom knowledge is sought to be imputed is special and limited, or where it is to the interest of the other client to conceal knowledge from one to whom the imputation is sought to be made.[19]

§ 77. Knowledge Acquired While Acting for Own Interest; Imputation of Attorney's Fraud.—An exception is ingrafted upon the general rule that knowledge of an attorney is imputable to his client, where the attorney is acting in his own interest or in fraud of his client.[20] It is almost certain that the attorney will conceal such fraud or wrong.[1] However, the view has been expressed that the fraud of the attorney cannot alter the legal effect of his knowledge with respect to his client in regard to third parties who had no connection with the attorney in relation to the perpetration of fraud and no knowledge that the fraud had been perpetrated.[2] Thus, where an attorney, employed to effect a composition with his client's creditors, secretly gave one of the creditors his personal obligation for, and afterward paid him, a sum in excess of what was accepted by the other creditors, it was held that the composition was thereby invalidated, although the client was ignorant of the fraud.[3]

§ 78. Imputation of Attorney's Negligence to Client.—While the client is not liable for the negligent physical conduct of his attorney,[4] the professional negligence, unskilfulness, or incompetency of counsel is imputed to the client, who is bound thereby, under the general principle that the acts and omissions of an attorney acting within the scope of his authority are to be regarded as the acts of the person he represents.[5] The courts will not usually relieve a party against the fault or negligence of his attorney,[6] unless it is an extreme case where a clear failure of justice would otherwise result,[7] particularly if the client is also negligent where, by diligence, he might have avoided the consequences of his attorney's negligence.[8] The rule has been applied where an attorney failed to bring suit within the statutory period allowed.[9] The rule applies in criminal, as well as in civil, cases.[10] It is frequently applied in the case of application for relief against a judgment obtained through an attorney's mistake or ignorance of the law, his omission or negligence in making or proving a proper defense, or his neglect to take other necessary legal steps, although there are many cases in which negligence or mistake of an attorney is held not imputable to the client so as to prevent him from obtaining relief from a judgment, especially where the mistake was an excusable one. This matter is discussed fully under another title.[11]

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[13] Littauer v. Houck, 92 Mich. 162, 52 N. W. 464, 31 Am. St. Rep. 572; Trentor v. Pothen, 46 Minn. 298, 49 N. W. 129, 24 Am. St. Rep. 225.
Annotation: 4 A.L.R. 1609, s. 38 A.L.R. 822.

[14] Wittenbrock v. Parker, 102 Cal. 93, 36 P. 374, 24 L.R.A. 197, 41 Am. St. Rep. 172; Constant v. University of Rochester, 111 N. Y. 604, 19 N. E. 631, 2 L.R.A. 734, 7 Am. St. Rep. 769.
Annotation: 4 A.L.R. 1610, s. 38 A.L.R. 822, 31 Am. St. Rep. 574; 3 Ann. Cas. 441.
Where the former employment was of recent date, knowledge acquired therein may be imputed to the second client. Melms v. Pabst Brewing Co. 93 Wis. 153, 66 N. W. 518, 57 Am. St. Rep. 899.

[15] Annotation: 4 A.L.R. 1610, s. 38 A.L.R. 822.

[16] Hess v. Conway, 92 Kan. 787, 142 P. 253, 4 A.L.R. 1580, on rehearing in 93 Kan. 246, 144 P. 205, 4 A.L.R. 1587, affirmed in 241 U. S. 624, 60 L. ed. 1211, 36 S. Ct. 681; Melms v. Pabst Brewing Co. 93 Wis. 153, 66 N. W. 518, 57 Am. St. Rep. 899.
Annotation: 4 A.L.R. 1612, s. 38 A.L.R. 823.

[17] Pyeatt v. Estus, 72 Okla. 160, 179 P. 42, 4 A.L.R. 1570.
Annotation: 4 A.L.R. 1612, s. 38 A.L.R. 823.

[18] Puffer v. Badley, 92 Or. 360, 181 P. 1, 4 A.L.R. 1561.
Annotation: 4 A.L.R. 1612, s. 38 A.L.R. 823.

[19] Florence v. De Beaumont, 101 Wash. 356, 172 P. 340, 4 A.L.R. 1565.

[20] Scotch Lumber Co. v. Sage, 132 Ala. 598, 32 So. 607, 90 Am. St. Rep. 932; Farnsworth v. Hazelett, 197 Iowa, 1367, 199 N. W. 410, 38 A.L.R. 814; Fairfield Sav. Bank v. Chase, 72 Me. 226, 39 Am. Rep. 319; Florence v. De Beaumont, 101 Wash. 356, 172 P. 340, 4 A.L.R. 1565.
Annotation: 4 A.L.R. 1618, 1619, s. 38 A.L.R. 824.

[1] Melms v. Pabst Brewing Co. 93 Wis. 153, 66 N. W. 518, 57 Am. St. Rep. 899.
Annotation: 3 Ann. Cas. 441.

[2] Armstrong v. Ashley, 204 U. S. 272, 51 L. ed. 482, 27 S. Ct. 270. See also Abrams v. United States Fidelity & G. Co. 127 Wis. 579, 106 N. W. 1091, 5 L.R.A.(N.S.) 575, 115 Am. St. Rep. 1055.

[3] Bank of Commerce v. Hoeber, 88 Mo. 37, 57 Am. Rep. 359.

[4] Am. Law Inst. Restatement, Agency, § 250, p. 559.

C. Authority to Appear

§ **79. Generally.**—No person has the right to appear as the attorney of another without the authority of that other, whether such other is a natural person or a corporation.[12] There must be a contract of employment, express or implied, between the attorney and the party for whom he appears, or someone authorized to represent such party.[13] Employment in a principal case does not authorize an attorney to appear in other proceedings not forming essentially a part of that case.[14] Nor does an authority to appear specially for the sole purpose of objecting to the jurisdiction of the court authorize him to enter a general appearance.[15] However, as a general rule, the mere appearance of an attorney for one of the parties to a suit is deemed sufficient for the opposite party and for the court; it is not generally necessary that an attorney regularly admitted prove his authority to represent a person in the first instance.[16] The law presumes that he had authority to appear for the party whom he purports to represent.[17] Nevertheless, his authority to appear may be questioned; and when it is disputed, he may be required to produce evidence of it.[18]

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[5] Wheiles v. Ætna L. Ins. Co. (C. C. A. 5th) 68 F. (2d) 99, citing R. C. L.; Alger v. Beasley, 180 Ark. 46, 20 S. W. (2d) 317, citing R. C. L.; Griffith v. Investment Co. 92 Fla. 781, 110 So. 271, citing R. C. L.; Small v. Colonial Invest. Co. 92 Fla. 503, 109 So. 433, citing R. C. L.; Sayre v. Com. 194 Ky. 338, 238 S. W. 737, 24 A.L.R. 1017; Given v. Kuhlman, — La. App. —, 145 So. 550, citing R. C. L.; Sayer v. Lee, 40 S. D. 170, 166 N. W. 635, citing R. C. L.

Annotation: 31 L.R.A. 36; 53 Am. St. Rep. 449; 20 Ann. Cas. 397.

[6] Putnam v. Day, 22 Wall. (U. S.) 60, 22 L. ed. 764; Bunnell v. Holmes, 64 Colo. 345, 171 P. 365, citing R. C. L.; Spaulding v. Thompson, 12 Ind. 477, 74 Am. Dec. 221; Carr v. First Nat. Bank, 35 Ind. App. 216, 73 N. E. 947, 111 Am. St. Rep. 159; Beale v. Swasey, 106 Me. 35, 75 A. 134, 20 Ann. Cas. 396; Douglas Mill. & Power Co. v. Rickey, 47 Nev. 148, 217 P. 590, citing R. C. L.; Drinkard v. Ingram, 21 Tex. 650, 73 Am. Dec. 250.

Annotation: 31 L.R.A. 36; 9 L.R.A.(N.S.) 524; 80 Am. St. Rep. 269; 96 Am. St. Rep. 108; 20 Ann. Cas. 397; Ann. Cas. 1913D, 498.

[7] People v. McCann, 247 Ill. 130, 93 N. E. 100, 20 Ann. Cas. 496; Dame v. Dame, 38 N. H. 429, 75 Am. Dec. 195; State v. Davies, 33 S. D. 243, 145 N. W. 719, Ann. Cas. 1916A, 1102.

[8] Peterson v. Koch, 110 Iowa, 19, 81 N. W. 160, 80 Am. St. Rep. 261; Halloran v. New England Teleph. & Teleg. Co. 95 Vt. 273, 115 A. 143, 18 A.L.R. 554.

Annotation: 80 Am. St. Rep. 264.

[9] Beale v. Swasey, 106 Me. 35, 75 A. 134, 20 Ann. Cas. 396.

Annotation: 20 Ann. Cas. 397.

[10] Sayre v. Com. 194 Ky. 338, 238 S. W. 737, 24 A.L.R. 1017.

Annotation: 24 A.L.R. 1027, 1031.

[11] See Judgments [Also 15 R. C. L. p. 711, § 161; p. 756, § 209].

[12] Santa Rosa v. Fall, 273 U. S. 315, 71 L. ed. 658, 47 S. Ct. 361; Osborn v. Bank of United States, 9 Wheat. (U. S.) 738, 6 L. ed. 204.

[13] Hirsch Bros. & Co. v. R. E. Kennington Co. 155 Miss. 242, 124 So. 344, 88 A.L.R. 1.

An attorney employed through a third person should promptly communicate the fact of retainer to the client. Hirsch Bros. & Co. v. R. E. Kennington Co. 155 Miss. 242, 124 So. 344, 88 A.L.R. 1.

[14] Hollan v. Kepner, 297 Ill. 332, 130 N. E. 699, citing R. C. L.

Annotation: 132 Am. St. Rep. 150.

[15] Green v. Green, 42 Kan. 654, 22 P. 730, 16 Am. St. Rep. 510.

§ 80. Presumption of Authority; Burden of Proving Want of Authority.— It is well established in the courts of this country, both Federal and state, that the appearance of a regularly admitted attorney at law is presumptive evidence of his authority to represent the person for whom he appears.[19] This rule applies whether the attorney appears for a natural person or for a corporation; in neither case is it necessary for him to show his authority in order to progress with the suit unless properly demanded.[20] This presumption as to the authority of an attorney to appear and represent his client is, however, usually considered to be a rebuttable one.[1] In other words, when the attorney's authority to appear is properly put in issue, it is competent to rebut this presumption of authority by proof that no such authority was given.[2] According to the weight of authority, a judgment predicated upon an unauthorized appearance by attorney may be set aside even though it may not be subject to collateral attack.[3] The right to assail an unauthorized appearance may, of course, be waived;[4] and until the presumption arising from a voluntary appearance by attorney is overcome by proof, the court will not deny the attorney the privilege of representing his client.[5] The burden of impeaching the authority of the attorney falls, of course, upon the party who claims that his appearance is unauthorized.[6] Such person must show some good cause for so doing, such as that the attorney was appearing for the mere purpose of oppression or for some other sinister purpose, or that there is fraud, accident, or mistake in the appearance.[7]

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[16] Tally v. Reynolds, 1 Ark. 99, 31 Am. Dec. 737; Penobscot Boom Corp. v. Lamson, 16 Me. 224, 33 Am. Dec. 656; Osborn v. Bank of United States, 9 Wheat. (U. S.) 738, 6 L. ed. 204.

Annotation: 126 Am. St. Rep. 33.

[17] See infra, § 80.

[18] Annotation: 126 Am. St. Rep. 34.

[19] Hill v. Mendenhall, 21 Wall. (U. S.) 453, 22 L. ed. 616; Shelton v. Tiffin, 6 How. (U. S.) 163, 12 L. ed. 387; New Jersey v. New York, 6 Pet. (U. S.) 323, 8 L. ed. 414; Washington use of M'Cue v. Young, 10 Wheat. (U. S.) 406, 6 L. ed. 352; Osborn v. Bank of United States, 9 Wheat. (U. S.) 738, 6 L. ed. 204; Brewer v. Watson, 71 Ala. 299, 46 Am. Rep. 318; Doe v. Abbott, 152 Ala. 243, 44 So. 637, 126 Am. St. Rep. 30; Tally v. Reynolds, 1 Ark. 99, 31 Am. Dec. 737; Great West Min. Co. v. Woodmas of Alston Min. Co. 12 Colo. 46, 20 P. 771, 13 Am. St. Rep. 204; Anderson v. Crawford, 147 Ga. 455, 94 S. E. 574, L.R.A.1918B, 894; Winchester v. Ring, 312 Ill. 544, 144 N. E. 333, 36 A.L.R. 520; Welch v. Sykes, 8 Ill. 197, 44 Am. Dec. 689; Carson, P. S. & Co. v. Long, 219 Iowa, 444, 257 N. W. 815, citing R. C. L.; Harshey v. Blackmarr, 20 Iowa, 161, 89 Am. Dec. 520; Hefferman v. Burt, 7 Iowa, 320, 71 Am. Dec. 445; Reynolds v. Fleming, 30 Kan. 106, 1 P. 61, 46 Am. Rep. 86; King Constr. Co. v. Mary Helen Coal Corp. 194 Ky. 435, 239 S. W. 799, citing R. C. L.; M'Alexander v. Wright, 3 T. B. Mon. (Ky.) 189, 16 Am. Dec. 93; Kelly v. Benedict, 5 Rob. (La.) 138, 39 Am. Dec. 530; Roselius v. Delachaise, 5 La. Ann. 481, 52 Am. Dec. 597; York Harbor Village Corp. v. Libby, 126 Me. 537, 140 A. 382; Penobscot Boom Corp. v. Lamson, 16 Me. 224, 33 Am. Dec. 656; Henck v. Todhunter, 7 Harr. & J. (Md.) 275, 16 Am. Dec. 300; Dorsey v. Kyle, 30 Md. 512, 96 Am. Dec. 617; Corbitt v. Timmerman, 95 Mich. 581, 55 N. W. 437, 35 Am. St. Rep. 586; Hirsch Bros. & Co. v. R. E. Kennington Co. 155 Miss. 242, 124 So. 344, 88 A.L.R. 1; Miller v. Continental Assur. Co. 233 Mo. 91, 134 S. W. 1003, Ann. Cas. 1912C, 102; Deegan v. Deegan, 22 Nev. 185, 37 P. 360, 58 Am. St. Rep. 742; Bunton v. Lyford, 37 N. H. 512, 75 Am. Dec. 144; American Ins. Co. v. Oakley, 9 Paige (N. Y.) 496, 38 Am. Dec. 561; Denton v. Noyes, 6 Johns. (N. Y.) 296, 5 Am. Dec. 237; Williams v. Johnson, 112 N. C. 424, 17 S. E. 496, 21 L.R.A. 848, 34 Am. St. Rep. 513; Bacon v. Mitchell, 14 N. D. 454, 106 N. W. 129, 4 L.R.A.(N.S.) 244; Pillsbury v. Dugan, 9 Ohio, 117, 34 Am. Dec. 427; Babcock v. Wambaugh & C. Oil Co. 4 Pa. D. & C. 468, citing R. C. L.; McEachern v. Brackett, 8 Wash. 652, 36 P. 690, 40 Am. St. Rep. 922; Charleston v. Littlepage, 73 W. Va. 156, 80 S. E. 131, 51 L.R.A.(N.S.) 353.

Annotation: 88 A.L.R. 15; 21 L.R.A. 848; 126 Am. St. Rep. 33.

Proof of a resolution by a city council authorizing the commencement of eminent domain proceedings need not be made, since, in the absence of statutory requirements or proof to the contrary, direction to the city counsel to commence the proceedings will be presumed. Winchester v. Ring, 312 Ill. 544, 144 N. E. 333, 36 A.L.R. 520.

[20] Annotation: 16 Am. Dec. 98.

[1] Great West Min. Co. v. Woodmas of Alston Min. Co. 12 Colo. 46, 20 P. 771, 13 Am. St. Rep. 204; Anderson v. Crawford, 147 Ga. 455, 94 S. E. 574, L.R.A.1918B, 894; Roselius v. Delachaise, 5 La. Ann. 481, 52 Am. Dec. 597; York Harbor Village Corp. v. Libby, 126 Me. 537, 140 A. 382.

[2] Doe ex dem. Chamberlain, M. & Co. v. Abbott, 152 Ala. 243, 44 So. 637, 126 Am. St. Rep. 30; Tally v. Reynolds, 1 Ark. 99, 31 Am. Dec. 737; Great West Min. Co. v. Woodmas of Alston Min. Co. 12 Colo. 46, 20 P. 771, 13 Am. St. Rep. 204; Hollinger v. Reeme, 138 Ind. 363, 36 N. E. 1114, 24 L.R.A. 46, 46 Am. St. Rep. 402; Green v. Green, 42 Kan. 654, 22 P. 730, 16 Am. St. Rep. 510; M'Alexander v. Wright, 3 T. B. Mon. (Ky.) 189, 16 Am. Dec. 93; Belt v. Wilson, 6 J. J. Marsh. (Ky.) 495, 22 Am. Dec. 88; Roselius v. Delachaise, 5 La. Ann. 481, 52 Am. Dec. 597; Keith v. Wilson, 6 Mo. 435, 35 Am. Dec. 443; Winters v. Means, 25 Neb. 241, 41 N. W. 157, 13 Am. St. Rep. 489; Vilas v. Plattsburgh & M. R. Co. (Vilas v. Butler) 123 N. Y. 440, 25 N. E. 941, 9 L.R.A. 844, 20 Am. St. Rep. 771.

Annotation: 88 A.L.R. 71; 126 Am. St. Rep. 33.

§ 81. **Sufficiency of Proof of Want of Authority.**—The presumption of the authority of an attorney who makes a voluntary appearance for a party to an action is a strong one and can be overthrown only by clear, satisfactory, and convincing proof of his authority,[8] or at least by a clear preponderance of the evidence.[9] The rule has been laid down that it is incumbent on the party who questions the authority of the attorney representing his adversary to show to the court, by affidavit, facts sufficient to raise a reasonable presumption that the attorney is acting in the case without authority from the party he assumes to represent.[10] In jurisdictions where an actual written warrant of attorney is required as evidence of the fact of employment and authority of the attorney,[11] the court may require such warrant to be produced when the attorney's authority to appear is called into question,[12] and even where such warrants have been dispensed with, the attorney may be required to show some authority, either written or verbal.[13] It is not, however, generally necessary for an attorney at law to produce or file a warrant of attorney to be enabled to appear for a party in court,[14] even though such party is a corporation.[15] It has been held that the authority of an attorney to bring a suit and represent the plaintiff is sufficiently shown by his oath,[16] and the declaration by the attorney that he was employed by the plaintiff or his agent who, the attorney believed, was duly authorized to employ him may be deemed sufficient.[17] Copies of proceedings of the board of directors of a corporation for whom the attorney appears may be admitted as evidence of the attorney's authority.[18] Even though a written authority may be required, if the attorney has such authority from the agent of the plaintiff, he need not show that such agent had written authority from his principal.[19]

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[3] See JUDGMENTS [Also 15 R. C. L. p. 713. § 163].

[4] Doe ex dem. Chamberlain, M. & Co. v. Abbott, 152 Ala. 243, 44 So. 637, 126 Am. St. Rep. 30.
Annotation: 126 Am. St. Rep. 33.

[5] Charleston v. Littlepage, 73 W. Va. 156, 80 S. E. 131, 51 L.R.A.(N.S.) 353.
Such appearance is binding until it is proved that it was unauthorized. Hill v. Mendenhall, 21 Wall. (U. S.) 453, 22 L. ed. 616.

[6] Carson, P. S. & Co. v. Long, 219 Iowa, 444 257 N. W. 815, citing R. C. L.; Reynolds v. Fleming, 30 Kan. 106, 1 P. 61, 46 Am. Rep. 86; King Constr. Co. v. Mary Helen Coal Corp. 194 Ky. 435, 239 S. W. 799, citing R. C. L.
Annotation: 126 Am. St. Rep. 36.

[7] Annotation: 16 Am. Dec. 99.

[8] Anderson v. Crawford, 147 Ga. 455, 94 S. E. 574, L.R.A.1918B, 894; Winters v. Means, 25 Neb. 241, 41 N. W. 157, 13 Am. St. Rep. 489. See also Stuart's Appeal, 163 Pa. 195, 29 A. 974, 975, 43 Am. St. Rep. 786.
Annotation: 88 A.L.R. 16; 126 Am. St. Rep. 39.

[9] Annotation: 88 A.L.R. 16.
If several attorneys are employed to defend an action, evidence of one of them that one of the defendants did not engage him to act as his attorney, without any evidence as to the want of authority of the other attorneys to represent such defendant, is insufficient to establish that such attorneys had no authority to appear for him in the action. And the authority of the attorney of record to represent one who he testifies is his client will not be decreed to be at an end on the testimony of another attorney, not of record, unsupported by other evidence. Annotation: 126 Am. St. Rep. 37.

[10] Tally v. Reynolds, 1 Ark. 99, 31 Am. Dec. 737; Kelly v. Benedict, 5 Rob. (La.) 138, 39 Am. Dec. 530.
Annotation: 126 Am. St. Rep. 43, 44.

[11] As to when a written warrant of attorney is necessary, see supra, § 32.

[12] M'Alexander v. Wright, 3 T. B. Mon. (Ky.) 189, 16 Am. Dec. 93.

[13] Keith v. Wilson, 6 Mo. 435, 35 Am. Dec. 443.

[14] Osborn v. Bank of United States, 9 Wheat. (U. S.) 738, 6 L. ed. 204; Rodgers v. Bromberg (C. C. A. 5th) 53 F. (2d) 723, 19 Am. Bankr. Rep (N. S.) 1, citing R. C. L., writ of certiorari denied in 285 U. S. 542, 76 L. ed. 934, 52 S. Ct. 314; Harshey v. Blackmarr, 20 Iowa, 161, 89 Am. Dec. 520; Henck v. Todhunter, 7 Harr. & J. (Md.) 275, 16 Am. Dec. 300; Hirsch Bros. & Co. v. R. E. Kennington Co. 155 Miss. 242, 124 So. 344, 88 A.L.R. 1; Bunton v. Lyford, 37 N. H. 512, 75 Am. Dec. 144; Haslet v. Street, 13 S. C. L. (2 M'Cord) 310, 13 Am. Dec. 724.
Annotation: 88 A.L.R. 29.

[15] Washington use of M'Cue v. Young, 10 Wheat. (U. S.) 406, 6 L. ed. 352; Osborn v.

§ 82. Challenging Authority to Appear.—Who may question the right of an attorney to appear for a party in a suit is a vexed question.[20] The party whom the attorney assumes to represent may, of course, challenge his authority to appear.[1] It seems clear, however, that an attorney's authority to appear will not be questioned at the instance of a stranger to the record.[2] However, the court, on its own motion, by virtue of its inherent powers, may investigate the authority of an attorney to appear in a cause,[3] and in some jurisdictions the opposite party may require that the attorney produce evidence of his authority,[4] especially where his rights will otherwise be jeopardized and he will be brought into litigation, without the consent of the man who stands on the record as his adversary.[5] In other jurisdictions, however, the adverse party cannot require an attorney affirmatively to show his authority to appear for the party whom he assumes to represent.[6]

As stated above, the court may, on its own motion, investigate the authority of an attorney to appear; generally, however, the court will make no inquiry into this matter until the attorney's power to act is challenged in an appropriate manner.[7] The proper method of attacking an attorney's authority to make an appearance is by motion, supported by oath showing, prima facie at least, his want of authority.[8] It has been held that an attorney's authority to appear and prosecute a suit cannot be questioned by demurrer or answer.[9]

Bank of United States, 9 Wheat. (U. S.) 738, 6 L. ed. 204.

[16] Mobile Transp. Co. v. Mobile, 128 Ala. 335, 30 So. 645, 64 L.R.A. 333, 86 Am. St. Rep. 143. And see Denton v. Noyes, 6 Johns. (N. Y.) 298, 5 Am. Dec. 237; Williams v. Johnson, 112 N. C. 424, 17 S. E. 496, 21 L.R.A. 848, 34 Am. St. Rep. 513.
Annotation: 21 L.R.A. 848.

[17] Penobscot Boom Corp. v. Lamson, 16 Me. 224, 33 Am. Dec. 656.

[18] Miller v. Continental Assur. Co. 233 Mo. 91, 134 S. W. 1003, Ann. Cas. 1912C, 102.

[19] Annotation: 16 Am. Dec. 99.

[20] Annotation: 126 Am. St. Rep. 35.

[1] Miller v. Continental Assur. Co. 233 Mo. 91, 134 S. W. 1003, Ann. Cas. 1912C, 102.

[2] Annotation: 88 A.L.R. 74; 126 Am. St. Rep. 35.

[3] Santa Rosa v. Fall, 273 U. S. 315, 71 L. ed. 658, 47 S. Ct. 361; Miller v. Continental Assur. Co. 233 Mo. 91, 134 S. W. 1003, Ann. Cas. 1912C, 102; Missoula Belt Line R. Co. v. Smith, 58 Mont. 432, 193 P. 529, citing R. C. L.
Annotation: Ann. Cas. 1912C, 106.

[4] Brewer v. Watson, 71 Ala. 299, 46 Am. Rep. 318; M'Alexander v. Wright, 3 T. B. Mon. (Ky.) 190, 16 Am. Dec. 93.
Annotation: 126 Am. St. Rep. 35.
The absence of the client from the state for a number of years has been held to furnish good reason for requiring the attorney to produce his authority. Keith v. Wilson, 6 Mo. 435, 35 Am. Dec. 443; Miller v. Continental Assur. Co. 233 Mo. 91, 134 S. W. 1003, Ann. Cas. 1912C, 102.

[5] M'Alexander v. Wright, 3 T. B. Mon. (Ky.) 189, 16 Am. Dec. 93; Belt v. Wilson, 6 J. J. Marsh. (Ky.) 495, 22 Am. Dec. 88.
Annotation: 126 Am. St. Rep. 35.

[6] Harrington v. Edwards, 17 Wis. 587, 84 Am. Dec. 768.
Annotation: 126 Am. St. Rep. 35.

[7] Hirsch Bros. & Co. v. R. E. Kennington Co. 155 Miss. 242, 124 So. 344, 88 A.L.R. 1.

[8] Charleston v. Littlepage, 73 W. Va. 156, 80 S. E. 131, 51 L.R.A.(N.S.) 353.
Annotation: 126 Am. St. Rep. 43, 44.
The proceeding may be by motion to vacate the appearance, to dismiss the action, or for an order requiring authority to be shown, but if a statute provides that the court may, on motion of either party, require the attorney for the adverse party to produce and prove authority under which he appears, and until this is done may stay all proceedings by him in behalf of the party for whom he assumes to act, it provides the exclusive method of testing the authority of the attorney to act. Annotation: 126 Am. St. Rep. 44.
Annotation: 126 Am. St. Rep. 44.

[9] Annotation: 126 Am. St. Rep. 43.

The authority of an attorney to appear should be challenged promptly; otherwise the right to do so will be held to have been waived.[10] In some instances it has been held that such right must be exercised at the first term after service and before pleading, and not after the trial has been entered upon by the selection of a jury.[11] The question cannot be raised for the first time in the appellate court.[12]

The authority of an attorney to appear should not be capriciously demanded, upon light or frivolous grounds, and if so demanded the court will not order it produced.[13]

If the attorney prosecuting a suit fails to produce satisfactory evidence of his authority to do so, in a case where there is reasonable ground to apprehend that he is proceeding without the permission of the individual who stands on the record as plaintiff, he will not be permitted to prosecute the suit,[14] and the suit will be dismissed.[15] An order granted on motion to compel an attorney of the plaintiff to produce his authority for using the plaintiff's name must direct that the authority be produced to the court granting the order, and state the time and place at which it is required to be presented.[16]

§ 83. Effect of Unauthorized Appearance.—The courts are not agreed as to the binding effect of a judgment which is litigated upon an unauthorized appearance entered by an attorney purporting to act for the defendant. According to the overwhelming weight of modern authority, a domestic judgment based upon an unauthorized appearance by an attorney is subject to direct attack, but not, according to the performance of authority, to collateral attack; some courts, however, hold that such a judgment is not subject to direct attack, and, on the other hand, a substantial number hold that it may be subjected to collateral attack.[17] Cases which take the position that an appearance by an attorney without authority is sufficient to give the court jurisdiction over the person restrict the party whose appearance has been thus entered to his remedy against the attorney,[18] it being well settled that an unauthorized appearance entered by an attorney for a party renders the attorney liable to such party for resulting damages.[19] With regard to foreign judgments, it seems well settled that the party on whose behalf an unauthorized appearance has been made by an attorney may attack the validity of the

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The objection cannot be heard at the trial as a defense to the action. Continental Tyre & Rubber Co. v. Daimler Co. [1915] 1 K. B. (Eng.) 893, 5 B. R. C. 304—C. A.

A mere denial of the authority of an attorney to appear for the party whom he assumes to represent is insufficient to challenge his authority and require him to produce it. Doe ex dem. Chamberlain, M. & Co. v. Abbott, 152 Ala. 243, 44 So. 637, 126 Am. St. Rep. 30.

[10] Annotation: 126 Am. St. Rep. 36.

[11] Doe ex dem. Chamberlain, M. & Co. v. Abbott, 152 Ala. 243, 44 So. 637, 126 Am. St. Rep. 30.

[12] McIlhenny v. Binz, 80 Tex. 1, 13 S. W. 655, 26 Am. St. Rep. 705.

Continental Tyre & Rubber Co. v. Daimler Co. [1915] 1 K. B. (Eng.) 893, 5 B. R. C. 304—C. A.

[13] Tally v. Reynolds, 1 Ark. 99, 31 Am. Dec. 737; M'Alexander v. Wright, 3 T. B. Mon. (Ky.) 189, 16 Am. Dec. 93.

[14] Tally v. Reynolds, 1 Ark. 99, 31 Am. Dec. 737; Belt v. Wilson, 6 J. J. Marsh. (Ky.) 495, 22 Am. Dec. 88.

[15] Belt v. Wilson, 6 J. J. Marsh. (Ky.) 495, 22 Am. Dec. 88; Keith v. Wilson, 6 Mo. 435, 35 Am. Dec. 443.

[16] Annotation: 126 Am. St. Rep. 44, 45.

[17] Annotation: 88 A.L.R. 12. For general discussion, see JUDGMENTS [Also 15 R. C. L. p. 713, § 163].

[18] Bunton v. Lyford, 37 N. H. 512, 75 Am. Dec. 144; Denton v. Noyes, 6 Johns. (N. Y.) 298, 5 Am. Dec. 237; American Ins. Co. v. Oakley, 9 Paige (N. Y.) 496, 38 Am. Dec. 561; Ferguson v. Crawford, 70 N. Y. 256, 26 Am. Rep. 589; Vilas v. Plattsburgh & M. R. Co. 123 N. Y. 440, 25 N. E. 941, 9 L.R.A. 844, 20 Am. St. Rep. 771; Abbott v. Dutton, 44 Vt. 546, 8 Am. Rep. 394; Hubbard v. Dubois, 37 Vt. 94, 86 Am. Dec. 690.

Annotation: 88 A.L.R. 16; 54 Am. St. Rep. 246, 247.

[19] See infra, § 122.

judgment. The matter of attack on a judgment based upon an unauthorized appearance is reserved for discussion elsewhere in this work.[20]

Some courts, while letting a judgment stand, though rendered against a defendant on the unauthorized appearance of an attorney, have granted relief to the extent of staying all proceedings and letting the defendant in to plead to the merits if he has any defense.[21]

§ 84. Withdrawal or Striking Out of Appearance.—Counsel may, under some circumstances, where the act is done with an honest purpose to subserve the interests or to comply with the wishes of his client, withdraw his own appearance and the answer of the defendant, and thereby accelerate the entry of a default judgment against the defendant, but he is not authorized to do so merely because his client has failed to pay his fee.[1]

D. Authority in Conduct of Litigation

§ 85. Generally.—An attorney of record, by virtue of his employment as such, subject to the approval of the court, has implied authority to do all acts necessary and proper to the regular and orderly conduct of the case and the protection and promotion of his client's interests, which affect the remedy only, and not the cause of action,[2] and which are ancillary or incidental to the general authority conferred.[3] He is the agent of his client to conduct his suit to judgment,[4] and his acts in conducting a suit are presumed to be authorized by the party he represents.[5] Such acts, in the absence of fraud, will be binding on the client,[6] though done without consulting him,[7] and even against his wishes.[8] An attorney may, and ought to, exercise his discretion in all the ordinary occurrences which take place in relation to the cause.[9] But even in the case of an employment under a general retainer, the implied authority is limited to the management of litigation and the control of all proceedings therein; [10] acts outside and beyond the ordinary course of procedure in the action,[11] or which affect the cause of action itself,[12] are not ordinarily binding upon the client. It has been held that what counsel did on a former trial and in the progress of it, is binding on his client only so far as that action and its consequences are concerned, and no further, and that it is not within the scope of his authority to change the rights of his client except so far as it might be done in that action.[13]

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[20] See Judgments [Also 15 R. C. L. 554].

[21] Hollinger v. Reeme, 138 Ind. 372, 36 N. E. 1114, 24 L.R.A. 46, 46 Am. St. Rep. 402; Vilas v. Plattsburgh & M. R. Co. 123 N. Y. 440, 25 N. E. 941, 9 L.R.A. 844, 20 Am. St. Rep. 771; Denton v. Noyes, 6 Johns. (N. Y.) 296, 5 Am. Dec. 237; American Ins. Co. v. Oakland, 9 Paige (N. Y.) 496, 38 Am. Dec. 561.

Annotation: 88 A.L.R. 24.

[1] Nichells v. Nichells, 5 N. D. 125, 64 N. W. 73, 33 L.R.A. 515, 57 Am. St. Rep. 540; Okmulgee N. R. Co. v. Oklahoma Salvage & Supply Co. 133 Okla. 64, 271 P. 167, citing R. C. L.

Annotation: 33 L.R.A. 515.

It is presumed, when an attorney of record applies for permission to have his appearance stricken out, and the same is ordered, that this was done at the instance and by the authority of the party for whom his appearance was entered. Henck v. Todhunter, 7 Harr. & J. (Md.) 275, 16 Am. Dec. 300.

[2] Osborn v. Bank of United States, 9 Wheat. (U. S.) 738, 6 L. ed. 204; Preston v. Hill, 50 Cal. 43, 19 Am. Rep. 647; Funded Debt Comrs. v. Younger, 29 Cal. 147, 87 Am. Dec. 164; Tobler v. Nevitt, 45 Colo. 231, 100 P. 416, 23 L.R.A.(N.S.) 702, 132 Am. St. Rep. 142, 16 Ann. Cas. 925; Robert v. Commercial Bank, 13 La. 528, 33 Am. Dec. 570; Pomeroy v. Prescott, 106 Me. 401, 76 A. 898, 138 Am. St. Rep. 347, 21 Ann. Cas. 574; Hahn v. Loker, 229 Mass. 363, 118 N. E. 661, L.R.A.1918D, 807; Moulton v. Bowker, 115 Mass. 36, 15 Am. Rep. 72; B. F. Goodrich Rubber Co. v. Holland, 159 Miss. 346, 131 So. 882, citing R. C. L.; Jenkins v. Gillespie, 10 Smedes & M. (Miss.) 31, 48 Am. Dec. 732; State v. Turlok, 76 Mont. 549, 248 P. 169, citing R. C. L.; Klein v. Boylan, 115 N. J. L. 295, 179 A. 638, reversed apparently on other grounds in — N. J. L. —, 184 A. 736, citing R. C. L.; Shaft v. Phœnix L. Ins. Co. 67 N. Y. 544, 23 Am. Rep. 138; Averill v. Williams, 4 Denio (N. Y.) 295, 47 Am. Dec. 252; Gorham v. Gale, 7 Cow. (N. Y.) 739, 47 Am. Dec. 549; Bacon v. Mitchell, 14 N. D. 454, 106 N. W. 129, 4 L.R.A.(N.S.) 244; Paulson v. Lyson, 12 N. D. 354, 97 N. W. 533, 1 Ann. Cas. 245; Nichells v. Nichells, 5 N. D. 125, 64 N. W. 73, 33 L.R.A. 515, 57 Am. St. Rep. 540; Garrett v. Hanshue, 53 Ohio St. 482, 42 N. E. 256, 35 L.R.A. 321; Neil v. Union Nat. Bank, 72 Okla. 116, 178 P. 659, citing R. C. L.; Swartz v. Morgan, 163 Pa. 195, 29 A. 974, 975, 43 Am. St. Rep. 786; Huston v. Mitchell, 14 Serg. & R. (Pa.) 307, 16 Am. Dec. 506.

Annotation: 4 L.R.A.(N.S.) 244; 93 Am. St. Rep. 170; 132 Am. St. Rep. 148.

An attorney retained in an action is, within his proper sphere, possessed of plenary authority and discretion in all those processes which are strictly incidental to the regular course of procedure in the action. Nichells v. Nichells, 5 N. D. 125, 64 N. W. 73, 33 L.R.A. 515.

An attorney may do anything fairly pertaining to the prosecution of his client's cause and the protection of his client's interests in the suit. Turner v. Fleming, 37 Okla. 75, 130 P. 551, 45 L.R.A.(N.S.) 265, Ann. Cas. 1915B, 831.

[3] Ball v. State Bank, 8 Ala. 590, 42 Am. Dec. 649. And see Wabash, St. L. & P. R. Co. v. McDougall, 126 Ill. 111, 18 N. E. 291, 1 L.R.A. 207, 9 Am. St. Rep. 39.

[4] Rogers v. Marshal (United States use of Rogers v. Conklin) 1 Wall. (U. S.) 644, 17 L. ed. 714; Sayre v. Com. 194 Ky. 338, 238 S. W. 737, 24 A.L.R. 1017.

[5] Alexandria Canal Co. v. Swann, 5 How. (U. S.) 83, 12 L. ed. 60.

§ 86. Exclusiveness of Control.—If a party appears in an action by attorney, he must be heard only through such attorney,[14] who, so long as he remains the attorney of record, has the exclusive management and control of the action and of all steps and proceedings taken therein to enforce the rights and remedies of his client.[15] If the client becomes dissatisfied with his attorney, he should apply to the court for leave to change counsel,[16] and until this has been done, he has no right to control his attorney in the due and orderly conduct and management of the case.[17]

§ 87. Commencement of Suit or Proceedings by or against Client.—As a general rule, when a demand is placed in the hands of an attorney for enforcement, he has authority to determine what proceedings he will institute,[18] and to commence the action for his client.[19] Whatever adverse proceedings may be taken by the attorney are to be considered, so far as they affect the defendant in the suit, as approved by the client in advance, and therefore as his act, even though they prove to be unwarranted by the law.[20] But em-

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An attorney whose authority is derived from a next friend prosecuting a lawsuit for an infant has no more power and authority than has the next friend. Paskewie v. East St. Louis & Suburban R. Co. 281 Ill. 385, 117 N. E. 1035, L.R.A.1918C, 52.

[6] Preston v. Hill, 50 Cal. 43, 19 Am. Rep. 647; Judd & Detweiler v. Gittings, 43 App. D. C. 304, Ann. Cas. 1917B, 518; Hall v. Presnell, 157 N. C. 290, 72 S. E. 985, 39 L.R.A.(N.S.) 62, Ann. Cas. 1913B, 1293; Wood v. Wood, 59 Ark. 441, 27 S. W. 641, 28 L.R.A. 157, 43 Am. St. Rep. 42.
Annotation: 8 L. ed. 60.

[7] Annotation: 87 Am. Dec. 167.

[8] Nichells v. Nichells, 5 N. D. 125, 64 N. W. 73, 33 L.R.A. 515, 57 Am. St. Rep. 540.

[9] Gorham v. Gale, 7 Cow. (N. Y.) 739, 17 Am. Dec. 549.

[10] Gibson v. Nelson, 111 Minn. 183, 126 N. W. 731, 31 L.R.A.(N.S.) 523, 137 Am. St. Rep. 549; Huston v. Mitchell, 14 Serg. & R. (Pa.) 307, 16 Am. Dec. 506.

[11] Gibson v. Nelson, 111 Minn. 183, 126 N. W. 731, 31 L.R.A.(N.S.) 523, 137 Am. St. Rep. 549; B. F. Goodrich Rubber Co. v. Holland, 159 Miss. 346, 131 So. 882, citing R. C. L.

[12] Bacon v. Mitchell, 14 N. D. 454, 106 N. W. 129, 4 L.R.A.(N.S.) 244.
Annotation: 4 L.R.A.(N.S.) 244.

[13] Arthur v. Homestead F. Ins. Co. 78 N. Y. 462, 34 Am. Rep. 550.

[14] Funded Debt Comrs. v. Younger, 29 Cal. 147, 87 Am. Dec. 164.

[15] Hightower v. Detroit Edison Co. 262 Mich. 1, 247 N. W. 97, 86 A.L.R. 509; Bacon v. Mitchell, 14 N. D. 454, 106 N. W. 129, 4 L.R.A.(N.S.) 244.
Am. Law Inst. Restatement, Agency, p. 860, § 385.
It is indispensable to the decorum of the court, and to the due and orderly conduct of a cause, that the attorney have the management and control of the action, and that his acts go unquestioned by everyone except the party whom he represents. Funded Debt Comrs. v. Younger, 29 Cal. 147, 87 Am. Dec. 164.

[16] See supra, §§ 44 et seq.

[17] Toy v. Haskell, 128 Cal. 558, 61 P. 89, 79 Am. St. Rep. 70; Funded Debt Comrs. v. Younger, 29 Cal. 147, 87 Am. Dec. 164; Bacon v. Mitchell, 14 N. D. 454, 106 N. W. 129, 4 L.R.A.(N.S.) 244; Paulson v. Lyson, 12 N. D. 354, 97 N. W. 533, 1 Ann. Cas. 245.
Annotation: 93 Am. St. Rep. 170.

[18] Annotation: 132 Am. St. Rep. 150.

[19] Annotation: 8 L. ed. 60.

[20] Foster v. Wiley, 27 Mich. 244, 15 Am. Rep. 185.

ployment to collect a debt does not, of itself, give authority to begin legal proceedings.[1]

An attorney cannot, without authority to do so, accept service of process which commences an action against his client.[2] Moreover, as a general rule, an attorney at law has no authority, merely by virtue of his general employment as such, to waive or admit service for his client of original process by which the court for the first time acquires jurisdiction of the client.[3] Yet this rule has been modified by statute in some states, and in others seems never to have obtained to its fullest extent.[4]

§ 88. **Execution of Indemnity Bonds.**—According to some decisions, an attorney employed to bring suit, having authority to take all steps necessary in the regular course of the litigation, may give a bond of indemnity in his client's name,[5] at least this has been held true where the client was a nonresident.[6] According to other decisions, however, the employment of counsel does not confer on him, ex necessitate, the right to bind his client to indemnify a third party who may become surety in the progress of the suit.[7]

§ 89. **Attachment and Arrest.**—The intrusting of an attorney with a demand for collection and giving him general authority to institute a suit empowers him to attach property of the debtor.[8] A client is bound by the acts of his attorney in causing the wrongful arrest or imprisonment of his adversary, if the attorney is acting under his directions or within the scope of his employment,[9] although it seems that mere authority given to collect a claim, without specific instructions, does not give the attorney the right to arrest the debtor, so as to make his client liable for malicious prosecution or false arrest or imprisonment.[10]

An attorney also has authority to release an attachment on realty or personalty,[11] at least where he takes other security.[12] It has been held, however, that an attorney may release a garnishee from his attachment only by special authority from the client.[13]

§ 90. **Writs, Notices, Pleadings, and Technical Formalities.**—Where the action has been commenced and jurisdiction has been acquired by the court, the attorney of record has authority to accept service of the usual papers and notices, and may give any notice affecting his client's rights which the latter himself might give. In some jurisdictions it has been held that an attorney authorized to commence an action is thereby empowered to indorse his client's name on the writ, but in others it has been decided that such authority is not conferred upon him by virtue of his employment.[14] Attorneys are also generally given the right to verify pleadings filed on behalf of their clients, although such right exists only to the extent and under the conditions which the statutes of each jurisdiction prescribe.[15] Attorneys also, by virtue of their implied authority, may bind their clients by the waiver of informalities, irregularities, and technical advantages in the cases which they are conducting,[16] and may make concessions in matters relating to the trial and progress of the causes.[17]

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[1] Am. Law Inst. Restatement, Agency, p. 978, § 426.

[2] Stone v. Bank of Commerce, 174 U. S. 412, 43 L. ed. 1028, 19 S. Ct. 747.

[3] Harshey v. Blackmarr, 20 Iowa, 161, 89 Am. Dec. 520.

Annotation: 132 Am. St. Rep. 154.

[4] Annotation: 132 Am. St. Rep. 154.

There is authority to the effect that where an attorney has actually been employed for the purposes of a suit and in anticipation thereof, he has as much power to bind his client before as after the commencement of the suit, and hence, may bind him by waiver of service. Hefferman v. Burts, 7 Iowa, 320, 71 Am. Dec. 445.

[5] Swartz v. D. S. Morgan & Co. 163 Pa. 195, 29 A. 294, 295, 43 Am. St. Rep. 786.

A bond of indemnity under seal, executed by an attorney whose authority was by parol, is valid against his client as a simple contract. Ford v. Williams, 13 N. Y. 577, 67 Am. Dec. 83.

[6] Swartz v. D. S. Morgan & Co. 163 Pa. 195, 29 A. 294, 295, 43 Am. St. Rep. 786; Clark v. Randall, 9 Wis. 135, 76 Am. Dec. 252.

[7] White v. Davidson, 8 Md. 169, 63 Am. Dec. 699.

[8] Annotation: 132 Am. St. Rep. 171.

[9] Guilleaume v. Rowe, 94 N. Y. 268, 46 Am. Rep. 141; Gibson v. Holmes, 78 Vt. 110, 62 A. 11, 4 L.R.A.(N.S.) 451.

Annotation: 35 A.L.R. 657.

[10] Annotation: 51 L.R.A.(N.S.) 474.

[11] Monson v. Hawley, 30 Conn. 51, 79 Am. Dec. 233; Hahn v. Loker, 229 Mass. 363, 118 N. E. 661, L.R.A.1918D, 807; Moulton v. Bowker, 115 Mass. 136, 15 Am. Rep. 72.

Annotation: 8 L. ed. 60; L.R.A.1918D, 809; 132 Am. St. Rep. 171, 172; 21 Ann. Cas. 584.

[12] Monson v. Hawley, 30 Conn. 51, 79 Am. Dec. 233.

[13] Annotation: 132 Am. St. Rep. 172.

§ 91. Stipulations and Agreements.—Generally speaking, an attorney of record has implied authority to enter into stipulations and agreements in all matters of procedure during the progress of the trial,[18] which are necessary or incidental to the management of the suit, and which affect only the procedure or remedy, as distinguished from the cause of action itself.[19] He may, for example, enter into a stipulation to advance the date of a hearing[20] or to continue the case.[1] He may waive objections to evidence and enter into stipulations for the admission of facts on the trial,[2] waive or stipulate for the waiver of his client's privilege as to confidential communications which do not involve his own relationship with the client,[3] or consent to accept a joinder in issue after having signed a judgment for the want of such joinder in due time, notwithstanding the express orders of his client to the contrary,[4] and, where suits are actually pending, he may bind his client by a stipulation that one suit shall abide the event of another suit involving the same question,[5] unless the agreement is improvidently, fraudulently, or collusively made.[6] Generally, however, an attorney, in his capacity merely as such, has no power to make any agreement for his client concerning the litigations before a suit has been commenced or before he has been retained to commence one,[7] although an attorney employed in anticipation of a suit to be brought may bind his client by stipulations in relation to the same.[8] A client may, by waiver or estoppel, be bound by a stipulation made by his attorney in excess of his authority.[9]

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[14] Annotation: 132 Am. St. Rep. 155.

An attorney is not compelled to accept notice of the time and place of taking a deposition, but if he does, or if he waives notice, it will bind the client. Buddicum v. Kirk, 3 Cranch (U. S.) 293, 2 L. ed. 444.

[15] See PLEADING [Also 21 R. C. L. p. 490, § 54].

[16] Gorham v. Gale, 7 Cow. (N. Y.) 739, 17 Am. Dec. 549.

Annotation: 8 L. ed. 60; 132 Am. St. Rep. 163.

[17] Hess v. Vinton Colliery Co. 255 Pa. 78, 99 A. 218, 14 A.L.R. 1.

As to the right of an attorney to waive the accused's right to be present when the verdict is returned, see CRIMINAL LAW [Also 7 R. C. L. p. 92, § 52].

[18] Wood v. Wood, 59 Ark. 441, 27 S. W. 641, 28 L.R.A. 157, 43 Am. St. Rep. 42; Equitable Trust Co. v. Washington-Idaho Water, Light & P. Co. (D. C.) 300 F. 601, citing R. C. L.; Gorham v. Gale, 7 Cow. (N. Y.) 739, 17 Am. Dec. 549; Bizzell v. Auto Tire & Equipment Co. 182 N. C. 98, 108 S. E. 439, citing R. C. L.; Youmans v. Hanna, 35 N. D. 479, 160 N. W. 705, 161 N. W. 797, Ann. Cas. 1917E, 263; Ohio County v. Clemens, 85 W. Va. 11, 100 S. E. 680, 7 A.L.R. 373.

Annotation: 8 L. ed. 60; 132 Am. St. Rep. 155.

An agreement that the property involved in the litigation may be sold pending an appeal and the parties left to their rights against the proceeds will bind the parties. Halliday v. Stuart, 151 U. S. 229, 38 L. ed. 141, 14 S. Ct. 302.

[19] North Missouri R. Co. v. Stephens, 36 Mo. 150, 88 Am. Dec. 138; Gorham v. Gale, 7 Cow. (N. Y.) 739, 17 Am. Dec. 549; Garrett v. Hanshue, 53 Ohio St. 482, 42 N. E. 256, 35 L.R.A. 321; Turner v. Fleming, 37 Okla. 75, 130 P. 551, 45 L.R.A.(N.S.) 265, Ann. Cas. 1915B, 831; Willis v. Chowning, 90 Tex. 617, 40 S. W. 395, 59 Am. St. Rep. 842; Ohio County v. Clemens, 85 W. Va. 11, 100 S. E. 680, 7 A.L.R. 373.

Annotation: 45 L.R.A.(N.S.) 265; 59 Am. St. Rep. 842; 132 Am. St. Rep. 155.

[20] Youmans v. Hanna, 35 N. D. 479, 160 N. W. 705, 161 N. W. 797, Ann. Cas. 1917E, 263.

[1] Ohio County v. Clemens, 85 W. Va. 11, 100 S. E. 680, 7 A.L.R. 373.

[2] Garrett v. Hanshue, 53 Ohio St. 482, 42 N. E. 256, 35 L.R.A. 321.

[3] Alberti v. New York, L. E. & W. R. Co. 118 N. Y. 77, 23 N. E. 35, 6 L.R.A. 765 (communication between physician and patient, attorney's client).

Annotation: 48 L.R.A.(N.S.) 421.

[4] Annotation: 76 Am. Dec. 259.

[5] Stone v. Bank of Commerce, 174 U. S. 412, 43 L. ed. 1028, 19 S. Ct. 747.

[6] Eidam v. Finnegan, 48 Minn. 53, 50 N. W. 933, 16 L.R.A. 507.

Annotation: 21 Ann. Cas. 584.

§ 92. **—Limitations on Power.**—The implied authority of an attorney to make stipulations is ordinarily limited to matters of procedure in the management or prosecution of the action; in the absence of special authority, any stipulation which operates as a surrender of the substantial rights of the client will not be upheld by the courts.[10] Thus, an attorney has no implied authority to remit a liability which his client might enforce against a witness, for the purpose of removing the interest of such witness so as to render him competent to testify,[11] or to make a general agreement with other attorneys not to try causes during a particular period.[12] In the absence of special authority, an attorney employed by a railway company in proceedings to condemn land for a right of way has no power to bind the company by his stipulation or agreement as to the plan of constructing the road,[13] nor has an attorney, employed to enjoin interference with a highway, authority to stipulate for the vacation of the highway.[14] Stipulations by counsel as to matters of law have also been held to be of no effect.[15]

§ 93. **Conclusiveness of Admissions of Attorney.**[16]—Admissions of facts made by an attorney in the progress of the trial are usually held to be binding on his client, provided such admissions are distinct and formal and made for the express purpose of dispensing with formal proof of such facts at the trial,[17] especially if acquiesced in by the client through his silence.[18] This rule applies in criminal prosecutions, whether the admission is made by the defense counsel or the prosecuting attorney,[19] and in the case of an attorney employed by a municipal corporation, as well as to an attorney employed by an individual.[20]

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[7] Stone v. Bank of Commerce, 174 U. S. 412, 43 L. ed. 1028, 19 S. Ct. 747 (agreement that rights of client shall abide result of test suits to be brought).

[8] Stone v. Bank of Commerce, 174 U. S. 412, 43 L. ed. 1028, 19 S. Ct. 747; Hefferman v. Burt, 7 Iowa, 320, 71 Am. Dec. 445.

[9] Annotation: 132 Am. St. Rep. 156.

[10] Ball v. Bank of State, 8 Ala. 590, 42 Am. Dec. 649; Wabash, St. L. & P. R. Co. v. McDougall, 126 Ill. 111, 18 N. E. 291, 1 L.R.A. 207, 9 Am. St. Rep. 539; De Louis v. Meek, 2 G. Greene (Iowa) 55, 50 Am. Dec. 491; Robert v. Commercial Bank, 13 La. 528, 33 Am. Dec. 570; Pomeroy v. Prescott, 106 Me. 401, 76 A. 898, 138 Am. St. Rep. 347, 21 Ann. Cas. 574; Garrett v. Hanshue, 53 Ohio St. 482, 42 N. E. 256, 35 L.R.A. 521; Breisch v. Locust Mt. Coal Co. 267 Pa. 546, 110 A. 242, 9 A.L.R. 1330; Hathaway v. Milwaukee, 132 Wis. 249, 111 N. W. 570, 112 N. W. 455, 9 L.R.A.(N.S.) 778, 122 Am. St. Rep. 975.

Annotation: 9 Am. St. Rep. 546; 59 Am. St. Rep. 852; 132 Am. St. Rep. 155.

[11] Ball v. Bank of State, 8 Ala. 590, 42 Am. Dec. 649.

[12] Robert v. Commercial Bank, 13 La. 528, 33 Am. Dec. 570.

[13] Wabash, St. L. & P. R. Co. v. McDougall, 126 Ill. 111, 18 N. E. 291, 1 L.R.A. 207, 9 Am. St. Rep. 539.

Annotation: 9 Am. St. Rep. 546.

[14] Breisch v. Locust Mt. Coal Co. 267 Pa. 546, 110 A. 242, 9 A.L.R. 1330.

[15] New Jersey Title Guarantee & T. Co. v. McGrath, 246 Mich. 553, 224 N. W. 755, citing R. C. L.; Reynolds v. McMan Oil & Gas Co. (Tex. Com. App.) 11 S. W. (2d) 778, citing R. C. L., rehearing denied in (Tex.) 14 S. W. (2d) 819.

Annotation: 132 Am. St. Rep. 159.

In the case of an attorney employed by a guardian ad litem to represent minor defendants, a stipulation which in effect waives a trial in one of two actions does not bind the infant party unless approved and ratified by the court upon a showing that it is for the interest, or at least not prejudicial to the interest, of the infant. Eidam v. Finnegan, 48 Minn. 53, 50 N. W. 933, 16 L.R.A. 507.

[16] Generally, as to admissibility of agent's admissions as evidence against client, see EVIDENCE [Also ADMISSIONS AND DECLARATIONS, 1 R. C. L. p. 507, §§ 48–53].

[17] Turner v. Yates, 16 How. (U. S.) 13, 14 L. ed. 824; Harvey v. Thorpe, 28 Ala. 250, 65 Am. Dec. 344; Godwin v. State, 1 Boyce (Del.) 173, 74 A. 1101, Ann. Cas. 1913E, 940; Central Branch Union P. R. Co. v. Shoup, 28 Kan. 394, 42 Am. Rep. 163; Municipality No. 2 v. Orleans Cotton Press, 18 La. 122, 36 Am. Dec. 624; Pratt v. Conway, 148 Mo. 291, 49 S. W. 1028, 71 Am. St. Rep. 602.

Annotation: 14 L. ed. 824; 132 Am. St. Rep. 159.

Am. Law Inst. Restatement, Agency, p. 642, § 284.

[18] Dick v. United States (C. C. A. 8th) 40 F. (2d) 609, 70 A.L.R. 90.

The rule applies when the admission is oral, if made at the trial in open court,[1] or even when it is made out of court, if made in the course of the attorney's employment,[2] and has been held applicable even to a failure of the attorney to deny or qualify a statement, made in open court, in his presence, by the opposing counsel, that certain matters were admitted by the attorney.[3] Where counsel, in their opening statements, state or admit facts, the existence of which precludes a recovery by their clients, the court may close the case at once and give judgment against the clients.[4] A statement made by an attorney in a letter written within the scope of his employment is admissible in evidence against his client on the trial of the case.[5]

Though the rule is different if the admission is made only for the purposes of the pending trial,[6] an unqualified and formal admission made by counsel for the purpose of relieving the opposing party from a strict rule of law or the proof of some fact may be introduced against the client upon a subsequent trial of the same action,[7] unless it is properly withdrawn.[8] Even an oral admission made by an attorney on a trial has been held to bind his client on a subsequent trial of the same action if it appears to have been intended to be general. The tribunal to determine what was the import and intent of the admission, when doubtful whether or not it was such general admission, is the jury before which the case is then pending for hearing.[9] In considering the existence and extent of the attorney's authority, the purpose of his employment, the relevancy of the admission or its relation to a disputed relevant fact, the seriousness and intent with which it was made, and the course or procedure of the litigation are all factors to be weighed.[10]

§ 94. —When Not Binding on Client.—An admission by counsel as to a matter of law has been held to be of no effect to bind his client.[11] Nor are mere matters of conversation, though they relate to the facts in controversy,[12] or admissions made by an attorney long after a case has been tried and his employment ended,[13] or admissions made or letters written before the attorney's appearance in the cause, unless authorized by the client after his retainer, binding.[14] Clearly, statements out of court by counsel, without the presence and without the knowledge or authority of his client, expressing an opinion as to the probability of the conviction of, or a verdict against, his client, are inadmissible against him.[15] While attorneys engaged in the actual management of a cause may bind their clients by admissions when so engaged, or by statements and correspondence in relation thereto, yet they have no authority, under a general retainer, to bind a client by statements that he has no cause of action or that he has surrendered whatever rights he possessed. When employed under a general retainer to prosecute a claim, an attorney cannot, in the absence of a reference by his client of the defendant to him for information, bind his client by admissions or advice prejudicial to the client's cause of action.[16] Thus, an attorney has no implied authority to admit the validity of set-offs to his client's cause of action.[17]

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[19] Dick v. United States (C. C. A. 8th) 40 F. (2d) 609, 70 A.L.R. 90; Godwin v. State, 1 Boyce (Del.) 173, 74 A. 1101, Ann. Cas. 1913E, 940; People v. Miller, 278 Ill. 490, 116 N. E. 131, L.R.A.1917E, 797; Sinclair v. State, 161 Miss. 142, 132 So. 581, 74 A.L.R. 241; State v. Wood, 99 Vt. 490, 134 A. 697, 48 A.L.R. 985.
Annotation: 70 A.L.R. 94.

[20] Municipality No. 2 v. Orleans Cotton Press, 18 La. 122, 36 Am. Dec. 634.

[1] Godwin v. State, 1 Boyce (Del.) 173, 74 A. 1101, Ann. Cas. 1913E, 940; Gilmore v. Shearer, 197 Iowa, 506, 197 N. W. 631, 32 A.L.R. 733 (admission of correctness of copy of deed); Ætna Bldg. & L. Asso. v. McCarty, 78 Okla. 187, 189 P. 357, citing R. C. L.

[2] Graffam v. Burgess, 117 U. S. 180, 29 L. ed. 839, 6 S. Ct. 686.

[3] Godwin v. State, 1 Boyce (Del.) 173, 74 A. 1101, Ann. Cas. 1913E, 940.
Annotation: Ann. Cas. 1913E, 945.

[4] See TRIAL [Also 26 R. C. L. p. 1071, § 77].

[5] Meginnes v. McChesney (Meginnes v. Copeland) 179 Iowa, 563, 160 N. W. 50, L.R.A.1917E, 1060.

[6] Annotation: 10 Ann. Cas. 1064.

[7] Moynahan v. Perkins, 36 Colo. 481, 85 P. 1132, 10 Ann. Cas. 1061.
Annotation: 10 Ann. Cas. 1063.

[8] Annotation: 10 Ann. Cas. 1064.

[9] Moynahan v. Perkins, 36 Colo. 481, 85 P. 1132, 10 Ann. Cas. 1061; Central Branch Union P. R. Co. v. Shoup, 28 Kan. 394, 42 Am. Rep. 163; Re Condemnation of Property (Mo.) 263 S. W. 97, citing R. C. L.

[10] Brown v. Hebb, 167 Md. 535, 175 A. 602, 97 A.L.R. 366.

[11] Annotation: 132 Am. St. Rep. 159.

[12] Annotation: 14 L. ed. 824.

[13] Annotation: 76 Am. Dec. 258.

[14] Annotation: 14 L. ed. 825.

Where an admission by an attorney has been made improvidently and by mistake, it would seem that the court, in the exercise of its coercive powers over its own officers, has the authority to relieve against the consequences of such admission and may set it aside upon such terms as may be just.[18]

§ 95. Incurring Incidental Expenses.—Such reasonable expenses as the conduct of a case may require may be incurred by the attorney of record, and he may bind his client for any services which may be necessary and proper, not only for the preparation of the case for trial, but for the convenient conduct of such trial and the proceedings thereafter taken.[19] Thus, he may bind his client for the expense of a stenographer employed to take and transcribe evidence,[20] for the fees of an expert witness, for the reasonable cost of printing briefs, and for the necessary expenses of the proper care and custody of property which he has been employed to recover.[1]

E. AUTHORITY TO RELEASE, DISMISS, OR COMPROMISE CAUSE OF ACTION OR CONFESS JUDGMENT

§ 96. Release of Client's Cause of Action.—The rule is well established that an attorney, merely by virtue of his employment as such, has no implied authority to release his client's claim or cause of action[2] or otherwise surrender his client's rights, except upon full payment.[3] His general authority gives him no right to release an indorser of a note received by him for collection[4] or to release a surety on an obligation which he has been employed to enforce, without previous satisfaction of the claim.[5] The release of a person from liability in order that he may testify as a witness is beyond the scope of the attorney's implied authority as such.[6] However, a release has sometimes been upheld under the circumstances of the particular case.[7] An attorney has been held to have implied authority to agree to release a surety on a delivery bond from all claim for damages assessed for the value of the use of the property if he will procure and deliver to the sheriff the property specified in the bond.[8]

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[15] State v. Edins, 25 N. M. 680, 187 P. 545, 8 A.L.R. 1331.
Annotation: 8 A.L.R. 1334.

[16] Rivers Bros. v. C. F. T. Co. 124 Or. 157, 264 P. 368, citing R. C. L.
Annotation: 132 Am. St. Rep. 159.

[17] Annotation: 2 A.L.R. 75.

[18] Harvey v. Thorpe, 28 Ala. 250, 65 Am. Dec. 344.
Annotation: 76 Am. Dec. 258.

[19] Miller v. Palmer, 25 Ind. App. 357, 58 N. E. 213, 81 Am. St. Rep. 107; Forbes v. Chicago, R. I. & P. R. Co. 150 Iowa, 177, 129 N. W. 810, Ann. Cas. 1912D, 311; Klein v. Boylan, 115 N. J. L. 295, 179 A. 638, reversed apparently on other grounds in — N. J. L. —, 184 A. 736, citing R. C. L.
Annotation: 23 L.R.A.(N.S.) 702; 132 Am. St. Rep. 161; Ann. Cas. 1912D, 313.
If he assumes the expense, he is entitled to be made whole by any regular means. Swartz v. D. S. Morgan & Co. 163 Pa. 195, 29 A. 974, 975, 43 Am. St. Rep. 786.

[20] Miller v. Palmer, 25 Ind. App. 357, 58 N. E. 213, 81 Am. St. Rep. 107. And see Tobler v. Nevitt, 45 Colo. 231, 100 P. 416, 132 Am. St. Rep. 142, 23 L.R.A.(N.S.) 702, 16 Ann. Cas. 925.
Annotation: 23 L.R.A.(N.S.) 702; 81 Am. St. Rep. 113.

[1] Annotation: 132 Am. St. Rep. 161.

[2] McLaughlin v. Monaghan, 290 Pa. 74, 138 A. 79, citing R. C. L.
Annotation: 132 Am. St. Rep. 168.

[3] Glover v. Bradley (C. C. A. 4th) 233 F. 721, Ann. Cas. 1917A, 921.

[4] Hall v. Presnell, 157 N. C. 290, 72 S. E. 985, 39 L.R.A.(N.S.) 62, Ann. Cas. 1913B, 1293.
Annotation: 132 Am. St. Rep. 168.

[5] Hall v. Presnell, 157 N. C. 290, 72 S. E. 985, 39 L.R.A.(N.S.) 62, Ann. Cas. 1913B,

§ 97. Dismissal, Discontinuance, Nonsuit, Retraxit, or Reinstatement.—Although there are decisions to the effect that an attorney has no implied authority to dismiss an action,[9] the general rule, as evidenced by the weight of authority, is that he may, by virtue of his general authority as such, dismiss or discontinue the action [10] or agree to a nonsuit.[11] But he is not, as a general rule, held to have the implied authority to enter a retraxit, since by the latter the plaintiff irrevocably renounces his right of action.[12] This rule has, however, been relaxed under the statutes of some jurisdictions.[13] So, also, an attorney may restore the action after a non pros., even without the consent of his client,[14] or agree to the reinstatement of an action against his client after a dismissal or a nonsuit.[15]

§ 98. Compromise of Cause of Action.—The rule is almost universal that an attorney who is clothed with no other authority than that arising from his employment in that capacity has no implied power by virtue of his general retainer to compromise and settle his client's claim or cause of action,[16] except

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1293. See also Chilton v. Willford, 2 Wis. 1, 60 Am. Dec. 399.

Annotation: 132 Am. St. Rep. 168.

An unauthorized extension of payment by him will not discharge a surety. Ohio County v. Clemens, 85 W. Va. 11, 100 S. E. 680, 7 A.L.R. 373.

[6] Ball v. State Bank, 8 Ala. 590, 42 Am. Dec. 649; Pomeroy v. Prescott, 106 Me. 401, 76 A. 898, 138 Am. St. Rep. 347, 21 Ann. Cas. 574.

Annotation: 132 Am. St. Rep. 168.

[7] Annotation: 76 Am. Dec. 258.

[8] Stone v. Bank of Commerce, 174 U. S. 412, 43 L. ed. 1028, 19 S. Ct. 747; Willis v. Chowning, 90 Tex. 617, 40 S. W. 395, 59 Am. St. Rep. 842.

[9] Annotation: 4 L.R.A.(N.S.) 244; 132 Am. St. Rep. 161.

[10] Ball v. Bank of State, 8 Ala. 590, 42 Am. Dec. 649; Monson v. Hawley, 30 Conn. 51, 79 Am. Dec. 233; Lovelace v. Lovelace, 179 Ga. 822, 177 S. E. 685, citing R. C. L.; Stone Mountain Confederate Monumental Asso. v. Smith, 170 Ga. 515, 153 S. E. 209, citing R. C. L.; Gibson v. Nelson, 111 Minn. 183, 126 N. W. 731, 31 L.R.A.(N.S.) 523, 137 Am. St. Rep. 549; Bacon v. Mitchell, 14 N. D. 454, 106 N. W. 129, 4 L.R.A.(N.S.) 244.

Annotation: 8 L. ed. 60; 132 Am. St. Rep. 161.

[11] Annotation: 76 Am. Dec. 258, 259.

When the alternative is presented of a probable defeat upon the merits, or a dismissal without prejudice, thus saving the cause of action, it is for the attorney to decide, as one of the incidents of the trial and in the performance of his duty to his client, which course to pursue. Bacon v. Mitchell, 14 N. D. 454, 106 N. W. 129, 4 L.R.A.(N.S.) 244.

[12] Glover v. Bradley (C. C. A. 4th) 233 F. 721, Ann. Cas. 1917A, 921; Thomason v. Odum, 31 Ala. 108, 68 Am. Dec. 159; Lambert v. Sandford, 2 Blackf. (Ind.) 137, 18 Am. Dec. 149; Gorham v. Gale, 7 Cow. (N. Y.) 739, 17 Am. Dec. 549; Kellogg v. Gilbert, 10 Johns. (N. Y.) 220, 6 Am. Dec. 335; Hall v. Presnell, 157 N. C. 290, 72 S. E. 985, 39 L.R.A.(N.S.) 62, Ann. Cas. 1913B, 1293; Lowry v. McMillan, 8 Pa. 157, 49 Am. Dec. 501; Sheffer v. Perkins, 83 Vt. 185, 75 A. 6, 25 L.R.A.(N.S.) 1313; Seymour State Bank v. Rettler, 164 Wis. 619, 160 N. W. 1084, citing R. C. L.

Annotation: 25 L.R.A.(N.S.) 1313; 132 Am. St. Rep. 162.

[13] Annotation: 25 L.R.A.(N.S.) 1314; 132 Am. St. Rep. 162.

[14] Annotation: 76 Am. Dec. 259.

[15] Rhodes v. Rhodes (Todd v. Rhodes) 108 Kan. 64, 193 P. 894, 16 A.L.R. 423; Swartz v. Morgan, 163 Pa. 195, 29 A. 974, 975, 43 Am. St. Rep. 786.

[16] United States v. Beebe, 180 U. S. 343, 45 L. ed. 563, 21 S. Ct. 371; Holker v. Parker, 7 Cranch (U. S.) 436, 3 L. ed. 396; Glover v. Bradley (C. C. A. 4th) 233 F. 721, Ann. Cas. 1917A, 921; Collins v. Thuringer, 92 Colo. 433, 21 P. (2d) 709, citing R. C. L.; Nichols v. Orr, 63 Colo. 333, 166 P. 561, 2 A.L.R. 449; Preston v. Hill, 50 Cal. 43, 19 Am. Rep. 647; Kilmer v. Gallaher, 112 Iowa, 583, 84 N. W. 697, 84 Am. St. Rep. 358; De Louis v. Meek, 2 G. Greene (Iowa) 55, 50 Am. Dec. 491; Hall v. Wright, 138 Ky. 71, 127 S. W. 516, Ann. Cas. 1912A, 1255; Harrow v. Farrow, 7 B. Mon. (Ky.) 126, 45 Am. Dec. 60; Pomeroy v. Prescott, 106 Me. 401, 76 A. 898, 138 Am. St. Rep. 347, 21 Ann. Cas. 574; White v. Davidson, 8 Md. 169, 63 Am. Dec. 699; Vaughn v. Robbins, 254 Mass. 35, 149 N. E. 677, 41 A.L.R. 1488; Dalton v.

in situations where he is confronted with an emergency and prompt action is necessary to protect the interests of the client and there is no opportunity for consultation with him.[17] Generally, unless such an emergency exists, either precedent special authority from the client or subsequent ratification by him is essential in order that a compromise or settlement by an attorney shall be binding on his client.[18] Obviously, therefore, if a litigant instructs his attorney not to compromise his case, the attorney is bound by such instructions, even though he honestly believes that a compromise settlement would be to the best interest of his client.[19] On the other hand, there can be no question but that an attorney may be specially authorized to enter into a compromise which will be binding on the client,[20] although it has been held that an attorney employed to bring suit for damages or to settle by compromise is not authorized to compromise without first consulting his client, especially after suit has been started.[1] Some cases hold that the authority of an attorney to compromise is presumed until the contrary is shown;[2] at least, it is not to be presumed that this was done without lawful authority, and slight

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West End Street R. Co. 159 Mass. 221, 34 N. E. 261, 38 Am. St. Rep. 410; Moulton v. Bowker, 115 Mass. 36, 15 Am. Rep. 72; Foster v. Wiley, 27 Mich. 244, 15 Am. Rep. 185; Gibson v. Nelson, 111 Minn. 183, 126 N. W. 731, 31 L.R.A.(N.S.) 523, 137 Am. St. Rep. 549; Fitch v. Scott, 3 How. (Miss.) 314, 34 Am. Dec. 86; North Missouri R. Co. v. Stephens, 36 Mo. 150, 88 Am. Dec. 138; Smith v. Jones, 47 Neb. 108, 66 N. W. 19, 53 Am. St. Rep. 519; Hall v. Presnell, 157 N. C. 290, 72 S. E. 985, 39 L.R.A.(N.S.) 62, Ann. Cas. 1913B, 1293; Loucheimer, M. & Co. v. Weil, 113 N. C. 181, 18 S. E. 103, 23 L.R.A. 578; Massachusetts Bonding & Ins. Co. v. Vance, 74 Okla. 261, 180 P. 693, 15 A.L.R. 981; National Surety Co. v. Scales, 68 Okla. 92, 171 P. 922, citing R. C. L.; Turner v. Fleming, 37 Okla. 75, 130 P. 551, 45 L.R.A.(N.S.) 265, Ann. Cas. 1915B, 831; North Whitehall Twp. v. Keller, 100 Pa. 105, 45 Am. Rep. 361; Huston v. Mitchell, 14 Serg. & R. (Pa.) 307, 16 Am. Dec. 506; Whipple v. Whitman, 13 R. I. 512, 43 Am. Rep. 42; Davis v. Home Ins. Co. 127 Tenn. 330, 155 S. W. 131, 44 L.R.A.(N.S.) 626; East Line & R. River R. Co. v. Scott, 72 Tex. 70, 10 S. W. 99, 13 Am. St. Rep. 758; Granger v. Batchelder, 54 Vt. 248, 41 Am. Rep. 846; Smock v. Dade, 5 Rand. (Va.) 639, 16 Am. Dec. 780; Dwight v. Hazlett, 107 W. Va. 192, 147 S. E. 877, 66 A.L.R. 102; Watt v. Brookover, 35 W. Va. 323, 13 S. E. 1007, 29 Am. St. Rep. 811; State ex rel. Wilson v. Young, 44 Wyo. 6, 7 P. (2d) 216, 81 A.L.R. 114.

Annotation: 66 A.L.R. 108; 31 L.R.A. (N.S.) 523; 42 L.R.A.(N.S.) 852; 21 Ann. Cas. 577; Ann. Cas. 1915B, 833.

An attorney cannot compromise an award obtained by his client against a township for road damages. North Whitehall Twp. v. Keller, 100 Pa. 105, 45 Am. Rep. 361.

As to effect of unauthorized compromise, see Compromise and Settlement [Also 5 R. C. L. p. 888, § 11].

[17] Lewis v. Vache, 92 Colo. 358, 20 P. (2d) 554, citing R. C. L.; Gibson v. Nelson, 111 Minn. 183, 126 N. W. 731, 31 L.R.A. (N.S.) 523, 137 Am. St. Rep. 549. And see North Whitehall Twp. v. Keller, 100 Pa. 105, 45 Am. Rep. 361.

Annotation: 66 A.L.R. 120; 31 L.R.A. (N.S.) 523; 21 Ann. Cas. 583; Ann. Cas. 1915B, 833.

[18] Gibson v. Nelson, 111 Minn. 183, 126 N. W. 731, 31 L.R.A.(N.S.) 523, 137 Am. St. Rep. 549; Smith v. Jones, 47 Neb. 108, 66 N. W. 19, 53 Am. St. Rep. 519; North Whitehall Twp. v. Keller, 100 Pa. 105, 45 Am. Rep. 361; Whipple v. Whitman, 13 R. I. 512, 43 Am. Rep. 42; Watt v. Brookover, 35 W. Va. 323, 13 S. E. 1007, 29 Am. St. Rep. 811.

[19] Rogers v. Pettigrew, 138 Ga. 528, 75 S. E. 631, 42 L.R.A.(N.S.) 852, Ann. Cas. 1913D, 409; Dalton v. West End Street R. Co. 159 Mass. 221, 34 N. E. 261, 38 Am. St. Rep. 410.

Annotation: 42 L.R.A.(N.S.) 852.

[20] Annotation: 66 A.L.R. 121; 21 Ann. Cas. 586; Ann. Cas. 1915B, 833.

This special authority may take the form of, or be coupled with, an assignment of the claim to the attorney; and where this is the case, the power cannot be revoked at will, at least not after a settlement is effected. Jeffries v. Mutual L. Ins. Co. 110 U. S. 305, 28 L. ed. 156, 4 S. Ct. 8.

The question as to the existence of such authority is one of fact to be determined by the jury. Such authority cannot be established by his declarations; nor will the fact that the attorney at the time of the settlement represented that he had special authority to make it prove his authority, especially when he testifies that he does not recollect that he had such authority. Nor will evidence of an inquiry by a client of his attorney as to the chance of getting a certain amount by way of a cash settlement constitute proof of authority of the attorney to accept such a settlement on behalf of his client. Annotation: 21 Ann. Cas. 586.

See further, as to what is considered sufficient proof, annotation: 66 A.L.R. 123–126.

[1] Annotation: 31 L.R.A.(N.S.) 524.

[2] United States v. Beebe, 180 U. S. 343, 45 L. ed. 563, 21 S. Ct. 371; East Line & R. River R. Co. v. Scott, 72 Tex. 70, 10 S. W. 99, 13 Am. St. Rep. 758.

Annotation: 66 A.L.R. 126.

evidence in such a case may be sufficient to authorize the belief that he was clothed with all the power he assumed to exercise.[3]

It has been held that a compromise settlement made in good faith by counsel, when sanctioned by the court in a decree, is binding upon the client.[4]

Statutes relative to the authority of an attorney touching the conduct of his client's cause of action have generally been held to effect no departure from the general rule that an attorney has no implied authority to compromise his client's claim.[5] The general rule has been held to apply even though the client may be a resident of a distant state[6] or is a municipality or other government body.[7] The general rule stated is now followed by the English courts, although the early tendency of these courts was, apparently, to recognize such power.[8]

In some states the question as to the implied power of an attorney to agree to a compromise of his client's right of action out of court appears to be an open one,[9] and in a few jurisdictions it has been held that an agreement of compromise by an attorney is binding on the client.[10] In some cases this view finds support in a statute expressly providing that no action shall be maintained on a demand settled by a creditor or his attorney intrusted to collect it, in full discharge of it, by the receipt of money or other valuable consideration, however small.[11]

§ 99. —Ratification or Estoppel to Repudiate.—An unauthorized compromise by an attorney may be ratified by the client; such ratification may be either express or implied from the circumstances, such as the client's acceptance of the fruits of the compromise with knowledge thereof.[12] So, the client may waive his right[13] or be estopped to repudiate an unauthorized compromise made by his attorney by reason of his own negligence, inattention, or apparent acquiescence therein,[14] provided he has full knowledge of the settlement. The acceptance of the proceeds of the settlement, without knowledge of it or of its terms, or under the supposition that such proceeds constitute merely a payment on account of his claim, does not estop him to pursue the defendant for the balance of his claim.[15]

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[3] East Line & R. River R. Co. v. Scott, 72 Tex. 70, 10 S. W. 99, 13 Am. St. Rep. 758.
Annotation: 66 A.L.R. 124.

[4] Glover v. Bradley (C. C. A. 4th) 233 F. 721, Ann. Cas. 1917A, 921.

[5] Annotation: 66 A.L.R. 120; 21 Ann. Cas. 584.

[6] Granger v. Batchelder, 54 Vt. 248, 41 Am. Rep. 846.
Annotation: 66 A.L.R. 119; 21 Ann. Cas. 583.

[7] United States v. Beebe, 180 U. S. 343, 45 L. ed. 563, 21 S. Ct. 371.
Annotation: 66 A.L.R. 119, 127; 21 Ann. Cas. 583; Ann. Cas. 1915B, 833.

[8] Annotation: 66 A.L.R. 136; 31 L.R.A. (N.S.) 525; 21 Ann. Cas. 589.
The holdings are also conflicting in Canada. Annotation: 66 A.L.R. 138; 21 Ann. Cas. 591.

[9] Anglo-American Land, Mortg. & Agency Co. v. Dyer, 181 Mass. 593, 64 N. E. 416, 92 Am. St. Rep. 437.
Annotation: 66 A.L.R. 134; 21 Ann. Cas. 592.

[10] Beleveau v. Amoskeag Mfg. Co. 68 N. H. 225, 40 A. 734, 44 L.R.A. 167, 73 Am. St. Rep. 577.
Annotation: 21 Ann. Cas. 593.

[11] Annotation: 31 L.R.A.(N.S.) 523.

[12] Mosher v. Beselin, 129 Neb. 541, 261 N. W. 126, citing R. C. L.
Annotation: 66 A.L.R. 131; 31 L.R.A. (N.S.) 523; Ann. Cas. 1915B, 833.

[13] Campbell v. Frye, 145 Okla. 213, 292 P. 7, citing R. C. L.

[14] Stowe v. United States, 19 Wall. (U. S.) 13, 22 L. ed. 144; Combs v. Virginia Iron, Coal & Coke Co. 236 Ky. 524, 33 S. W. (2d) 649, citing R. C. L.; Huston v. Mitchell, 14 Serg. & R. (Pa.) 307, 16 Am. Dec. 506.
Annotation: 66 A.L.R. 130; 31 L.R.A. (N.S.) 529.
It is the duty of the client to express his disapproval of the settlement within a reasonable time, especially where the attorney has acted in good faith, believing the settlement to be advantageous to his client, and has promptly apprised him of it. Annotation: 21 Ann. Cas. 587.

[15] United States v. Beebe, 180 U. S. 343, 45 L. ed. 563, 21 S. Ct. 371; Cram v. Sickel, 51 Neb. 828, 71 N. W. 724, 66 Am. St. Rep. 478.

§ 100. Submission to Arbitration, Reference, or Amicable Action.—Although he has no right to enter into a compromise without the consent of his client,[16] according to numerous authorities, an attorney may submit to arbitration a case actually pending in court[17] or enter into a reference,[18] as this is one of the modes of trial to which the client's assent is implied.[19] In some jurisdictions it is held that an attorney may bind his client by stating a case for the judgment of the court[20] or by agreeing to an amicable action.[1] Some courts, however, take the position that an attorney cannot, without special authority from his client, submit a controversy to arbitration unless the cause is actually pending and the submission is made under the authority and direction of the court.[2] And even though an attorney may have general authority to submit to arbitration, whether a cause is pending or not, where his client has agreed to the terms of an arbitration, the attorney has no authority to assent to a change in the terms thus agreed upon.[3]

§ 101. Consenting to or Confessing Judgment.—It is quite generally conceded that the control of the attorney, as such, over the conduct of the cause impliedly authorizes him to bind his client by a confession of, or consent to, judgment,[4] and by his consent to orders and judgments made in the progress of a cause and intended to promote the interests of his client.[5] However, where a judgment is entered by an attorney by confession against his client, an inquiry may properly be ordered as to the consideration and the proceed-

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Annotation: 66 A.L.R. 131; 21 Ann. Cas. 587.

[16] See supra, § 98.

[17] Holker v. Parker, 7 Cranch (U. S.) 436, 3 L. ed. 396; Ball v. Bank of State, 8 Ala. 590, 42 Am. Dec. 649; Daniels v. New London, 58 Conn. 156, 19 A. 573, 7 L.R.A. 563; White v. Davidson, 8 Md. 169, 63 Am. Dec. 699; Jenkins v. Gillespie, 10 Smedes & M. (Miss.) 31, 48 Am. Dec. 732; North Missouri R. Co. v. Stephens, 36 Mo. 150, 88 Am. Dec. 138; Gorham v. Gale, 7 Cow. (N. Y.) 739, 17 Am. Dec. 549; Bank of Glade Spring v. McEwen, 160 N. C. 414, 76 S. E. 222, Ann. Cas. 1914C, 542; Maroulas v. State Industrial Acci. Commission, 117 Or. 406, 244 P. 317, citing R. C. L.; Swartz v. Morgan, 163 Pa. 195, 29 A. 974, 975, 43 Am. St. Rep. 786.

Annotation: 132 Am. St. Rep. 169.

[18] Alexandria Canal Co. v. Swann, 5 How. (U. S.) 83, 12 L. ed. 60; Holker v. Parker, 7 Cranch (U. S.) 436, 3 L. ed. 396; Jones v. Horsey, 4 Md. 306, 59 Am. Dec. 81; Pike v. Emerson, 5 N. H. 393, 22 Am. Dec. 468; Huston v. Mitchell, 14 Serg. & R. (Pa.) 307, 16 Am. Dec. 506; Somers v. Balabrega, 1 Dall. (Pa.) 164, 1 L. ed. 83.

Filmer v. Delber, 3 Taunt. 486, 128 Eng. Reprint, 192, 3 Eng. Rul. Cas. 371.

Annotation: 132 Am. St. Rep. 169; 3 Eng. Rul. Cas. 372.

[19] Bank of Glade Spring v. McEwen, 160 N. C. 414, 76 S. E. 222, Ann. Cas. 1914C, 542.

[20] Annotation: 132 Am. St. Rep. 171.

[1] Swartz v. Morgan, 163 Pa. 195, 29 A. 974, 43 Am. St. Rep. 786.

Annotation: 132 Am. St. Rep. 171.

[2] Daniels v. New London, 58 Conn. 156, 19 A. 573, 7 L.R.A. 563; Jenkins v. Gillespie, 10 Smedes & M. (Miss.) 31, 48 Am. Dec. 732.

Annotation: 132 Am. St. Rep. 169.

[3] Daniels v. New London, 58 Conn. 156, 19 A. 573, 7 L.R.A. 563; Jenkins v. Gillespie, 10 Smedes & M. (Miss.) 31, 48 Am. Dec. 732. And see North Missouri R. Co. v. Stephens, 36 Mo. 150, 88 Am. Dec. 138.

A change by which the award is to be made final, instead of being returned to the court for judgment, is a material change such as an attorney cannot make unless expressly authorized. Daniels v. New London, 58 Conn. 156, 19 A. 573, 7 L.R.A. 563.

[4] Pacific R. Co. v. Ketchum, 101 U. S. 289, 25 L. ed. 932; Wood v. Wood, 59 Ark. 441, 27 S. W. 641, 28 L.R.A. 157, 43 Am. St. Rep. 42; Adkins v. Bryant, 133 Ga. 465, 66 S. E. 21, 134 Am. St. Rep. 211; De Charette v. St. Matthews Bank & T. Co. 214 Ky. 400, 283 S. W. 410, 50 A.L.R. 34; Parr v. Chicago, B. & Q. R. Co. 194 Mo. App. 416, 184 S. W. 1169, citing R. C. L.; Beliveau v. Amoskeag Mfg. Co. 68 N. H. 225, 40 A. 734, 44 L.R.A. 167, 73 Am. St. Rep. 577; Kellogg v. Gilbert, 10 Johns. (N. Y.) 220, 6 Am. Dec. 335; Denton v. Noyes, 6 Johns. (N. Y.) 296, 5 Am. Dec. 237; Garrett v. Hanshue, 53 Ohio St. 482, 42 N. E. 256, 35 L.R.A. 321; Schmidt v. Oregon Gold Min. Co. 28 Or. 9, 40 P. 406, 1014, 52 Am. St. Rep. 759; Dunman v. Hartwell, 9 Tex. 495, 60 Am. Dec. 176; Dwight v. Hazlett, 107 W. Va. 192, 147 S. E. 877, 66 A.L.R. 102; Teter v. Irwin, 69 W. Va. 200, 71 S. E. 115, Ann. Cas. 1913A, 707.

Annotation: 46 L.R.A.(N.S.) 750; 132 Am. St. Rep. 162; Ann. Cas. 1914C, 548, 551.

An attorney's consent to judgment against his client may be binding notwithstanding the attorney's knowledge of the fact that his client had a good defense to the action. Annotation: 76 Am. Dec. 259.

[5] Glover v. Bradley (C. C. A. 4th) 233 F. 721, Ann. Cas. 1917A, 921; De Charette v. St. Matthews Bank & T. Co. 214 Ky. 400, 283 S. W. 410, 50 A.L.R. 34.

ings be stayed in the meantime.[6] The rule itself is based on a presumption and becomes impotent whenever the presumption is reasonably rebutted.[7] If the consent judgment was entered through fraud, it will not be upheld.[8] Moreover, a considerable number of decisions maintain the view that an attorney has no implied authority to enter a consent decree or confess judgment without the client's direction, knowledge, or consent,[9] and that where a judgment or decree is entered against the protest of the client or his instructions not to compromise, it will be held not binding on the client,[10] especially when the judgment or decree is designed to carry into effect an unauthorized compromise.[11] However, authority of an attorney in consenting to a decree may be shown by the conduct of the client, his acquiescence, ratification, or other circumstances,[12] or the court may indulge in a presumption that he had authority so to act.[13]

In some jurisdictions, under particular statutes involved, the courts have recognized the right of attorneys representing a municipality to bind it by a consent judgment,[14] but other courts disaffirm the right.[15]

Where it appears of record that a defendant assented to a decree through its solicitor, it is equivalent to a direct finding as a fact by the court that the solicitor had authority to do what he did, and it binds the court on an appeal so far as the question is one of fact only.[16]

F. Authority after Judgment

§ 102. Generally.—It is frequently stated, as a broad general rule, that in the absence of a special arrangement, the authority of an attorney to act for his client terminates when final judgment is obtained,[17] but clearly this is not so in all cases and for all purposes.[18] A final judgment may well be held to terminate the comprehensive authority with which an attorney is vested, yet as a general rule, the authority of the attorney continues after judgment, so far at least as regards the institution of proceedings required to make the judgment obtained by him effectual.[19]

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[6] Starr v. Vanderheyden, 9 Johns. (N. Y.) 253, 6 Am. Dec. 275.

[7] Dwight v. Hazlett, 107 W. Va. 192, 147 S. E. 877, 66 A.L.R. 102.

Annotation: Ann. Cas. 1914C, 549.

[8] Adkins v. Bryant, 133 Ga. 465, 66 S. E. 21, 134 Am. St. Rep. 211.

[9] Kilmer v. Gallaher, 112 Iowa, 583, 84 N. W. 697, 84 Am. St. Rep. 358; Bank of Glade Spring v. McEwen, 160 N. C. 414, 76 S. E. 222, Ann. Cas. 1914C, 542.

Annotation: 46 L.R.A.(N.S.) 752; 132 Am. St. Rep. 162; Ann. Cas. 1914C, 550.

The rule is based on the theory that a different holding would be opposed to the doctrine denying that the attorney, merely by virtue of his authority as such, can bind his client by a compromise. Annotation: 76 Am. Dec. 259.

[10] Preston v. Hill, 50 Cal. 43, 19 Am. Rep. 647; Davis v. First Nat. Bank, 139 Ga. 702, 78 S. E. 190, 46 L.R.A.(N.S.) 750; Dalton v. West End Street R. Co. 159 Mass. 221, 34 N. E. 261, 38 Am. St. Rep. 410.

[11] Holker v. Parker, 7 Cranch (U. S.) 436, 3 L. ed. 396; Kilmer v. Gallaher, 112 Iowa, 583, 54 N. W. 697, 84 Am. St. Rep. 358; Bizzell v. Auto Tire & Equipment Co. 182 N. C. 98, 108 S. E. 439, citing R. C. L.; Turner v. Fleming, 37 Okla. 75, 130 P. 551, 45 L.R.A.(N.S.) 265, Ann. Cas. 1915B, 831; Huston v. Mitchell, 14 Serg. & R. (Pa.) 307, 16 Am. Dec. 506.

[12] Teter v. Irwin, 69 W. Va. 200, 71 S. E. 115, Ann. Cas. 1913A, 707.

[13] Annotation: 46 L.R.A.(N.S.) 753; Ann. Cas. 1914C, 549.

[14] Coolsaet v. Veblen, 55 S. D. 485, 226 N. W. 726. 67 A.L.R. 1499.

Annotation: 67 A.L.R. 1507.

[15] Annotation: 67 A.L.R. 1507.

[16] Pacific R. Co. v. Ketchum, 101 U. S. 289, 25 L. ed. 932. See also Hefferman v. Burt, 7 Iowa, 320, 71 Am. Dec. 445; Dunman v. Hartwell, 9 Tex. 495, 60 Am. Dec. 176.

[17] Foster v. Wiley, 27 Mich. 244, 15 Am. Rep. 185; Treasurers v. M'Dowell, 19 S. C. L. (1 Hill) 184, 26 Am. Dec. 166; Strickland v. Capital City Mills, 74 S. C. 16, 54 S. E. 220, 7 L.R.A.(N.S.) 426; Hamilton v. Hamilton (Tex. Civ. App.) 225 S. W. 69, citing R. C. L.; Sandall v. Sandall, 57 Utah, 150, 193 P. 1093, 15 A.L.R. 620.

[18] Foster v. Wiley, 27 Mich. 244, 15 Am. Rep. 185.

[19] Union Bank v. Geary, 5 Pet. (U. S.) 99, 8 L. ed. 60; Albertson v. Goldsby, 28 Ala. 711, 65 Am. Dec. 380; Pennington v. Yell, 11 Ark. 212, 52 Am. Dec. 262; Brackett v. Norton, 4 Conn. 517, 10 Am. Dec. 179;

§ 103. Collection or Satisfaction of Judgment.—It is generally conceded that where an attorney has recovered a judgment for his client, he has authority, by virtue of his employment as attorney, to receive payment and give or enter satisfaction of the judgment.[1] An attorney has no implied authority, however, to accept anything in satisfaction of the judgment other than that which was sued for and for which the judgment was rendered,[2] nor can he accept less than the full amount of the judgment,[3] or other than lawful money,[4] or enter satisfaction without the actual receipt of the money, in case of a money judgment.[5]

§ 104. Sale, Transfer, or Assignment of Judgment or Its Proceeds.—It is a well-established general rule that an attorney at law, merely by virtue of his general employment as such, has no authority to sell or assign a judgment recovered in favor of his client, or any interest therein.[6] Nor can an attorney indorse negotiable paper made payable to his client in satisfaction of the judgment,[7] or assign a sheriff's certificate of sale acquired through judgment and execution sale, or accept the amount represented thereby from a lienholder,[8] even though the contract of employment authorized him to retain his fee from the fund recovered.[9] An attempted sale of a judgment by an attorney will bind the client only when he has expressly authorized or has subsequently ratified or adopted that act.[10] This may be inferred from circumstances,[11]

Smyth v. Harvie, 31 Ill. 62, 83 Am. Dec. 202; Heard v. Lodge, 20 Pick. (Mass.) 53, 32 Am. Dec. 197.

Annotation: 132 Am. St. Rep. 173.

At common law, for the purpose of enforcing the judgment, the attorney's authority is said to continue for a year and a day thereafter, and if the judgment is not satisfied and continues in force, his authority will be prolonged accordingly. Pennington v. Yell, 11 Ark. 212, 52 Am. Dec. 262. And see Brackett v. Norton, 4 Conn. 517, 10 Am. Dec. 179.

[1] Hayes v. Waldrop, 214 Ala. 534, 108 So. 333, citing R. C. L.; Ball v. Bank of State, 8 Ala. 590, 42 Am. Dec. 649; Albertson v. Goldsby, 28 Ala. 711, 65 Am. Dec. 380; Brackett v. Norton, 4 Conn. 517, 10 Am. Dec. 179; Howard v. Kelly, 137 Iowa, 76, 114 N. W. 544, 126 Am. St. Rep. 274; Hopkins Mfg. Co. v. Ketterer, 237 Pa. 285, 85 A. 421, Ann. Cas. 1914B, 558; Strickland v. Capital City Mills, 74 S. C. 16, 54 S. E. 220, 7 L.R.A.(N.S.) 426; Wheeler v. Alderman, 34 S. C. 533, 13 S. E. 673, 27 Am. St. Rep. 842; Treasurers v. M'Dowell, 19 S. C. L. (1 Hill) 184, 26 Am. Dec. 166; Smock v. Dade, 5 Rand. (Va.) 639, 16 Am. Dec. 780; State ex rel. Lane v. Ballinger, 41 Wash. 23, 82 P. 1018, 3 L.R.A.(N.S.) 72; Yoakum v. Tilden, 3 W. Va. 167, 100 Am. Dec. 738.

Annotation: 132 Am. St. Rep. 174.

A tender of payment made to an attorney is binding upon the client. Hopkins Mfg. Co. v. Ketterer, 237 Pa. 285, 85 A. 421, Ann. Cas. 1914B, 558.

[2] Harrow v. Farrow, 7 B. Mon. (Ky.) 126, 45 Am. Dec. 60.

Annotation: 132 Am. St. Rep. 175.

[3] Harrow v. Farrow, 7 B. Mon. (Ky.) 126, 45 Am. Dec. 60; Vaughn v. Robbins, 254 Mass. 35, 149 N. E. 677, 41 A.L.R. 1488; Hahn v. Loker, 229 Mass. 363, 118 N. E. 661, L.R.A.1918D, 807; Hoy v. Nichols, 170 Minn. 191, 212 N. W. 530; Watt v. Brookover, 35 W. Va. 323, 13 S. E. 1007, 29 Am. St. Rep. 811.

Annotation: 66 A.L.R. 115; 132 Am. St. Rep. 175; 21 Ann. Cas. 580.

[4] Chapman v. Cowles, 41 Ala. 103, 91 Am. Dec. 508 (acceptance of depreciated paper money unauthorized).

[5] Wheeler v. Alderman, 34 S. C. 533, 13 S. E. 673, 27 Am. St. Rep. 842; Treasurers v. M'Dowell, 19 S. C. L. (1 Hill) 184, 26 Am. Dec. 166; Smock v. Dade, 5 Rand. (Va.) 639, 16 Am. Dec. 780 (may not receive bond from judgment debtor).

A subsequent purchaser for value, of land affected by such judgment, will, however, be protected even though it is afterwards made to appear that the satisfaction was improperly entered. Wheeler v. Alderman, 34 S. C. 533, 13 S. E. 673, 27 Am. St. Rep. 842.

[6] Boren v. McGehee, 6 Port. (Ala.) 432, 31 Am. Dec. 695; Ball v. Bank of State, 8 Ala. 590, 42 Am. Dec. 649; Gardner v. Mobile & N. W. R. Co. 102 Ala. 635, 15 So. 271, 48 Am. St. Rep. 84; Head v. Gervais, Walk. (Miss.) 431, 12 Am. Dec. 577; Holiday Oil Co. v. Fidelity & D. Co. 162 Okla. 197, 19 P. (2d) 335, citing R. C. L.; Fassitt v. Middleton, 47 Pa. 214, 86 Am. Dec. 535; Campbell's Appeal, 29 Pa. 401, 72 Am. Dec. 641.

Annotation: 66 A.L.R. 115; 132 Am. St. Rep. 173.

[7] Crahe v. Mercantile Trust & Sav. Bank, 295 Ill. 375, 129 N. E. 120, 12 A.L.R. 92.

[8] Howard v. Kelly, 137 Iowa, 76, 114 N. W. 544, 126 Am. St. Rep. 274.

[9] Crahe v. Mercantile Trust & Sav. Bank, 295 Ill. 375, 129 N. E. 120, 12 A.L.R. 92.

[10] Campbell's Appeal, 29 Pa. 401, 72 Am. Dec. 641.

[11] Gardner v. Mobile & N. W. R. Co. 102 Ala. 635, 15 So. 271, 48 Am. St. Rep. 84;

as where there is silent acquiescence for many years by the client.[12]

§ 105. Release of Judgment or Lien Thereof.—The general authority of an attorney employed to prosecute a suit to judgment does not empower him to release a judgment obtained by him, or to discharge the lien of such judgment before the payment or satisfaction thereof.[13] Neither can the attorney waive the lien of the judgment by filing such judgment as a claim in equity proceedings.[14] It is generally no part of the attorney's business, in attending to the affairs of his client, to alter or change by substitution or satisfaction any lien held by his client unless he is authorized to do so; third persons deal with an attorney at their peril when they have him change or substitute one security for another.[15]

§ 106. Opening, Modifying, Vacating, or Reviewing Judgment.—The attorney of record in a case ordinarily has no right, without a new warrant of authority from the client, to vacate, open,[16] or consent to the setting aside of a final judgment in favor of his client,[17] or to agree to a new trial;[18] it is generally held, however, that he has authority to accept service of notice of process to vacate or modify the judgment[19] except where such notice is made a long time afterwards.[20] The attorney of record also has authority to receive and accept service of notice or citation of appeal or error proceedings to review the judgment rendered,[1] unless statutory provision as to who shall be served, renders, expressly or by implication, such service insufficient.[2]

Under the practice in some jurisdictions a default judgment may be opened by the attorney by whom it was taken and the defendant allowed to answer or be heard on the merits; in others it has been held that an attorney may consent that a default judgment be opened, even contrary to his client's instructions, where it was taken under such circumstances that it would be opened by the court itself.[3]

During the time when an attorney is legally authorized to enforce a judgment, he has the authority to protect such judgment against proceedings

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Campbell's Appeal, 29 Pa. 401, 72 Am. Dec. 641.

[12] Gardner v. Mobile & N. W. R. Co. 102 Ala. 635, 15 So. 271, 48 Am. St. Rep. 84.

[13] Harrow v. Farrow, 7 B. Mon. (Ky.) 126, 45 Am. Dec. 60; Banks v. Evans, 10 Smedes & M. (Miss.) 35, 48 Am. Dec. 734; Kirk's Appeal, 87 Pa. 243, 30 Am. Rep. 357; Ludden & B. Southern Music House v. Sumter, 45 S. C. 186, 22 S. E. 738, 55 Am. St. Rep. 761.

Annotation: L.R.A.1918D, 809; 55 Am. St. Rep. 763; 132 Am. St. Rep. 174.

It does not make any difference or add any superior sanctity to that arrangement, that it was entered of record in open court. Harrow v. Farrow, 7 B. Mon. (Ky.) 126, 45 Am. Dec. 60.

[14] Annotation: 132 Am. St. Rep. 174.

[15] Ludden & B. Southern Music House v. Sumter, 45 S. C. 186, 22 S. E. 738, 55 Am. St. Rep. 761.

[16] Annotation: Ann. Cas. 1916B, 724.

[17] Tritsch v. Covington, 161 Ky. 171, 170 S. W. 518, Ann. Cas. 1916B, 722.

Annotation: 132 Am. St. Rep. 172; Ann. Cas. 1916B, 724.

[18] Annotation: 132 Am. St. Rep. 172.

[19] McSherry v. McSherry, 113 Md. 395, 77 A. 653, 140 Am. St. Rep. 428 (such authority was recognized twenty-five months after entry of the decree, the client being without the state at the time).

Annotation: 78 A.L.R. 370.

[20] Underwood v. Underwood, 142 Ga. 441, 83 S. E. 208, L.R.A.1915B, 674; Sandall v. Sandall, 57 Utah, 150, 193 P. 1093, 15 A.L.R. 620.

Annotation: 15 A.L.R. 627.

The authority of an attorney for the defendant in a divorce proceeding terminates when the decree is entered and he is paid, so that subsequent notice to him of a motion for modification of the decree is without effect upon the defendant. Sandall v. Sandall, 57 Utah, 150, 193 P. 1093, 15 A.L.R. 620.

[1] Scruggs v. Memphis & C. R. Co. 131 U. S. cciv, appx. 26 L. ed. 741; United States v. Curry, 6 How. (U. S.) 106, 12 L. ed. 363; Bacon v. Hart, 1 Black (U. S.) 38, 17 L. ed. 52; Re Osborn, 179 Minn. 133, 228 N. W. 551, citing R. C. L.; Atwood v. McKenzie-Waterhouse Co. 120 Wash. 214, 206 P. 978, 41 A.L.R. 650.

[2] State ex rel. Hibler v. Superior Ct. 164 Wash. 618, 3 P. (2d) 1098, 78 A.L.R. 366.

[3] Annotation: 132 Am. St. Rep. 172; Ann. Cas. 1916B, 725.

instituted for its vacation.[4] He may, after the entry of judgment, represent the client on a motion for a new trial,[5] and may consent to a remittitur to avoid the grant of a new trial for excessiveness of damages.[6]

While it seems that an attorney is without authority to institute affirmative proceedings on his own motion to keep alive a judgment intrusted to him for collection, yet it has been held that the attorney for the defendant may, by virtue of such relation, waive notice of motion for revivor of a judgment.[7]

§ 107. **Prosecuting Appeal or Writ of Error.**—It seems to be conceded generally that an attorney retained to prosecute or defend an action has no implied authority, in the event of a judgment adverse to his client, to prosecute review proceedings and to bind his client for costs and expenses incidental thereto,[8] although he should, where he has easy access to his client, first consult the latter's wishes upon the question of taking an appeal from the judgment rendered against him.[9] When an appeal has been taken by an attorney, however, it will be presumed that he had authority to do so.[10] A distinction is made by some authorities between the power of an attorney to try a litigated issue and that of one employed to collect the debt; the latter, it seems, may appeal from the judgment if it is against his client. And in respect of attorneys of public bodies, such as municipal corporations, who are employed to protect the interest of their clients in all legal controversies, the courts generally recognize the scope of their powers as being larger than those of attorneys for private litigants, especially retained for a single case.[11] In some jurisdictions the rule obtains that an attorney may not object to a dismissal of an appeal for the sole reason that he has a contract for a contingent fee.[12]

Although there are authorities apparently holding to the contrary, the general rule seems to be that an attorney is not authorized, by virtue of his general powers as such, to execute an appeal bond for his client.[13] However, an attorney may, after entry of judgment, in the exercise of his general authority, stipulate for an extension of time in which to perfect an appeal, and there is no question but that attorneys conducting an appeal may stipulate in matters relating to the procedure.[14]

§ 108. **Control of Execution.**—An attorney has, subject to the control by the client himself,[15] authority to control the remedy which the law gives him to secure or collect the debt of his client.[16] He is, in general, deemed to have authority to cause execution to issue [17] and to take other steps necessary to enforce payment of the judgment; [18] he may direct the sheriff as to the time and manner of its enforcement,[19] procure the arrest of the defendant,[20] permit a sheriff to renew an execution in the name of his client, indemnify an officer for making a levy,[1] and generally control or superintend the execution of final process.[2] General directions which the attorney deems best calculated to advance the interests of his client are a justification and exoneration to the sheriff and are binding on the plaintiff, depriving him of the right to go against the sheriff for his loss,[3] and, according to many decisions, subjecting him to liability for a wrongful execution[4] or arrest.[5] Other decisions, however, are to the effect that in the absence of proof of special authority, the acts of an atorney in taking goods under process are in excess of his general powers as attorney and do not subject his client to liability.[6]

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[4] Annotation: 132 Am. St. Rep. 172.

[5] Morris v. Standard Oil Co. 192 Cal. 343, 219 P. 998, 30 A.L.R. 1103.

[6] Annotation: 30 A.L.R. 1111.

[7] Annotation: 132 Am. St. Rep. 172.

[8] Tobler v. Nevitt, 45 Colo. 231, 100 P. 416, 132 Am. St. Rep. 142, 23 L.R.A.(N.S.) 702, 16 Ann. Cas. 925.
Annotation: 132 Am. St. Rep. 180; 16 Ann. Cas. 928.

[9] Annotation: 132 Am. St. Rep. 180.

[10] Annotation: 132 Am. St. Rep. 180.

[11] Tobler v. Nevitt, 45 Colo. 231, 100 P. 416, 23 L.R.A.(N.S.) 702, 132 Am. St. Rep. 142, 16 Ann. Cas. 925.

[12] See Appeal and Error, Vol. 3, p. 321, § 745.

[13] Annotation: 132 Am. St. Rep. 181.

[14] Annotation: 132 Am. St. Rep. 181.

[15] Albertson v. Goldsby, 28 Ala. 711, 65 Am. Dec. 380.
Annotation: 76 Am. Dec. 263.

[16] Rogers v. Marshall (United States use of Rogers v. Conklin), 1 Wall. 644, 17 L. ed. 714.

[17] Erwin v. Blake, 8 Pet. (U. S.) 18, 8 L. ed. 852; Union Bank v. Geary, 5 Pet. (U. S.) 99, 8 L. ed. 60; Foster v. Wiley, 27 Mich. 244, 15 Am. Rep. 185; Kellogg v. Gilbert, 10 Johns. (N. Y.) 220, 6 Am. Dec. 335.
Annotation: 8 L. ed. 60.

[18] Brackett v. Norton, 4 Conn. 517, 10 Am. Dec. 179.
Annotation: 132 Am. St. Rep. 176.

§ 109. —**Return.**—The implied authority of an attorney to enforce a judgment by execution and to control such execution extends to the return thereof; acts of an attorney in causing an execution to be returned to him for the purpose of indorsing payment thereon and discharging it, or in accepting without objection an unsatisfied execution delivered to him on or before the return day, or in advising the officer to omit to return the execution at the proper time, will protect the officer against suit for failure to make a return or for negligence in making it. Nor will a sheriff be liable for a defect in a return made by the authorized attorney of the plaintiff, who directed the officer to sign it.[7]

§ 110. —**Stay of Execution.**—The plaintiff's attorney, by virtue of his implied authority to control an execution, may stay the same for a reasonable length of time, and discharge the defendant from arrest thereon, where this seems advisable in the interests of his client and he exercises such power honestly and with discretion.[8] But he cannot stay execution so as to destroy his client's lien, or postpone it to subsequent claims,[9] or discharge a surety.[10]

§ 111. —**Execution Sale.**—An attorney may procure satisfaction of execution issued upon his client's judgment by levy upon and sale of the defendant's property,[11] and he may, within reasonable bounds, control the sale under execution.[12] Thus, he may consent to or direct a postponement of the sale,[13] even though the lien of the execution may be defeated or lost by reason of the postponement.[14] It has been held, however, that an attorney has no implied authority to agree to a private sale of the property levied on or to a sale by a person other than the sheriff,[15] or to direct what shall be sold under his client's execution,[16] or to bind his client by an agreement that the amount bid shall be paid by the purchaser to a third person, and not to the officer making the sale.[17]

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[19] Erwin v. Blake, 8 Pet. (U. S.) 18, 8 L. ed. 852; Brackett v. Norton, 4 Conn. 517, 10 Am. Dec. 179; Gorham v. Gale, 7 Cow. (N. Y.) 739, 17 Am. Dec. 549; Lynch v. Com. 16 Serg. & R. (Pa.) 368, 16 Am. Dec. 582.
Annotation: 8 L. ed. 60; 132 Am. St. Rep. 176.

[20] Annotation: 8 L. ed. 61; 132 Am. St. Rep. 173.

[1] Annotation: 8 L. ed. 60, 61.

[2] Rogers v. Marshall (United States ex rel. Rogers v. Conklin) 1 Wall. (U. S.) 644, 17 L. ed. 714.
Annotation: 4 Ann. Cas. 980.

[3] Rogers v. Marshall (United States use of Rogers v. Conklin) 1 Wall. (U. S.) 644, 17 L. ed. 714; Bickham v. Kosminsky, 74 Ark. 413, 86 S. W. 292, 4 Ann. Cas. 978; Lynch v. Com. 16 Serg. & R. (Pa.) 368, 16 Am. Dec. 582.
Annotation: 4 Ann. Cas. 980.

[4] Foster v. Wiley, 27 Mich. 244, 15 Am. Rep. 185.
Annotation: 91 A.L.R. 929.

[5] Guilleaume v. Rowe, 94 N. Y. 268, 46 Am. Rep. 141.
Annotation: 51 L.R.A.(N.S.) 474.

[6] Welsh v. Cochran, 63 N. Y. 181, 20 Am. Rep. 519; Averill v. Williams, 4 Denio (N. Y.) 295, 47 Am. Dec. 252.
Annotation: 91 A.L.R. 929.

[7] Albertson v. Goldsby, 28 Ala. 711, 65 Am. Dec. 380.
Annotation: 132 Am. St. Rep. 177.

[8] Annotation: 8 L. ed. 61; 132 Am. St. Rep. 177.
An attorney can postpone execution on a judgment against one joint defendant and issue it on the judgment against the other. Union Bank v. Geary, 5 Pet. (U. S.) 99, 8 L. ed. 60.

[9] Reynolds v. Ingersoll, 11 Smedes & M. (Miss.) 249, 49 Am. Dec. 57.

[10] Annotation: 132 Am. St. Rep. 177.

[11] Erwin v. Blake, 8 Pet. (U. S.) 18, 8 L. ed. 752; Union Bank v. Geary, 5 Pet. (U. S.) 99, 8 L. ed. 60.
Annotation: 8 L. ed. 60.

[12] Annotation: 132 Am. St. Rep. 178.

§ 112. —Payment and Satisfaction.—An attorney having caused execution to issue is also presumed to have authority to receive the money collected therein and to acknowledge satisfaction, and thus discharge the execution;[18] but he cannot discharge the execution without receiving payment[19] or bind his client by accepting less than the full amount unless so authorized.[20] Of course, the client may revoke the authority of his attorney to collect money upon an execution; and his authority will be revoked automatically by the death of the client.[1]

§ 113. —Discharge of Defendant Taken upon Body Execution.—Although there is some authority to the contrary,[2] the generally adopted view is that an attorney has no implied authority to bind his client by the discharge of a judgment debtor from arrest, except upon payment of the judgment in full;[3] the sheriff cannot justify or excuse his action in discharging the defendant from custody by reason of the fact the plaintiff's attorney consented to the discharge.[4]

§ 114. Purchase for Client at Judicial Sale.—It is a general rule that an attorney at law, in prosecuting a suit to judgment and execution, is not empowered merely by virtue of his character as such attorney to bid or to authorize anyone else to bid for his client at a sale under the client's execution[5] or in foreclosure of his client's mortgage.[6] In some jurisdictions, however, it is held that an attorney may purchase the property for his client.[7] It has been held, also, that he may, himself, in the absence of fraud, purchase property sold under a mortgage given by his client and hold the property for and in behalf of him.[8]

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[13] Albertson v. Goldsby, 28 Ala. 711, 65 Am. Dec. 380; Lynch v. Com. 16 Serg. & R. (Pa.) 368, 16 Am. Dec. 582.

[14] Albertson v. Goldsby, 28 Ala. 711, 65 Am. Dec. 380.

[15] Annotation: 132 Am. St. Rep. 178.

[16] Averill v. Williams, 4 Denio (N. Y.) 295, 47 Am. Dec. 252.

[17] Annotation: 132 Am. St. Rep. 178.

[18] Erwin v. Blake, 8 Pet. (U. S.) 18, 8 L. ed. 852; Brackett v. Norton, 4 Conn. 517, 10 Am. Dec. 179; Foster v. Wiley, 27 Mich. 244, 15 Am. Rep. 185; Butler v. Jones, 7 How. (Miss.) 587, 40 Am. Dec. 82; Kellogg v. Gilbert, 10 Johns. (N. Y.) 220, 6 Am. Dec. 335.

Annotation: 8 L. ed. 60.

Although money made on execution can be paid to an attorney of record of the execution creditor, such attorney has no authority as such to authorize the clerk of the court in his official capacity to accept money on a judgment. Hendry v. Benlisa, 37 Fla. 609, 20 So. 800, 34 L.R.A. 283.

A payment made by the sheriff to the attorney will discharge the sheriff, unless he has been notified by the plaintiff that he has changed his attorney or that the money is not to be paid to him. Butler v. Jones, 7 How. (Miss.) 587, 40 Am. Dec. 82.

[19] Union Bank v. Geary, 5 Pet. (U. S.) 99, 8 L. ed. 60.

[20] Vaughn v. Robbins, 254 Mass. 35, 149 N. E. 677, 41 A.L.R. 1488; Foster v. Wiley, 27 Mich. 244, 15 Am. Rep. 185.

[1] Annotation: 76 Am. Dec. 263.

[2] Annotation: L.R.A.1918D, 809.

[3] Rogers v. Marshall (United States use of Rogers v. Conklin) 1 Wall. (U. S.) 644, 17 L. ed. 714; Brackett v. Norton, 4 Conn. 517, 10 Am. Dec. 179; Hahn v. Loker, 229 Mass. 363, 118 N. E. 661, L.R.A.1918D, 807; Foster v. Wiley, 27 Mich. 244, 15 Am. Rep. 185; Kellogg v. Gilbert, 10 Johns. (N. Y.) 220, 6 Am. Dec. 335; Gorham v. Gale, 7 Cow. (N. Y.) 739, 17 Am. Dec. 549; Treasurers v. M'Dowell, 19 S. C. L. (1 Hill) 184, 26 Am. Dec. 166.

Annotation: L.R.A.1918D, 808.

[4] Treasurers v. M'Dowell, 19 S. C. L. (1 Hill) 184, 26 Am. Dec. 166.

The sheriff is liable for an escape if, knowing that the judgment is unsatisfied, he permits the defendant to go at large by the direction of the plaintiff's attorney acting merely under his general authority. Kellogg v. Gilbert, 10 Johns. (N. Y.) 220, 6 Am. Dec. 335.

[5] Foster v. Wiley, 27 Mich. 244, 15 Am. Rep. 185; Averill v. Williams, 4 Denio (N. Y.) 295, 47 Am. Dec. 252; Beardsley v. Root, 11 Johns. (N. Y.) 464, 6 Am. Dec. 386. And see Fisher v. McInerney, 137 Cal. 28, 69 P. 622, 907, 92 Am. St. Rep. 68.

Annotation: 132 Am. St. Rep. 179, 180; 21 Ann. Cas. 277.

§ 115. Control over Supplementary Proceedings.—An attorney, by virtue of his general employment to collect a claim, has the authority after judgment to institute supplementary proceedings and to procure the appointment of a receiver; and when an attorney has an execution in his hands for collection, although he is not the attorney of record, he has prima facie authority to act for the judgment creditor and apply for a subpœna commanding the debtor to appear and disclose.[9]

VI. RIGHT OF CLIENT TO SETTLE OR DISMISS SUIT

§ 116. Settlement or Compromise out of Court.—An attorney, by virtue of his general authority as such, has the exclusive control of the litigation in which he represents his client;[10] his client, on the other hand, is generally conceded to have the exclusive control over the subject-matter of the litigation[11] and may, according to the great weight of authority, at any time before judgment, if acting in good faith, compromise, settle, or adjust his cause of action out of court without his attorney's intervention, knowledge, or consent,[12] and even though he has agreed with his attorney not to do so[13] and the defendant has knowledge of such agreement and of the attorney's claim.[14] The mere fact of an agreement to pay the attorney a contingent fee or a part of the subject-matter of litigation in case of success will not deprive the client of the power to make a settlement.[15]

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[6] Savery v. Sypher, 6 Wall. (U. S.) 157, 18 L. ed. 822.

[7] Annotation: 132 Am. St. Rep. 180; 21 Ann. Cas. 277.

[8] Pacific R. Co. v. Ketchum, 101 U. S. 289, 25 L. ed. 932.

Annotation: 21 Ann. Cas. 277.

[9] Annotation: 132 Am. St. Rep. 177.

[10] See supra, § 86.

[11] Paulson v. Lyson, 12 N. D. 354, 97 N. W. 533, 1 Ann. Cas. 245; Re Snyder, 190 N. Y. 66, 82 N. E. 742, 14 L.R.A.(N.S.) 1101, 123 Am. St. Rep. 533, 13 Ann. Cas. 441.

Annotation: 14 L.R.A.(N.S.) 1101.

[12] Millsap v. Sparks, 21 Ariz. 317, 188 P. 135, citing R. C. L.; St. Louis, I. M. & S. R. Co. v. Blaylock, 117 Ark. 504, 175 S. W. 1170, Ann. Cas. 1917A, 563; Nichols v. Orr, 63 Colo. 333, 166 P. 561, 2 A.L.R. 449; Lamont v. Washington & G. R. Co. 2 Mackey (D. C.) 502, 47 Am. Rep. 268; Cameron v. Boeger, 200 Ill. 84, 65 N. E. 690, 93 Am. St. Rep. 165; Hanna v. Island Coal Co. 5 Ind. App. 163, 31 N. E. 846, 51 Am. St. Rep. 246; Kansas City Elev. R. Co. v. Service, 77 Kan. 316, 94 P. 262, 14 L.R.A.(N.S.) 1105; Rowe v. Fogle, 88 Ky. 105, 10 S. W. 426, 2 L.R.A. 708; Potter v. Mayo, 3 Me. 34, 14 Am. Dec. 211; Boyd v. Johnson, 145 Md. 385, 125 A. 697, citing R. C. L.; Desaman v. Butler Bros. 118 Minn. 198, 136 N. W. 747, Ann. Cas. 1913E, 642; Burho v. Carmichiel, 117 Minn. 211, 135 N. W. 386, Ann. Cas. 1913D, 305; Boogren v. St. Paul City R. Co. 97 Minn. 51, 106 N. W. 104, 3 L.R.A.(N.S.) 379, 114 Am. St. Rep. 691; Weller v. Jersey City, H. & P. Street R. Co. 68 N. J. Eq. 659, 61 A. 459, 6 Ann. Cas. 442; Coughlin v. New York C. & H. R. R. Co. 71 N. Y. 443, 27 Am. Rep. 75; Bank of Glade Spring v. McEwen, 160 N. C. 414, 76 S. E. 222, Ann. Cas. 1914C, 542; Greenleaf v. Minneapolis, St. P. & S. Ste. M. R. Co. 30 N. D. 112, 151 N. W. 879, Ann. Cas. 1917D, 908; Paulson v. Lyson, 12 N. D. 354, 97 N. W. 533, 1 Ann. Cas. 245; Davy v. Fidelity & C. Ins. Co. 78 Ohio St. 256, 85 N. E. 504, 17 L.R.A.(N.S.) 443, 125 Am. St. Rep. 694; Jackson v. Stearns, 48 Or. 25, 84 P. 798, 5 L.R.A.(N.S.) 390; Tyler v. Superior Ct. 30 R. I. 107, 73 A. 467, 23 L.R.A.(N.S.) 1045; Miller v. Newell, 20 S. C. 123, 47 Am. Rep. 833; Tompkins v. Nashville, C. & St. L. R. Co. 110 Tenn. 157, 72 S. W. 116, 61 L.R.A. 340, 100 Am. St. Rep. 795; Kean v. Southwest Nat. Bank (Tex. Civ. App.) 50 S. W. (2d) 839, citing R. C. L.; Hooper v. Welch, 43 Vt. 169, 5 Am. Rep. 267; Humptulips Driving Co. v. Cross, (Humptulips Driving Co. v. Burrows) 65 Wash. 636, 118 P. 827, 37 L.R.A.(N.S.) 226; Plummer v. Great Northern R. Co. 60 Wash. 214, 110 P. 989, 31 L.R.A.(N.S.) 1215; Kusterer v. Beaver Dam, 56 Wis. 471, 14 N. W. 617, 43 Am. Rep. 725.

Annotation: 51 Am. St. Rep. 251; 93 Am. St. Rep. 173; Ann. Cas. 1913E, 646; Ann. Cas. 1917A, 570.

Even pending an appeal the client has a right to settle. Nichols v. Orr, 63 Colo. 333, 166 P. 561, 2 A.L.R. 449.

[13] Kendall v. United States, 7 Wall. (U. S.) 113, 19 L. ed. 85; Hanna v. Island Coal Co. 5 Ind. App. 163, 31 N. E. 846, 51 Am. St. Rep. 246; Southworth v. Rosendahl, 133 Minn. 447, 158 N. W. 717, 3 A.L.R. 468; Weller v. Jersey City, H. & P. Street R. Co. 68 N. J. Eq. 659, 61 A. 459, 6 Ann. Cas. 442; Re Snyder, 190 N. Y. 66, 82 N. E. 742, 14 L.R.A.(N.S.) 1101, 123 Am. St. Rep. 533, 13 Ann. Cas. 441; Randall v. Van Wagenen, 115 N. Y. 527, 22 N. E. 361, 12 Am. St. Rep. 828; Coughlin v. New York C. & H. R. R. Co. 71 N. Y. 443, 27 Am. Rep. 75; Davy v. Fidelity & C. Ins. Co. 78 Ohio St. 256, 85 N.

§ 117. Effect of Existence of Attorney's Lien.—One's right to settle or compromise his own case without his attorney's consent is not affected by the fact that the attorney has a right to a lien [16] upon the cause of action, the property involved, or the money in the hands of the adverse party,[17] at least not where the attorney has failed to perfect his lien by compliance with the terms of the statute or where the lien for any other reason has not attached.[18] Before judgment has been obtained, in the absence of an assignment of the claim to him, the attorney cannot interfere.[19] Moreover, while, if a cause of action before judgment is in its nature assignable, the owner of it may assign and create equitable interests therein and an agreement of this nature, if made with an attorney, must be respected by those having notice,[20] yet if the cause of action is not assignable, the client cannot give his attorney any lien on it that will prevent a settlement or compromise by the parties before judgment, even if the amount is definitely fixed, an agreement is made that the same shall become a lien, and the adverse party is notified of the fact.[1] Actions for slander and libel, for assault and battery, and for personal injuries arising from the negligent conduct of others are within this rule.[2]

In some jurisdictions, however, a statute gives an attorney a lien on suits for money and denies to the parties the right to satisfy the suit until such lien is satisfied.[3]

§ 118. Dismissal of Suit.—In some jurisdictions an attempt has been made

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E. 504, 17 L.R.A.(N.S.) 443, 125 Am. St. Rep. 694; Miller v. Newell, 20 S. C. 123, 47 Am. Rep. 833; Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 570, 48 Am. Rep. 821; Kusterer v. Beaver Dam, 56 Wis. 471, 14 N. W. 617, 43 Am. Rep. 725.
Annotation: 14 L.R.A.(N.S.) 1101; 13 Ann. Cas. 445.

[14] Winslow Bros. Co. v. Murphy, 139 Ga. 231, 77 S. E. 25, 45 L.R.A.(N.S.) 750; Hanna v. Island Coal Co. 5 Ind. App. 163, 31 N. E. 846, 51 Am. St. Rep. 246.

[15] Nichols v. Orr, 63 Colo. 333, 166 P. 561, 2 A.L.R. 449; Cameron v. Boeger, 200 Ill. 84, 65 N. E. 690, 93 Am. St. Rep. 165; Boogren v. St. Paul City R. Co. 97 Minn. 51, 106 N. W. 104, 3 L.R.A.(N.S.) 379, 114 Am. St. Rep. 691; Paulson v. Lyson, 12 N. D. 354, 94 N. W. 533, 1 Ann. Cas. 245; Stearns v. Wollenberg, 51 Or. 88, 92 P. 1079, 14 L.R.A.(N.S.) 1095; Miller v. Newell, 20 S. C. 123, 47 Am. Rep. 833; Plummer v. Great Northern R. Co. 60 Wash. 214, 110 P. 989, 31 L.R.A.(N.S.) 1215; Kusterer v. Beaver Dam, 56 Wis. 471, 14 N. W. 617, 43 Am. Rep. 725.
Annotation: 14 L.R.A.(N.S.) 1095; 93 Am. St. Rep. 169.

[16] Nichols v. Orr, 63 Colo. 333, 166 P. 561, 2 A.L.R. 449; Winslow Bros. Co. v. Murphy, 139 Ga. 231, 77 S. E. 25, 45 L.R.A. (N.S.) 750; Standidge v. Chicago, R. Co. 254 Ill. 524, 98 N. E. 963, 40 L.R.A.(N.S.) 529, Ann. Cas. 1913C, 65; Greenleaf v. Minneapolis, St. P. & S. Ste. M. R. Co. 30 N. D. 112, 151 N. W. 879, Ann. Cas. 1917D, 908.

[17] O'Connor v. St. Louis Transit Co. 198 Mo. 622, 97 S. W. 150, 115 Am. St. Rep. 495, 8 Ann. Cas. 703; Tompkins v. Nashville, C. & St. L. R. Co. 110 Tenn. 157, 72 S. W. 116, 61 L.R.A. 340, 100 Am. St. Rep. 795.

[18] Burho v. Carmichiel, 117 Minn. 211, 135 N. W. 386, Ann. Cas. 1913D, 305; Boogren v. St. Paul City R. Co. 97 Minn. 51, 106 N. W. 104, 3 L.R.A.(N.S.) 379, 114 Am. St. Rep. 691; Stearns v. Wollenberg, 51 Or. 88, 92 P. 1079, 14 L.R.A.(N.S.) 1095; Jackson v. Stearns, 48 Or. 25, 84 P. 798, 5 L.R.A.(N.S.) 390; Plummer v. Great Northern R. Co. 60 Wash. 214, 110 P. 989, 31 L.R.A.(N.S.) 1215.
Annotation: Ann. Cas. 1917A, 571.

[19] Am. Law Inst. Restatement, Agency, § 464, p. 1094.

[20] Cameron v. Boeger, 200 Ill. 84, 65 N. E. 690, 93 Am. St. Rep. 165; Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge, 161 Mich. 181, 126 N. W. 56, 137 Am. St. Rep. 495; Stearns v. Wollenberg, 51 Or. 88, 92 P. 1079, 14 L.R.A.(N.S.) 1095.
Annotation: 93 Am. St. Rep. 169.

[1] Hanna v. Island Coal Co. 5 Ind. App. 163, 31 N. E. 846, 51 Am. St. Rep. 246.
Annotation: 51 Am. St. Rep. 251.

[2] Lamont v. Washington & G. R. Co. 2 Mackey (D. C.) 502, 47 Am. Rep. 268; Hanna v. Island Coal Co. 5 Ind. App. 163, 31 N. E. 846, 51 Am. St. Rep. 246; Weller v. Jersey City, H. & P. St. R. Co. 68 N. J. Eq. 659, 61 A. 459, 6 Ann. Cas. 442; Coughlin v. New York C. & H. R. R. Co. 71 N. Y. 443, 27 Am. Rep. 75.
Annotation: 51 Am. St. Rep. 251; 6 Ann. Cas. 444.

[3] Bell v. Bell, 214 Ala. 573, 108 So. 375, 45 A.L.R. 935.

to distinguish between a stipulation by a party to the suit for its dismissal and the right of a party to compromise, on the ground that a stipulation for dismissal is an attempt by the party to control the course of the action in court.[4] In practical effect, however, there seems to be no difference between authorizing the dismissal of a cause by stipulation and settling or adjusting the controversy between the parties out of court.[5] The general rule, as evidenced by the majority of the decisions, is that the client has the right to dismiss his action without his attorney's consent, or even over his objection,[6] at least where such dismissal is in good faith and there is no recovery or consideration except an agreement that each party shall pay his own costs.[7] Sometimes, authority to dismiss is expressly given to the client by statute.[8] The right of a client to dismiss his suit exists notwithstanding his attorney is serving for a contingent fee[9] or a right to a lien exists, either by legislative enactment or because of contractual relations, which has not actually attached.[10]

§ 119. Effect of Client's Fraud or Collusion.—The general rule that a litigant has the power to dismiss the suit or compromise the matter in litigation without the consent or intervention of his attorney presupposes the honesty and good faith of such transaction. A settlement by a client will be upheld only if made in good faith.[11] Collusive and fraudulent settlements or dismissals effected for the purpose of defrauding the attorney are reprehensible, and if attempted, the court may, in the exercise of its inherent power to protect its officers, interfere to protect the attorney against collusion and fraud practiced by the parties to the cause.[12] The authority of courts in this respect has been exercised both under the common law and under the statutes designed to secure attorneys in the collection of their compensation for services rendered in a cause,[13] although there are decisions which seem to question the existence of such power save where the attorney has acquired a lien.[14]

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[4] Toy v. Haskell, 128 Cal. 558, 61 P. 89. 79 Am. St. Rep. 70. And see Paulson v. Lyson, 12 N. D. 354, 97 N. W. 533, 1 Ann. Cas. 245.

A statute allowing a dismissal of an action by either party on the written consent of the other has been construed to mean that where there is an attorney of record, such consent must come from, or be sanctioned by, him. Funded Debt Comrs. v. Younger, 29 Cal. 147, 87 Am. Dec. 164.

[5] Annotation: 93 Am. St. Rep. 171.

[6] Bell v. Bell, 214 Ala. 573, 108 So. 375, 45 A.L.R. 935; St. Louis, I. M. & S. R. Co. v. Blaylock, 117 Ark. 504, 175 S. W. 1170, Ann. Cas. 1917A, 563; Keefer v. Keefer, 140 Ga. 18, 78 S. E. 462, 46 L.R.A.(N.S.) 527; Cameron v. Boeger, 200 Ill. 84, 65 N. E. 690, 93 Am. St. Rep. 165; Rowe v. Fogle, 88 Ky. 105, 10 S. W. 426, 2 L.R.A. 708; Gibson v. Nelson, 111 Minn. 183, 126 N. W. 731, 31 L.R.A.(N.S.) 523, 137 Am. St. Rep. 549; Boogren v. St. Paul City R. Co. 97 Minn. 51, 106 N. W. 104, 3 L.R.A.(N.S.) 379, 114 Am. St. Rep. 691; Petersen v. Petersen, 76 Neb. 282, 107 N. W. 391, 124 Am. St. Rep. 812; Andrewes v. Haas, 214 N. Y. 255, 108 N. E. 423, 3 A.L.R. 458; Paulson v. Lyson, 12 N. D. 354, 97 N. Y. 533, 1 Ann. Cas. 245; Tompkins v. Nashville, C. & St. L. R. Co. 110 Tenn. 157, 72 S. W. 116, 61 L.R.A. 340, 100 Am. St. Rep. 795; Hillman v. Hillman, 42 Wash. 595, 85 P. 61, 114 Am. St. Rep. 135; State ex rel. Ryan v. Miller, 82 W. Va. 490, 96 S. E. 791, citing R. C. L.

Annotation: 93 Am. St. Rep. 171; 114 Am. St. Rep. 695; 137 Am. St. Rep. 556; 1 Ann. Cas. 247.

Such a stipulation will be enforced by the court, at least in the absence of fraud or collusion to injure the attorney. Paulson v. Lyson, 12 N. D. 354, 97 N. W. 533, 1 Ann. Cas. 245.

[7] Rowe v. Fogle, 88 Ky. 105, 10 S. W. 426, 2 L.R.A. 708.

[8] Johnson v. Gerald, 216 Ala. 581, 113 So. 447, 59 A.L.R. 348; Bell v. Bell, 214 Ala. 573, 108 So. 375, 45 A.L.R. 935.

[9] Andrewes v. Haas, 214 N. Y. 255, 108 N. E. 423, 3 A.L.R. 458.

[10] Platt v. Jerome, 19 How. (U. S.) 384, 15 L. ed. 623; Weller v. Jersey City, H. & P. Street R. Co. 68 N. J. Eq. 659, 61 A. 459, 6 Ann. Cas. 442; Stearns v. Wollenberg, 51 Or. 88, 92 P. 1079, 14 L.R.A.(N.S.) 1095; Jackson v. Stearns, 48 Or. 25, 84 P. 798, 5 L.R.A.(N.S.) 390; Tompkins v. Nashville, C. & St. L. R. Co. 110 Tenn. 157, 72 S. W. 116, 61 L.R.A. 340, 100 Am. St. Rep. 795.

Annotation: 93 Am. St. Rep. 176, 177; Ann. Cas. 1917A, 571.

[11] Millsap v. Sparks, 21 Ariz. 317, 188 P. 135, citing R. C. L.; Nichols v. Orr, 63 Colo. 333, 166 P. 561, 2 A.L.R. 449.

[12] Randall v. Van Wagenen, 115 N. Y. 527, 22 N. E. 361, 12 Am. St. Rep. 828; Coughlin v. New York C. & H. R. R. Co. 71 N. Y. 443, 27 Am. Rep. 75; Jackson v. Stearns, 48 Or. 25, 84 P. 798, 5 L.R.A.(N.S.) 390.

Annotation: 5 L.R.A.(N.S.) 390; 93 Am. St. Rep. 174.

The courts will closely scrutinize settlements made without the knowledge or consent of the attorneys and set them aside when there is an appearance of fraud. Annotation: Ann. Cas. 1917A, 571.

VII. LIABILITY OF ATTORNEY TO CLIENT

A. Existence, Nature, and Extent

§ 120. Generally.—An attorney, by virtue of his relationship to his client, is under certain obligations to the client which he is bound to perform with fidelity and with reasonable care and skill.[15] If he fails in the performance of these duties, he may become personally liable to the client for the loss ensuing from his action, whether the same consists of a violation of his contract with his client, the perpetration of a fraud upon the client, or a negligent performance or failure to perform the duties growing out of the relation. In all his professional relations with his client an attorney is held to a strict accountability.[16] He is presumed to know what his duties are, and he cannot plead ignorance or that in violating a plain duty he did not intend to commit a wrong.[17]

However, he is not liable to his client for the shortcomings of the officer who levies execution upon the client's judgment.[18]

§ 121. Liability on Contract.—In general, it may be said that if an attorney fails or neglects to perform services which he has agreed to perform or in other respects fails to carry out his contract with his client, the latter has a good cause of action ex contractu.[19] The contract must, of course, be founded upon some legally sufficient consideration. For example, an express promise made by the attorney to reimburse the plaintiff, should the latter be nonsuited or cast in the suit, for all the costs, is without consideration and unenforceable.[20] If, however, an attorney having a debt for collection promises his client to pay the debt himself if he fails to collect, and the client, upon the faith of such a promise, agrees not to withdraw the business from the attorney or consents to forbear taking proceedings which, but for the promise, would have secured the debt, there is a sufficient consideration to enable the client to maintain an action against the attorney on the promise.[1]

Another element that often enters into the question of the contractual liability of an attorney to his client is the illegality of the contract or the services contracted for.[2] It has been said that no reason can be given why a champertous contract or a contract against public policy which the attorney cannot enforce against his client may be enforced against him.[3] In this regard some courts have taken the position that a client cannot recover money placed in the hands of an attorney for use in the advancement of an illegal purpose,[4] as, for example, the compounding of a felony.[5] These courts take the position that when an attorney and his client enter into a contract that is contrary to public policy, they are in pari delicto and neither can recover against the other.[6] Other courts, however, take the position that because of the peculiar relation of trust and confidence between the attorney and his client, the strict duty of integrity and of regard for the client's interest which rests upon the attorney, and the fact that the client is naturally subject to the attorney's influence, the client should be relieved of the character of one in pari delicto and should be taken out of the operation of the general principle which denies relief to either party to an unlawful agreement or transaction if the parties are in pari delicto.[7]

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[13] Annotation: 5 L.R.A.(N.S.) 391; 93 Am. St. Rep. 174, 175.

[14] Boogren v. St. Paul City R. Co. 97 Minn. 51, 106 N. W. 104, 3 L.R.A.(N.S.) 379, 114 Am. St. Rep. 691.

[15] See supra, §§ 46, 47.

[16] Armstrong v. Morrow, 166 Wis. 1, 163 N. W. 179, Ann. Cas. 1918E, 1156.

[17] Re Evans, 22 Utah, 366, 62 P. 913, 53 L.R.A. 952, 83 Am. St. Rep. 794.

[18] Pennington v. Yell, 11 Ark. 212, 52 Am. Dec. 262.

[19] Weekley v. Knight, 116 Fla. 721, 156 So. 625, citing R. C. L.

As to liability for negligence in performance, see infra, §§ 124 et seq.

[20] Mitchell v. Bell, 1 N. C. pt. 2, p. 157 (Conference, 17), 2 Am. Dec. 627.

[1] Annotation: 83 Am. St. Rep. 183.

[2] As to when contract between attorney and client is invalid, see supra, §§ 54 et seq.

[3] Adye v. Hanna, 47 Iowa, 264, 29 Am. Rep. 484.

[4] Jones v. Henderson, 189 Ky. 412, 225 S. W. 34, 20 A.L.R. 1471; Dixon v. Olmstead, 9 Vt. 310, 31 Am. Dec. 629.

Annotation: 20 A.L.R. 1476, s. 26 A.L.R. 98.

§ 122. Injury Resulting from Violation of Authority or Instructions.—An attorney who undertakes, without his client's consent, to step outside the bounds of his implied authority does so at his own risk and is responsible to the client for any injury sustained by reason of the unauthorized act.[8] He is, for example, liable for the damages which his client sustains as a result of an unauthorized compromise of the client's claim[9] or dismissal of his action,[10] an unauthorized confession of judgment or entry of a consent decree,[11] a wrongful submission of the cause to arbitration,[12] his releasing of an attachment without the client's consent,[13] or his allowing the vacation or opening of a judgment without authority.[14] He is liable, also, for any loss which ensues from a disobedience of his client's lawful instructions.[15]

If an attorney, without having authority to do so, enters an appearance for a party against whom suit is brought, the defendant has a remedy against such attorney,[16] even though the resultant damage is minimized by the right of the client to vacate the appearance and the proceedings thereon.[17] There is, however, no liability if the appearance proves beneficial to the party in whose behalf it was made.[18]

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[5] Jones v. Henderson, 189 Ky. 412, 225 S. W. 34, 20 A.L.R. 1471.

[6] Holland v. Sheehan, 108 Minn. 362, 122 N. W. 1, 23 L.R.A.(N.S.) 510, 17 Ann. Cas. 687.

[7] Re Sylvester, 195 Iowa, 1329, 192 N. W. 442, 30 A.L.R. 180 (contract to procure divorce); Berman v. Coakley, 243 Mass. 348, 137 N. E. 667, 26 A.L.R. 92; Irwin v. Curie, 171 N. Y. 409, 64 N. E. 161, 58 L.R.A. 830.

Annotation: 20 A.L.R. 1476, s. 26 A.L.R. 98.

One who, having been told by an attorney of a threatened criminal prosecution against him, retains the attorney to defend him and pays the attorney a large sum of money to suppress the prosecution, which the attorney retains in the execution of a conspiracy between the attorney and another to cheat the client, is entitled to equitable relief against the attorney. Berman v. Coakley, 243 Mass. 348, 137 N. E. 667, 26 A.L.R. 92.

[8] Fitch v. Scott, 3 How. (Miss.) 314, 34 Am. Dec. 86; Vooth v. McEachen, 181 N. Y. 28, 73 N. E. 488, 2 Ann. Cas. 601.

Annotation: Ann. Cas. 1917B, 13.

[9] Fitch v. Scott, 3 How. (Miss.) 314, 34 Am. Dec. 86.

Annotation: 66 A.L.R. 133; 21 Ann. Cas. 588; Ann. Cas. 1917B, 14.

[10] Cornell v. Edsen, 78 Wash. 662, 139 P. 602, 51 L.R.A.(N.S.) 279.

Annotation: Ann. Cas. 1915B, 833.

[11] Denton v. Noyes, 6 Johns. (N. Y.) 296, 5 Am. Dec. 237.

Annotation: 46 L.R.A.(N.S.) 754; Ann. Cas. 1917B, 25.

[12] Bank of Glade Spring v. McEwen, 160 N. C. 414, 76 S. E. 222, Ann. Cas. 1914C, 542.

[13] Annotation: Ann. Cas. 1917B, 27.

[14] Annotation: Ann. Cas. 1917B, 29.

[15] Wilcox v. Plummer, 4 Pet. (U. S.) 172, 7 L. ed. 821; Caltrider v. Weant, 147 Md. 338, 128 A. 72, citing R. C. L.; Gilbert v. Williams, 8 Mass. 51, 5 Am. Dec. 77; Cox v. Livingston, 2 Watts & S. (Pa.) 103, 37 Am. Dec. 486; McCoy v. Hydrick, 143 S. C. 135, 141 S. E. 174, 56 A.L.R. 953; Cornell v. Edsen, 78 Wash. 662, 139 P. 602, 51 L.R.A. (N.S.) 279.

Annotation: 56 A.L.R. 962; 22 L. ed. 482; Ann. Cas. 1917B, 13.

An attorney for a plaintiff in execution who purchases property sold under execution contrary to the plaintiff's orders is responsible for the amount of the judgment under which the property was sold. Fisher v. Knox, 13 Pa. 622, 53 Am. Dec. 503.

[16] Woodward v. Sonnesyn, 162 Minn. 397, 203 N. W. 221 (writ of certiorari denied in 269 U. S. 567, 70 L. ed. 415, 46 S. Ct. 25) citing R. C. L.; Denton v. Noyes, 6 Johns. (N. Y.) 298, 5 Am. Dec. 237.

[17] Robb v. Vos, 155 U. S. 13, 39 L. ed. 52, 15 S. Ct. 4; Shelton v. Tiffin, 6 How. (U. S.) 163, 12 L. ed. 387; Tally v. Reynolds, 1 Ark. 99, 31 Am. Dec. 737; Harshey v. Blackmarr, 20 Iowa, 161, 89 Am. Dec. 520; Piggott v. Addicks, 3 G. Greene (Iowa) 427, 56 Am. Dec. 547; Marvel v. Manouvrier, 14

§ 123. Fraud, Unfair Dealing, or Unlawful Exactions.—An attorney is liable for any loss sustained by his client in consequence of such attorney's fraud or unfair dealing.[19] Thus, an attorney who makes fraudulent misstatements of fact or law to his client[20] or who fails to impart to his client information as to matters of fact[1] is liable for the resulting damages which his client sustains. If an attorney uses his position to exact from his client an exorbitant fee which is larger than the law allows in such a case, such sum may, if paid by the client, no matter how voluntarily, be recovered back as money received for his use.[2]

§ 124. Negligence in Performance of Duties.—An attorney must possess the skill and knowledge possessed by other members of the profession and must execute the business intrusted to his professional management with a reasonable degree of care, skill, and despatch.[3] If an attorney fails to possess such skill and knowledge or to exercise such care, skill, and despatch, and actual loss to his client results therefrom,[4] a cause of action arises in favor of the client against the attorney for the damages sustained.[5] It is, of course, essential that the relation of attorney and client exist between the attorney and the person seeking to hold him liable for such resultant loss.[6]

La. Ann. 3, 74 Am. Dec. 424; Fowler v. Lee, 10 Gill & J. (Md.) 358, 32 Am. Dec. 172; Bunton v. Lyford, 37 N. H. 512, 75 Am. Dec. 144; Ferguson v. Crawford, 70 N. Y. 253, 26 Am. Rep. 589; American Ins. Co. v. Oakley, 9 Paige (N. Y.) 496, 38 Am. Dec. 561; Denton v. Noyes, 6 Johns. (N. Y.) 296, 5 Am. Dec. 237; Abbott v. Dutton, 44 Vt. 546, 8 Am. Rep. 394.

Annotation: Ann. Cas. 1917B, 14.

[18] Marshall v. McDermitt, 79 W. Va. 245, 90 S. E. 830, L.R.A.1917C, 883.

[19] Robertson v. Chapman, 152 U. S. 673, 38 L. ed. 592, 14 S. Ct. 741.

Annotation: Ann. Cas. 1917B, 12.

[20] Annotation: Ann. Cas. 1917B, 12.

[1] Baker v. Humphrey, 101 U. S. 494, 25 L. ed. 1065; L'Amoureux v. Vandenburgh, 7 Paige (N. Y.) 316, 32 Am. Dec. 635; Holland v. Brown (Tex. Civ. App.) 66 S. W. (2d) 1095, citing R. C. L.

Annotation: Ann. Cas. 1917B, 12.

[2] Smart v. White, 73 Me. 332, 40 Am. Rep. 356; Hall v. Kimmer, 61 Mich. 269, 28 N. W. 96, 1 Am. St. Rep. 575.

Annotation: Ann. Cas. 1918C, 868.

[3] See supra, § 47.

[4] Maryland Casualty Co. v. Price (C. C. A. 4th) 231 F. 397, Ann. Cas. 1917B, 50; Fitch v. Scott, 3 How. (Miss.) 314, 34 Am. Dec. 86.

Annotation: 22 L. ed. 482; Ann. Cas. 1917B, 55.

[5] National Sav. Bank v. Ward, 100 U. S. 195, 25 L. ed. 621; Marsh v. Whitmore, 21 Wall. (U. S.) 178, 22 L. ed. 482; Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134; Pennington v. Yell, 11 Ark. 212, 52 Am. Dec. 262; Cox v. Sullivan, 7 Ga. 144, 50 Am. Dec. 386; Citizens Loan Fund & Sav. Asso. v. Friedley, 123 Ind. 143, 23 N. E. 1075, 7 L.R.A. 69, 18 Am. St. Rep. 320; Smallwood v. Norton, 20 Me. 83, 37 Am. Dec. 39; Caltrider v. Weant, 147 Md. 338, 128 A. 72, citing R. C. L.; McLellan v. Fuller, 220 Mass. 494, 108 N. E. 180, Ann. Cas. 1917B, 1; Gilbert v. Williams, 8 Mass. 51, 5 Am. Dec. 77; Fitch v. Scott, 3 How. (Miss.) 314, 34 Am. Dec. 86; Re Miller, 55 Nev. 444, 38 P. (2d) 972, citing R. C. L.; McCullough v. Sullivan, 102 N. J. L. 381, 132 A. 102, 43 A.L.R. 928; Mitchell v. Bell, 1 N. C. pt. 2, p. 157 (Conference, 17) 2 Am. Dec. 627; Lawall v. Groman, 180 Pa. 532, 37 A. 98, 57 Am. St. Rep. 662; Watson v. Muirhead, 57 Pa. 161, 98 Am. Dec. 213; Cox v. Livingston, 2 Watts & S. (Pa.) 103, 37 Am. Dec. 486; Lynch v. Com. 16 Serg. & R. (Pa.) 368, 16 Am. Dec. 582; Hill v. Mynatt (Tenn.) 59 S. W. 163, 52 L.R.A. 883; Cotton v. Sharpstein, 14 Wis. 226, 80 Am. Dec. 774.

Purves v. Landell, 12 Clark & F. 91, 8 Eng. Reprint, 1332, 18 Eng. Rul. Cas. 630; Godefroy v. Dalton, 6 Bing. 460, 130 Eng. Reprint, 1357, Eng. Rul. Cas. 656; Re Fitzpatrick, 54 Ont. L. Rep. 3, 13 B. R. C. 146, [1924] 1 D. L. R. 981.

Annotation: 22 L. ed. 482; 52 L.R.A. 883; Ann. Cas. 1917B, 3; 18 Eng. Rul. Cas. 643; 24 Eng. Rul. Cas. 663.

An attorney who undertakes the management of business committed to his charge thereby impliedly represents that he possesses the skill, and will exhibit the diligence, ordinarily possessed and employed by well-informed members of his profession in the conduct of business such as he has undertaken. Citizens Loan Fund & Sav. Asso. v. Friedley, 123 Ind. 143, 23 N. E. 1075, 7 L.R.A. 669, 18 Am. St. Rep. 320.

[6] National Sav. Bank v. Ward, 100 U. S. 195, 25 L. ed. 621; Maryland Casualty Co. v. Price (C. C. A. 4th) 231 F. 397, Ann. Cas. 1917B, 50; Buckley v. Gray, 110 Cal. 339, 42 P. 900, 31 L.R.A. 862, 52 Am. St. Rep. 88; Lawall v. Gorman, 180 Pa. 532, 37 A. 98, 57 Am. St. Rep. 662.

The liability of the attorney is not affected, however, by the client's diligence or the want of it, unless stipulated for by special contract.[7]

The attorney may show as a defense a want of sufficient time to perform his duty, lack of proper information from the client, or authority in the matter given by the client.[8] Moreover, the client may release his attorney from all liability.[9] However, champerty will not be a defense to an action against an attorney for negligence or want of skill.[10] It has also been held that an attorney cannot escape the consequences of his negligence by showing that he consulted a distinguished attorney as to the course to pursue, and that in such person's opinion an arrangement thereafter made by him was the best thing he could do for his client.[11]

The liability of an attorney for the consequences of his want of reasonable care or skill extends to matters not in litigation,[12] such as the drafting of legal documents,[13] the investigation of titles,[14] etc. Thus, an attorney who agrees to invest funds for his client must use reasonable care, diligence, and skill in seeing that the investments are safely and prudently made and that the client is amply secured; he is responsible for any loss occasioned by his failure to do so.[15] So, it is generally held that an attorney is liable for any loss sustained by a minor where the loss is due to unskilfulness or negligence of the attorney in the management of the minor's affairs.[16]

§ 125. —**What Amounts to Negligence.**—The courts have encountered considerable difficulty in the determination of what amounts to such negligence as to render the attorney responsible to his client for resultant loss. As to this, no general rule can be laid down; each case must depend upon the particular facts thereof.[17] Generally speaking, however, attorneys are held to the same rule of liability for want of professional skill and diligence in practice and for erroneous or negligent advice to those who employ them as are physicians, surgeons, and others who hold themselves out to the world as possessing skill and qualifications in their respective trades and professions;[18] they are liable for the want of such skill, care, and diligence as men of the legal profession commonly possess and exercise in matters of professional employment.[19] There can be no doubt that for any misfeasance or unreasonable neglect of an attorney whereby his client suffers a loss, an action may be supported and damages recovered to the amount of such loss.[20]

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[7] Cox v. Sullivan, 7 Ga. 144, 50 Am. Dec. 386.

[8] Annotation: Ann. Cas. 1917B, 41.

[9] Annotation: Ann. Cas. 1917B, 42.

[10] Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134.

Annotation: Ann. Cas. 1917B, 42.

[11] Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134.

[12] National Sav. Bank v. Ward, 100 U. S. 195, 25 L. ed. 621.

[13] See infra, § 133.

[14] See infra, § 132.

[15] Hyman v. Parkerson, 140 La. 249, 72 So. 953, L.R.A.1917B, 694; Lawall v. Groman, 180 Pa. 532, 37 A. 98, 57 Am. St. Rep. 662.

Annotation: L.R.A. 1917B, 694; Ann. Cas. 1917B, 21.

[16] Wood v. Claiborne, 82 Ark. 514, 102 S. W. 219, 11 L.R.A.(N.S.) 913, 118 Am. St. Rep. 89; Re Woods, 158 Tenn. 383, 13 S. W. (2d) 800, 62 A.L.R. 904.

Annotation: 62 A.L.R. 910.

[17] Annotation: 34 Am. Dec. 89, 90.

[18] Slade v. Harris, 105 Conn. 436, 135 A. 570, citing R. C. L.; Citizens Loan Fund & Sav. Asso. v. Friedley, 123 Ind. 143, 23 N. E. 1075, 7 L.R.A. 669, 18 Am. St. Rep. 320; McCullough v. Sullivan, 102 N. J. L. 381, 132 A. 102, 43 A.L.R. 928.

Annotation: Ann. Cas. 1917B, 4.

[19] National Sav. Bank v. Ward, 100 U. S. 195, 25 L. ed. 621; Hampel-Lawson Mercantile Co. v. Poe, 169 Ark. 840, 277 S. W. 29, citing R. C. L.; McCullough v. Sullivan, 102 N. J. L. 381, 132 A. 102, 43 A.L.R. 928; Re Woods, 158 Tenn. 383, 13 S. W. (2d) 800, 62 A.L.R. 904.

The attorney is liable for his failure to perform his professional duty, whether or not such failure was intentional or fraudulent. Cornell v. Edsen, 78 Wash. 662, 139 P. 602, 51 L.R.A.(N.S.) 279.

[20] Gilbert v. Williams, 8 Mass. 51, 5 Am. Dec. 77; Fitch v. Scott, 3 How. (Miss.) 314, 34 Am. Dec. 86.

An attorney is not, on the other hand, bound to exercise extraordinary diligence, but only a reasonable degree of care and skill, having reference to the character of the business he undertakes to do.[1] He is not answerable for every error or mistake,[2] and will be protected as long as he acts honestly and in good faith to the best of his skill and knowledge, or with at least reasonable skill and learning and an ordinary degree of attention or care.[3]

While some law writers and some adjudged cases state that an attorney is liable to his client for "gross negligence" or "gross ignorance" in the performance of his professional duties only,[4] yet it would appear that even when such term is used, it merely means the want or absence of reasonable care, skill, and knowledge.[5]

§ 126. —**Errors of Judgment and Mistakes of Law.**—It is well settled that an attorney who acts in good faith and in an honest belief that his advice and acts are well founded and in the just interests of his client is not answerable for a mere error of judgment[6] or for a mistake in a point of law which has not been settled by the court of last resort and on which reasonable doubt may be entertained by well-informed lawyers.[7] He is not, in the absence of an express agreement, an insurer or guarantor of the soundness of his opinions, of the successful outcome of the litigation which he is employed to conduct, or of the validity of an instrument that he is engaged to draft.[8] Under the rules stated, an attorney cannot be held liable for an error in judgment on points of new occurrence or of nice or doubtful construction,[9] and he clearly cannot be charged with negligence for accepting as a correct exposition of the law a decision of the highest court of the state.[10]

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[1] Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134; Hampel-Lawson Mercantile Co. v. Poe, 169 Ark. 840, 277 S. W. 29, citing R. C. L.; Pennington v. Yell, 11 Ark. 212, 52 Am. Dec. 262; Cox v. Sullivan, 7 Ga. 144, 50 Am. Dec. 386.

[2] See infra, § 126.

[3] National Sav. Bank v. Ward, 100 U. S. 195, 25 L. ed. 621; Gilbert v. Williams, 8 Mass. 51, 5 Am. Dec. 77; Babbitt v. Bumpus, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585; Fitch v. Scott, 3 How. (Miss.) 314, 34 Am. Dec. 86; Lynch v. Com. 16 Serg. & R. (Pa.) 368, 16 Am. Dec. 582; Hill v. Mynatt (Tenn.) 59 S. W. 163, 52 L.R.A. 883.

Annotation: 52 L.R.A. 883; Ann. Cas. 1917B, 7.

[4] Pennington v. Yell, 11 Ark. 212, 52 Am. Dec. 262; Babbitt v. Bumpus, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585.

Godefroy v. Dalton, 6 Bing. 460, 130 Eng. Reprint, 1357, 24 Eng. Rul. Cas. 656.

Annotation: Ann. Cas. 1917B, 4; 24 Eng. Rul. Cas. 663.

[5] Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134.

Purves v. Landell, 12 Clark & F. 91, 8 Eng. Reprint, 1332, 18 Eng. Rul. Cas. 630.

Annotation: Ann. Cas. 1917B, 5; 18 Eng. Rul. Cas. 643.

[6] National Sav. Bank v. Ward, 100 U. S. 195, 25 L. ed. 621; Re Watts, 190 U. S. 1, 47 L. ed. 933, 23 S. Ct. 718; Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134; Gilbert v. Williams, 8 Mass. 51, 5 Am. Dec. 77; Fitch v. Scott, 3 How. (Miss.) 314, 34 Am. Dec. 86; McCullough v. Sullivan, 102 N. J. L. 381, 132 A. 102, 43 A.L.R. 928; Watson v. Muirhead, 57 Pa. 161, 98 Am. Dec. 213; Hill v. Mynatt (Tenn.) 59 S. W. 163, 52 L.R.A. 883.

Annotation: 22 L. ed. 484; 52 L.R.A. 883.

Am. Law Inst. Restatement, Agency, § 379, p. 840.

[7] Citizens Loan Fund & Sav. Asso. v. Friedley, 123 Ind. 143, 23 N. E. 1075, 7 L.R.A. 669, 18 Am. St. Rep. 320; Babbitt v. Bumpus, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585; Watson v. Muirhead, 57 Pa. 161, 98 Am. Dec. 213; Hill v. Mynatt (Tenn.) 59 S. W. 163, 52 L.R.A. 883.

Annotation: Ann. Cas. 1917B, 9.

[8] National Sav. Bank v. Ward, 100 U. S. 195, 25 L. ed. 621; Cox v. Sullivan, 7 Ga. 144, 50 Am. Dec. 386; Citizens Loan Fund & Sav. Asso. v. Friedley, 123 Ind. 143, 23 N. E. 1075, 7 L.R.A. 669, 18 Am. St. Rep. 320; Gilbert v. Williams, 8 Mass. 51, 5 Am. Dec. 77; Babbitt v. Bumpus, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585; Fitch v. Scott, 3 How. (Miss.) 314, 34 Am. Dec. 86; McCullough v. Sullivan, 102 N. J. L. 381, 132 A. 102, 43 A.L.R. 928; Watson v. Muirhead, 57 Pa. 161, 98 Am. Dec. 213; Lynch v. Com. 16 Serg. & R. 368, 16 Am. Dec. 582.

Annotation: Ann. Cas. 1917B, 6.

[9] Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134; Citizens Loan Fund & Sav. Asso. v. Friedley, 123 Ind. 143, 23 N. E. 1075, 7 L.R.A. 669, 18 Am. St. Rep. 320; Fitch v. Scott, 3 How. (Miss.) 314, 34 Am. Dec. 86.

Fletcher & Son v. Jubb [1920] 1 K. B. (Eng.) 275, 10 B. R. C. 1—C. A.

Annotation: 52 L.R.A. 883.

In the case of construction of statutes, an error of the attorney will not render him liable where the act in question is difficult or doubtful. Hill v. Mynatt (Tenn.) 59 S. W. 163, 52 L.R.A. 883.

§ 127. —Ignorance of the Law.—The attorney undertakes, in the practice of his profession, that he is possessed of that knowledge and contracts to use that reasonable knowledge in the transaction of business for his client which lawyers of ordinary ability and skill possess and exercise, and for any loss resulting from the lack of this measure of professional attainment he is liable to his client.[11] He is usually held to be liable for the consequences of his ignorance or nonobservance of the rules of the courts in which he practices[12] or for his ignorance of the statutes and published decisions of his own state.[13] However, he is not liable for error due to his ignorance of the laws of a foreign jurisdiction.[14]

§ 128. Negligence in Preparing and Conducting Litigation.—An attorney who undertakes to conduct a litigation impliedly contracts to exercise due care, skill, and knowledge of the law in the conduct of such litigation, and renders himself liable for any loss or injury which his client suffers in consequence of his failure to do so.[15] He is liable for any loss or injury sustained in consequence of his failure to prepare, file, and serve pleadings essential for a proper presentation of his client's cause,[16] his negligence or want of skill in preparing a necessary affidavit,[17] his want of care in the preparation of the case for trial,[18] or his failure to conduct the trial with that reasonable degree of care, skill, diligence, and learning expected of the average lawyer.[19] He is liable also for mistakes in pleading which indicate a lack on his part of the attainments and diligence commonly possessed and exercised by legal practitioners of ordinary skill and capacity, although he does not guarantee the legal sufficiency of every pleading which he prepares,[20] nor is he answerable for a mistake or error of judgment in the conduct of a case.[1]

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[10] Marsh v. Whitmore, 21 Wall. (U. S.) 178, 22 L. ed. 482; Citizens Loan Fund & Sav. Asso. v. Friedley, 123 Ind. 143, 23 N. E. 1075, 7 L.R.A. 669, 18 Am. St. Rep. 320.
Annotation: Ann. Cas. 1917B, 10.

[11] National Sav. Bank v. Ward, 100 U. S. 195, 25 L. ed. 621; Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134; Citizens Loan Fund & Sav. Asso. v. Friedley, 123 Ind. 145, 23 N. E. 1075, 7 L.R.A. 669, 18 Am. St. Rep. 320; McCullough v. Sullivan, 102 N. J. L. 381, 132 A. 102, 43 A.L.R. 928; Hill v. Mynatt (Tenn.) 59 S. W. 163, 52 L.R.A. 883.
Annotation: Ann. Cas. 1917B, 19.

An attorney is liable to his client if the latter's interests suffer on account of the attorney's failure to understand and apply those rules and principles of law that are well established and clearly defined in the elementary books or which have been declared in adjudged cases that have been duly reported and published a sufficient length of time to have become known to those who exercise reasonable diligence in keeping pace with the literature of the profession. Citizens Loan Fund & Sav. Asso. v. Friedley, 123 Ind. 143, 23 N. E. 1075, 7 L.R.A. 669.

[12] Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134; Citizens Loan Fund & Sav. Asso. v. Friedley, 123 Ind. 143, 23 N. E. 1075, 7 L.R.A. 669, 18 Am. St. Rep. 320; Hill v. Mynatt (Tenn.) 59 S. W. 163, 52 L.R.A. 883.
Fletcher & Son v. Jubb [1920] 1 K. B. (Eng.) 275, 10 B. R. C. 1—C. A.
Annotation: 52 L.R.A. 883.

[13] Citizens Loan Fund & Sav. Asso. v. Friedley, 123 Ind. 143, 23 N. E. 1075, 7 L.R.A. 669, 18 Am. St. Rep. 320.

[14] Annotation: Ann. Cas. 1917B, 11.

[15] Wilcox v. Plummer, 4 Pet. (U. S.) 172, 7 L. ed. 821; Re Dahl, 159 Minn. 481, 199 N. W. 429, 43 A.L.R. 52.
Fletcher & Son v. Jubb [1920] 1 K. B. (Eng.) 275, 10 B. R. C. 1—C. A.
Annotation: Ann. Cas. 1917B, 24.

[16] Annotation: Ann. Cas. 1917B, 25.

[17] Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134.

[18] Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134; Citizens Loan, Fund & Sav. Asso. v. Friedley, 123 Ind. 143, 23 N. E. 1075, 7 L.R.A. 669, 18 Am. St. Rep. 320.
Fletcher & Son v. Jubb [1920] 1 K. B. (Eng.) 275, 10 B. R. C. 1—C. A.

[19] McLellan v. Fuller, 220 Mass. 494, 108 N. E. 180, Ann. Cas. 1917B, 1.
Fletcher & Son v. Jubb [1920] 1 K. B. (Eng.) 275, 10 B. R. C. 1—C. A.
Annotation: Ann. Cas. 1917B, 28.

[20] Annotation: 52 L.R.A. 885, 886; Ann. Cas. 1917B, 26.

[1] McCullough v. Sullivan, 102 N. J. L. 381, 132 A. 102, 43 A.L.R. 928.
Annotation: Ann. Cas. 1917B, 28.

§ 129. Negligence in Enforcing Judgment.—An attorney may be held liable to his client for negligence in the performance of his duty of enforcing the judgment recovered for his client;[2] for example, he may be held liable for his failure to take the necessary steps for the due entry and enrolment of a judgment to which his client is entitled,[3] or for his failure to proceed for the enforcement of the judgment.[4] The attorney, however, will always be justified in ceasing to proceed with his client's cause, unless specially instructed to go on, whenever he is influenced to do this by a prudent regard for the interest of his client.[5] As a general rule he will not be held liable for failure to take proceedings for the review of a cause unless he has been directed, and has agreed, to do so;[6] he will not be held liable either for failure to take a bill of exceptions, or for committing an error of judgment in determining whether he should yield to, or appeal from, a decision of the court.[7]

§ 130. Negligence in Collection of Claims.—An attorney receiving a claim for collection must exercise the same degree of care and skill as is required of him in the performance of his other professional duties, and a want of such care, skill, and diligence will be deemed negligence and will render him liable to his client for loss or injury resulting therefrom.[8] Thus, he is liable to his client for loss consequent on his neglect or delay in the institution of suit for collection of a claim intrusted to him,[9] as where he fails or neglects to bring suit within the time limited by statute and thus the right of action is barred.[10] Again, if he is intrusted either to bring suit or to secure the debt immediately by attaching property of the debtor, but fails to do either, in consequence of which a loss ensues, the attorney is liable, though he acted under an honest belief that delay would best subserve the client's interest, or that a suit would be unavailing.[11] He does not, however, guarantee or insure the collection of claims placed in his hands, and if he acts in good faith, to the best of his skill, and with a reasonable degree of care and diligence, he is not responsible for failure to collect.[12] Nor is an attorney liable for failure to protest a promissory note, left with him for collection, without proof of special instructions so to do, or that such was the usual course of business, when both maker and indorser live at a distance from his place of business.[13]

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[2] **An attorney should defend against replevin process to recover goods** seized on an attachment sued out by the attorney on judgment obtained by him; and where the plaintiff in replevin suffers a nonsuit, the attorney for the attachment creditor should move for judgment for a return of property replevied, and for failure to do so, in consequence of which the claim is lost, he is liable for negligence, and he cannot show by way of defense that the plaintiff in replevin was the real owner of the property. Smallwod v. Norton, 20 Me. 83, 37 Am. Dec. 39.

[3] Annotation: Ann. Cas. 1917B, 29.

[4] Pennington v. Yell, 11 Ark. 212, 52 Am. Dec. 262.

Annotation: Ann. Cas. 1917B, 30.

[5] Pennington v. Yell, 11 Ark. 212, 52 Am. Dec. 262.

[6] Annotation: Ann. Cas. 1917B, 31.

[7] Annotation: 52 L.R.A. 886.

[8] Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134; Pennington v. Yell, 11 Ark. 212, 52 Am. Dec. 262; Cox v. Sullivan, 7 Ga. 144, 50 Am. Dec. 386; Smallwood v. Norton, 20 Me. 83, 37 Am. Dec. 39; Fitch v. Scott, 3 How. (Miss.) 314, 34 Am. Dec. 86; Cox v. Livingston, 2 Watts & S. (Pa.) 103, 37 Am. Dec. 486.

Annotation: Ann. Cas. 1917B, 32.

An attorney who accepts depreciated money is liable to his client for the loss sustained. Annotation: Ann. Cas. 1917B, 33.

The receipt by the client of a part of the proceeds of collection when more was due is not a ratification of the attorney's acts in the collection, so as to become an accord and satisfaction, or an estoppel against the client to sue for the attorney's negligence in the matter. Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134.

[9] Fitch v. Scott, 3 How. (Miss.) 314, 34 Am. Dec. 86.

The reasonableness of the time within which to sue is a question for the jury. Annotation: 34 Am. Dec. 91.

The presentation of claims against the estate of deceased debtors must be made by an attorney with reasonable diligence, and if, on account of a want of prosecution or unreasonable delay, the time for distribution passes without the recognition of the claim, and it is thereby lost, the attorney will be liable. It is held, however, that the failure of the attorney to file a claim against the estate of an insolvent will not be negligence rendering him liable where it appears that the debtor was living when the claim was put into the attorney's hands, and he is not shown to have had knowledge of the debtor's subsequent death. Annotation: 34 Am. Dec. 92.

[10] Wilcox v. Plummer, 4 Pet. (U. S.) 172, 7 L. ed. 821.

Fletcher & Son v. Jubb [1920] 1 K. B. (Eng.) 275, 10 B. R. C. 1—C. A.

Annotation: 20 Ann. Cas. 398; Ann. Cas. 1917B, 24; 10 B. R. C. 9.

[11] Gilbert v. Williams, 8 Mass. 51, 5 Am. Dec. 77; Cox v. Livingston, 2 Watts & S. (Pa.) 103, 37 Am. Dec. 486.

§ 131. Failure to Remit; Loss or Conversion of Money Collected.—An attorney impliedly agrees to pay over promptly money collected for a client,[14] and if he fails to turn over the same after a demand has been made for it or directions given for its remittance, he is liable to an action.[15]

In regard to money which an attorney collects for his client, the attorney, so long as he chooses to treat and preserve the fund as a trust fund, occupies the relation of a trustee, and the circumstances under which he will be liable for its loss are precisely those which govern in the case of any other trustee.[16] If it becomes necessary or proper to deposit money in a bank and he acts in this regard as a prudent man would act in regard to his own money, depositing the fund in such way as to indicate its character, he is excused if a loss occurs;[17] he should not, however, mingle his client's money with his own,[18] and if he deposits the money in his own name without any indication of the trust character, he becomes liable for any loss resulting to the client upon the subsequent failure of the bank.[19]

§ 132. Negligence or Mistake in Investigating, Abstracting, or Conveying Title.—An attorney employed to examine the title to real property must exercise reasonable care and skill in the matter, and his failure to do so is negligence for which he will be liable to his client in damages for the loss occasioned,[20] but he assumes no responsibility for losses of his client not occasioned by his negligence in performing his undertaking.[1] In this connection it should be noted that while the liability of an abstracter is generally limited to those who employ him,[2] if the attorney for a mortgagor who pays the fees undertakes, on behalf of the mortgagee, to see that the mortgage is a first lien on the property, he is bound to perform that duty with ordinary and reasonable skill and care in his profession, and is liable for negligence in that respect.[3] The attorney is not, however, a guarantor in examining titles; he merely undertakes to bring reasonable skill and diligence to the discharge of his duty, and he is not liable for errors of judgment or for mistakes on doubtful questions of law.[4]

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[12] Marsh v. Whitmore, 21 Wall. (U. S.) 178, 22 L. ed. 482; Odlin v. Stetson, 17 Me. 244, 35 Am. Dec. 248.

Annotation: Ann. Cas. 1917B, 33.

[13] Odlin v. Stetson, 17 Me. 244, 35 Am. Dec. 248.

[14] Goodyear Metallic Rubber Co. v. Baker (Goodyear Metallic Rubber Shoe Co. v. Carpenter) 81 Vt. 39, 69 A. 160, 17 L.R.A. (N.S.) 667, 15 Ann. Cas. 1207.

[15] Re Dahl, 159 Minn. 481, 199 N. W. 429, 43 A.L.R. 52; State ex rel. Sorensen v. Goldman, 127 Neb. 340, 255 N. W. 32, citing R. C. L.; Cotton v. Sharpstein, 14 Wis. 226, 80 Am. Dec. 774.

Annotation: 20 L.R.A.(N.S.) 36; Ann. Cas. 1917B, 36.

A claim against an attorney for money collected by him for a client is "a debt created while acting in a fiduciary character," within the meaning of the bankruptcy act, and is not barred by a discharge in bankruptcy. Heffren v. Jayne, 39 Ind. 463, 13 Am. Rep. 281; Flanagan v. Pearson, 42 Tex. 1, 19 Am. Rep. 40.

[16] Naltner v. Dolan, 108 Ind. 500, 8 N. E. 289, 58 Am. Rep. 61.

Annotation: 96 A.L.R. 801; Ann. Cas. 1917B, 34.

[17] Peirce v. Palmer, 31 R. I. 432, 77 A. 201, Ann. Cas. 1912B, 181.

Annotation: Ann. Cas. 1917B, 35.

[18] Annotation: Ann. Cas. 1917B, 35.

[19] Naltner v. Dolan, 108 Ind. 500, 8 N. E. 289, 58 Am. Rep. 61.

[20] National Sav. Bank v. Ward, 100 U. S. 195, 25 L. ed. 621; Wittenbrock v. Parker, 102 Cal. 93, 36 P. 374, 24 L.R.A. 197, 41 Am. St. Rep. 172; Trimboli v. Kinkel, 226 N. Y. 147, 123 N. E. 205, 5 A.L.R. 1385; Lawall v. Groman, 180 Pa. 532, 37 A. 98, 57 Am. St. Rep. 662.

Annotation: 5 A.L.R. 1389; Ann. Cas. 1917B, 20.

It is negligence on the part of an attorney, in preparing an abstract of title to real estate, to fail to apply the settled rules of law which should be known to all conveyancers. Trimboli v. Kinkel, 226 N. Y. 147, 123 N. E. 205, 5 A.L.R. 1385.

If an attorney for a mortgagee is guilty of negligence in examining the title to ascertain that the mortgage is a first lien on the property, as he has agreed to do, the mortgagee, without waiting for the mortgage to be foreclosed, is entitled to recover at once from such attorney the difference between the value of the security contracted for and that actually received. The cause of action is the breach of duty, and not the damages, which are only an incident. Lawall v. Groman, 180 Pa. 532, 37 A. 98, 57 Am. St. Rep. 662.

Generally, as to liability of abstracter, see ABSTRACTS OF TITLE, Vol. 1, p. 165, § 17.

[1] Annotation: Ann. Cas. 1917B, 22.

§ 133. **Drafting, Preserving, and Recording Legal Documents.**—An attorney employed to prepare a written instrument is responsible for any loss sustained by his client as the result of his negligence or carelessness or his failure to observe well-established principles of law,[5] although he is not liable for a mere error in judgment in drafting instruments.[6] The same rule exists as to negligence of the attorney in the keeping of papers with which he is intrusted,[7] and an attorney who agrees to have certain documents recorded is responsible for loss sustained by his client through his failure to do so.[8]

A client who relies upon his attorney to see that a document given to him by a third party contains all the stipulations of the agreement may recover from the attorney for the loss sustained by his negligence in receiving an instrument from which one of the stipulations has been omitted.[9]

§ 134. **Liability for Acts of Partner, Assistant, Clerk, or Agent.**—A law firm is responsible to a client who has retained it for the negligent or fraudulent acts of its individual members when acting within the scope of their authority.[10] Thus, each member of the firm, irrespective of his personal participation in the transaction,[11] as well as the law firm itself, is liable to a client for money collected in the course of the firm's business and misappropriated by a member of the firm. So, where a member of such a firm represents to a client that the money upon a claim intrusted to the firm for collection has been collected, though in fact it has not, it has been held that the firm will be liable in an action by the client to recover the money.[12] An attorney is also liable for the acts of his partner in excess of the authority given by the client.[13] However, a firm of lawyers is not liable for the acts of one of its members outside the ordinary course of its business.[14]

Attorneys are also liable for the negligence of assistant attorneys employed by them [15] and for the negligence or misconduct of those to whom claims for collection are given,[16] or of clerks or other persons in charge of their offices

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[2] See ABSTRACTS OF TITLE, Vol. 1, p. 168, § 23.

[3] Lawall v. Groman, 180 Pa. 532, 37 A. 98, 57 Am. St. Rep. 662.

[4] Citizens Loan Fund & Sav. Asso. v. Friedley, 123 Ind. 143, 23 N. E. 1075, 7 L.R.A. 669, 18 Am. St. Rep. 320; Watson v. Muirhead, 57 Pa. 161, 98 Am. Dec. 213.

[5] Annotation: 43 A.L.R. 932; 52 L.R.A. 891; Ann. Cas. 1917B, 22.

[6] McCullough v. Sullivan, 102 N. J. L. 381, 132 A. 102, 43 A.L.R. 928.

[7] Annotation: Ann Cas. 1917B, 24.

[8] Annotation: Ann. Cas. 1917B, 23.

[9] Finkbeiner v. Yeo, 26 Manitoba L. R. 22, 9 B. R. C. 460, 25 D. L. R. 673.

[10] Annotation: 22 L. ed. 484; Ann. Cas. 1917B, 16; 24 Eng. Rul. Cas. 667.

[11] Smyth v. Harvie, 31 Ill. 62, 83 Am. Dec. 202.

Annotation: Ann. Cas. 1917B, 17.

[12] Annotation: 19 Eng. Rul. Cas. 459.

[13] Annotation: Ann. Cas. 1917B, 16.

[14] Annotation: Ann. Cas. 1917B, 17.

[15] Cummins v. Heald, 24 Kan. 600, 36 Am. Rep. 264.

Annotation: 22 L. ed. 484.

[16] Cummins v. Heald, 24 Kan. 600, 36 Am. Rep. 264; Dickson v. Wright, 52 Miss. 585, 24 Am. Rep. 677; Krause v. Dorrance, 10 Pa. 462, 51 Am. Dec. 496; Cox v. Livingston, 2 Watts & S. (Pa.) 103, 37 Am. Dec. 486.

Annotation: 61 A.L.R. 283; 22 L. ed. 484; 50 Am. St. Rep. 115.

Where a claim is intrusted to an attorney, a receipt by him "for collection" imports an undertaking by the attorney him-

or business, in so far as such persons act within the apparent scope of their authority.[17]

B. Enforcement by Action

§ 135. Form of Remedy.—In the case of negligence of an attorney resulting in loss or injury, the client may maintain an action of assumpsit for breach of the implied contract to use reasonable care and diligence,[18] or sue in case for such negligence,[19] or employ the Code substitutes for these remedies.[20] The client's cause of action is based on his attorney's breach of duty, and not on the consequential damages subsequently resulting.[21] A bill in equity cannot be based on the attorney's negligence in the performance of a professional duty, although it may lie in the case of a fraud perpetrated by means of the fiduciary relation.[1]

The duty of an attorney to pay over to his client money collected for such client rests in contract and is usually enforced by an action at law,[2] although it seems that a bill for an accounting may be maintained against an attorney who has collected money for his client which he refuses to account for.[3] If there has been a conversion of the money, he is liable to an action of tort and to all the consequences of such an action.[4]

§ 136. Necessity of Demand.—Although it is clearly an attorney's duty to pay over money collected for his client, yet it is usually held that a demand is a condition precedent to the maintenance of an action against him for the recovery of such money.[5] However circumstances may exist which will dispense with the necessity of a demand, as where the attorney has been guilty of fraud or malpractice, or of culpable negligence in not giving notice of the receipt of the money in a reasonable time, or when he puts in a sham plea for

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self to collect, and not merely that he receives it for transmission to another for collection, for whose negligence he is not to be responsible, and the attorney so receipting is liable by its very terms for the negligence of the distant attorney who is his agent, or for the embezzlement by the latter of the proceeds of the collection. Cummins v. Heald, 24 Kan. 600, 36 Am. Rep. 264.

[17] Annotation: 22 L. ed. 484; Ann. Cas. 1917B, 18.

Attorneys are liable for frauds perpetrated upon clients by their clerks apparently acting within the scope of their authority, even though such wrongs are committed for the benefit of the clerks rather than their employers. Lloyd v. Grace, S. & Co. [1912] A. C. (Eng.) 716, 5 B. R. C. 498, Ann. Cas. 1913B, 819—H. L.

[18] Pennington v. Yell, 11 Ark. 212, 52 Am. Dec. 262; Cox v. Sullivan, 7 Ga. 144, 50 Am. Dec. 386.

Annotation: Ann. Cas. 1917B, 45.

[19] Odlin v. Stetson, 17 Me. 244, 35 Am. Dec. 248; Gilbert v. Williams, 8 Mass. 51, 5 Am. Dec. 77; Lawall v. Groman, 180 Pa. 532, 37 A. 98, 57 Am. St. Rep. 662; Watson v. Muirhead, 57 Pa. 161, 98 Am. Dec. 213.

Annotation: Ann. Cas. 1917B, 45.

[20] Annotation: Ann. Cas. 1917B, 45.

[21] Cornell v. Edsen, 78 Wash. 662, 139 P. 602, 51 L.R.A.(N.S.) 279.

Annotation: 51 L.R.A.(N.S.) 279; 126 Am. St. Rep. 950.

[1] Annotation: 5 A.L.R. 1395; Ann. Cas. 1917B, 46.

[2] Gunn v. Howell, 35 Ala. 144, 73 Am. Dec. 484; Pennington v. Yell, 11 Ark. 212, 52 Am. Dec. 262; Taylor v. Spears, 6 Ark. 381, 44 Am. Dec. 519; Krause v. Dorrance, 10 Pa. 462, 51 Am. Dec. 496; Fisher v. Knox, 13 Pa. 622, 53 Am. Dec. 503.

Annotation: Ann. Cas. 1917B, 47.

If the attorney has been permitted, because of his own false representations, to keep the money until the right to recover it has been extinguished by the statute of limitations, and then pleads the statute in an action on contract, it has been held that the complaint should be sustained for recovery of damages for the fraud, if it fairly appears that the damages were thus caused. Ott v. Hood, 152 Wis. 97, 139 N. W. 762, 44 L.R.A.(N.S.) 524. Annotation: 44 L.R.A.(N.S.) 524.

[3] Williams v. Storrs, 6 Johns. Ch. (N. Y.) 353, 10 Am. Dec. 340.

Annotation: Ann. Cas. 1917B, 47.

[4] Flanagan v. Pearson, 42 Tex. 1, 19 Am. Rep. 40; Cotton v. Sharpstein, 14 Wis. 226, 80 Am. Dec. 774.

Annotation: 20 L.R.A.(N.S.) 36; Ann. Cas. 1917B, 47.

[5] Black v. Hersch, 18 Ind. 342, 81 Am. Dec. 362; Naltner v. Dolan, 108 Ind. 500, 8 N. E. 289, 58 Am. Rep. 61; Roberts v. Armstrong, 1 Bush (Ky.) 263, 89 Am. Dec. 624; Jordan v. Westerman, 62 Mich. 170, 28 N. W. 826, 4 Am. St. Rep. 836; Douglas v. Corry, 46 Ohio St. 349, 21 N. E. 440, 15 Am. St. Rep. 604; Krause v. Dorrance, 10 Pa. 462, 51 Am. Dec. 496. And see Lillie v. Hoyt, 5 Hill (N. Y.) 395, 40 Am. Dec. 360.

delay, or when he exhibits a manifest desire to baffle the plaintiff and withhold from him his just demand.[6] Moreover, it seems that a previous demand is not necessary under a contract which is void as against public policy.[7]

In some jurisdictions, it is held that the commencement of the suit is a sufficient demand.[8]

§ 137. Applicability of Statute of Limitations.—An attorney may avail himself of the statute of limitations in an action brought against him by his client for negligence, disobedience of instructions, or failure to pay over money collected by him for the client, which accordingly will bar an action by the client to recover the money, not brought within the statutory period.[9] The relation between attorney and client does not belong to that class of express, continuing and subsisting trusts to which the statute is, in equity, held to be inapplicable.[10] The discussion of the question as to when the cause of action against an attorney accrues within the meaning of the statute of limitation will be found under another title.[11]

§ 138. Pleading.—In actions against attorneys for negligence or violation of duty, the usual rule prevails that the plaintiff must allege the facts essential to establish the breach of a duty by the defendant.[12] It is necessary to allege the existence of the relation of attorney and client,[13] but it is not generally necessary to aver the payment of a retaining fee, unless it is alleged that the attorney was retained in consideration of fees and rewards to be paid him, without stating that such payment was to be at a future time.[14] The plaintiff must allege that the attorney was negligent,[15] and show that he suffered damage by reason of the negligence alleged.[16] In jurisdictions where, in an action against an attorney for money collected by him and not paid over to his client, a demand is essential to the right of action, such demand, or circumstances that would dispense therewith, must be alleged.[17]

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[6] Krause v. Dorrance, 10 Pa. 462, 51 Am. Dec. 496. And see Douglas v. Corry, 46 Ohio St. 349, 21 N. E. 440, 15 Am. St. Rep. 604.

Annotation: 44 L.R.A.(N.S.) 524.

The rule that no cause of action arises except on demand and refusal to pay presupposes that the collector has reasonably notified his principal of the collection, and only waits opportunity to pay over the money personally, or remit the same in such manner as the principal may direct. The client need not, in order to protect his interests, keep in touch with the attorney's office in order to demand the money. He may wait for notice, relying upon the duty to give such notice within a reasonable time, and in case of failure, he may sue without further ceremony. Ott v. Hood, 152 Wis. 97, 139 N. W. 762, 44 L.R.A.(N.S.) 524, Ann. Cas. 1914C, 636.

[7] Jordan v. Westerman, 62 Mich. 170, 28 N. W. 826, 4 Am. St. Rep. 836.

[8] Douglas v. Corry, 46 Ohio St. 349, 21 N. E. 440, 15 Am. St. Rep. 604 (stating this to be the rule in Iowa).

[9] Wilcox v. Plummer, 4 Pet. (U. S.) 172, 7 L. ed. 821; Schofield v. Woolley, 98 Ga. 548, 25 S. E. 769, 58 Am. St. Rep. 315; Orozem v. McNeill, 103 Kan. 429, 175 P. 633, 3 A.L.R. 1598; Cook v. Rives, 13 Smedes & M. (Miss.) 328, 53 Am. Dec. 88; Douglas v. Corry, 46 Ohio St. 349, 21 N. E. 440, 15 Am. St. Rep. 604; Lawall v. Groman, 180 Pa. 532, 37 A. 98, 57 Am. St. Rep. 662; Rhines v. Evans, 66 Pa. 195, 5 Am. Rep. 365; McDowell v. Potter, 8 Pa. 189, 49 Am. Dec. 503; Thomas v. Ervin, 25 S. C. L. (Cheves) 22, 34 Am. Dec. 586; Ott v. Hood, 152 Wis. 97, 139 N. W. 762, 44 L.R.A.(N.S.) 524, Ann. Cas. 1914C, 636.

Annotation: 15 Am. St. Rep. 608; Ann. Cas. 1917B, 50.

[10] Schofield v. Woolley, 98 Ga. 548, 25 S. E. 769, 58 Am. St. Rep. 315 and note; Cook v. Rives, 13 Smedes & M. (Miss.) 329, 53 Am. Dec. 88; Douglas v. Corry, 46 Ohio St. 349, 21 N. E. 440, 15 Am. St. Rep. 604.

But in Browder v. Da Costa, 91 Fla. 1, 109 So. 448, citing R. C. L., it was held that the peculiar circumstances of the case lifted it out of the operation of this rule.

[11] See LIMITATION OF ACTIONS [Also 17 R. C. L. p. 766, §§ 132–134].

[12] Maryland Casualty Co. v. Price (D. C.) 231 F. 397, Ann. Cas. 1917B, 50; Priest v. Dodsworth, 235 Ill. 613, 85 N. E. 940, 14 Ann. Cas. 340; Vooth v. McEachen, 181 N. Y. 28, 73 N. E. 488, 2 Ann. Cas. 601.

Annotation: 2 Ann. Cas. 603; 14 Ann. Cas. 342.

[13] Cavillaud v. Yale, 3 Cal. 108, 58 Am. Dec. 388; Buckley v. Gray, 110 Cal. 339, 42 P. 900, 31 L.R.A. 862, 52 Am. St. Rep. 88; Lawall v. Groman, 180 Pa. 532, 37 A. 98, 57 Am. St. Rep. 662. And see Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134; Smallwood v. Norton, 20 Me. 83, 37 Am. Dec. 39.

The fact of employment is sufficiently pleaded where it is averred that the attorneys were employed generally and directed to take certain action, although there is no averment of employment in the particular case. Maryland Casualty Co. v. Price (D. C.) 231 F. 397, Ann. Cas. 1917B, 50.

[14] Cavillaud v. Yale, 3 Cal. 108, 58 Am. Dec. 388.

[15] Pennington v. Yell, 11 Ark. 212, 52 Am.

Causes of action against an attorney for neglect of duty and for fraud may be joined in one suit.[18]

§ 139. **Burden of Proof.**—In actions against attorneys for negligence or violation of duty, the usual rule prevails that the plaintiff must prove the facts essential to establish the breach of a duty by the defendant.[19] The plaintiff must prove the existence of the relation of attorney and client between himself and the defendant,[20] and the facts constituting the alleged negligence;[1] he must show that that negligence was the proximate cause of the injury of which he complains;[2] and generally he must prove the fact and extent of the damage alleged.[3] Some decisions, however, take the view that when negligence has been proved in consequence of which a client has lost his case, it is not incumbent on the client to show that but for the negligence he would have succeeded in the action; it has been held in some instances that in case of negligence and violation of duty in the collection of claims, since the measure of damages is, prima facie, the amount of the claim, the attorney has the burden of proving that the client, in point of fact, sustained no loss.[4] In an action for money collected and not paid over to the client, in jurisdictions where a demand is essential to the right of action, such demand, or circumstances that would dispense therewith, must be proved.[5]

§ 140. **Evidence.**—In actions against attorneys for negligence, want of skill, or disobedience to instructions, the ordinary rules of evidence[6] are applicable,

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Dec. 262; Priest v. Dodsworth, 235 Ill. 613, 85 N. E. 940, 14 Ann. Cas. 340.

Purves v. Landell, 12 Clark & F. 91, 8 Eng. Reprint, 1332, 18 Eng. Rul. Cas. 630.

A declaration for negligence in failing to report existing encumbrances on property, the title to which the attorney was employed to examine, must state in particular what the encumbrances were. Annotation: 5 A.L.R. 1395.

[16] Maryland Casualty Co. v. Price (D. C.) 231 F. 397, Ann. Cas. 1917B, 50; Pennington v. Yell, 11 Ark. 212, 52 Am. Dec. 262; Priest v. Dodsworth, 235 Ill. 613, 85 N. E. 940, 14 Ann. Cas. 340; Vooth v. McEachen, 181 N. Y. 28, 73 N. E. 488, 2 Ann. Cas. 601.

[17] Black v. Hersch, 18 Ind. 342, 81 Am. Dec. 362.

[18] Annotation: 5 A.L.R. 1395.

[19] Priest v. Dodsworth, 235 Ill. 613, 85 N. E. 940, 14 Ann. Cas. 340; Vooth v. McEachen, 181 N. Y. 28, 73 N. E. 488, 2 Ann. Cas. 601.

Annotation: 2 Ann. Cas. 603; 14 Ann. Cas. 342.

In an action for negligence in the collection of a claim, it is necessary for the plaintiff to prove the delivery of the claim to the attorney, a failure to collect the same, due to the attorney's negligence, and the fact that the debt might have been collected but for such negligence. Priest v. Dodsworth, 235 Ill. 613, 85 N. E. 940, 14 Ann. Cas. 340; Vooth v. McEachen, 181 N. Y. 28, 73 N. E. 488, 2 Ann. Cas. 601.

When the amount of a note is alleged to have been lost by the attorney's negligence, it must be shown that the debt subsists against the maker, and also that he was solvent. Pennington v. Yell, 11 Ark. 212, 52 Am. Dec. 262; Priest v. Dodsworth, 235 Ill. 613, 85 N. E. 940, 14 Ann. Cas. 340.

[20] Maryland Casualty Co. v. Price (D. C.) 231 F. 397, Ann. Cas. 1917B, 50; Cavillaud v. Yale, 3 Cal. 108, 58 Am. Dec. 388; Buckley v. Gray, 110 Cal. 339, 42 P. 900, 31 L.R.A. 862, 52 Am. St. Rep. 88; Lawall v. Groman, 180 Pa. 532, 37 A. 98, 57 Am. St. Rep. 662. And see Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134; Smallwood v. Norton, 20 Me. 83, 37 Am. Dec. 39.

[1] Maryland Casualty Co. v. Price (D. C.) 231 F. 397, Ann. Cas. 1917B, 50; Pennington v. Yell, 11 Ark. 212, 52 Am. Dec. 262; Priest v. Dodsworth, 235 Ill. 613, 85 N. E. 940, 14 Ann. Cas. 340.

Purves v. Landell, 12 Clark & F. 91, 8 Eng. Reprint, 1332, 18 Eng. Rul. Cas. 630.

Where a client defends an action by an attorney on a note given for legal services on the ground of the plaintiff's negligence in the management of the business intrusted to him, he has the burden of proving negligence. Priest v. Dodsworth, 235 Ill. 613, 85 N. E. 940, 14 Ann. Cas. 340; Plymouth County Bank v. Gilman, 9 S. D. 278, 68 N. W. 735, 62 Am. St. Rep. 868.

[2] Maryland Casualty Co. v. Price (D. C.) 231 F. 397, Ann. Cas. 1917B, 50.

[3] Pennington v. Yell, 11 Ark. 212, 52 Am. Dec. 262.

[4] Annotation: 2 Ann. Cas. 603.

[5] Black v. Hersch, 18 Ind. 342, 81 Am. Dec. 362.

[6] See EVIDENCE [Also 10 R. C. L. 847].

as, for instance, the rule with regard to parol evidence to vary or contradict a written contract,[7] the admissibility of declarations, etc.[8] The receipt by an attorney of a note for collection is admissible in evidence to show the relation of attorney and client.[9] Whether an attorney has been negligent or has displayed such ignorance in the performance of his professional duties as to render him liable to his client for damage resulting therefrom is sometimes to be ascertained from the testimony of those who are conversant with, and skilled in, the same kind of business.[10] The record of a case conducted by one attorney in the name of another is admissible in evidence, in an action against the first, to show the final determination of the case.[11] Evidence of an attorney's negligence subsequent to the receipt of business transmitted to him for his professional attention is no evidence that before that time he was not a lawyer of reputed learning and ability.[12]

In an action against an attorney at law for negligence an averment that the defendant was employed and undertook to act as an attorney is sufficiently proved by his acting as such for the plaintiff and being recognized as acting in that capacity on the records of the court.[12a]

§ 141. Trial; Questions of Law and Fact.—Questions of trial practice arising in an action to enforce the liability of an attorney to his client are controlled by the principles which govern trial practice generally.[13] The question whether or not an attorney has been guilty of such negligence or ignorance in the performance of his professional duties as will render him liable to his client,[14] as, for example, the question whether or not the attorney exercised reasonable knowledge and skill in the preparation and drafting of an instrument for his client, is usually deemed to be a question of fact for the determination of the jury, and not one of law for the court.[15] But where the facts are ascertained, the attorney's negligence becomes a question for the court.[16]

§ 142. Measure and Mitigation of Damages.—The principles which govern the measure of damages recoverable for the breach of a contractual duty or a duty imposed by law[17] govern the question of the amount of damages recoverable by a client from his attorney. The fundamental principle is that the injured party shall have compensation for the injury sustained; accordingly, in an action based upon the attorney's negligence, want of skill, or breach of duty toward his client, the actual damage sustained by his client by reason of his negligence or violation of duty is the measure of recovery;[18] unless sub-

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[7] Cox v. Sullivan, 7 Ga. 144, 50 Am. Dec. 386.

[8] Lawall v. Groman, 180 Pa. 532, 37 A. 98, 57 Am. St. Rep. 662.

[9] Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134.

[10] Pennington v. Yell, 11 Ark. 212, 52 Am. Dec. 262.

[11] Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134.

[12] Plymouth County Bank v. Gilman, 9 S. D. 278, 68 N. W. 735, 62 Am. St. Rep. 868.

[12a] Smallwood v. Norton, 20 Me. 83, 37 Am. Dec. 39.

[13] See Trial [Also 26 R. C. L. p. 1008].

[14] Pennington v. Yell, 11 Ark. 212, 52 Am. Dec. 262; McLellan v. Fuller, 220 Mass. 494, 108 N. E. 180, Ann. Cas. 1917B, 1.

Annotation: 22 L. ed. 484; Ann. Cas. 1917B, 11.

What is a reasonable time within which to collect a debt is a question dependent on circumstances, and therefore one to be submitted to the jury. Rhines v. Evans, 66 Pa. 192, 5 Am. Rep. 364.

[15] McCullough v. Sullivan, 102 N. J. L. 381, 132 A. 102, 43 A.L.R. 928.

[16] Annotation: Ann. Cas. 1917B, 11.

[17] See Damages [Also 8 R. C. L. p. 414].

[18] Maryland Casualty Co. v. Price (C. C. A. 4th) 231 F. 397, Ann. Cas. 1917B, 50; Pennington v. Yell, 11 Ark. 212, 52 Am. Dec. 262; Cox v. Sullivan, 7 Ga. 144, 50 Am. Dec. 386; Vooth v. McEachen, 181 N. Y. 28, 73 N. E. 488, 2 Ann. Cas. 601; Cox v. Livingston, 2 Watts & S. (Pa.) 103, 37 Am. Dec. 486.

Annotation: Ann. Cas. 1917B, 39–55.

In an action for violation of duty in settling a claim without authority, if the plaintiff fails to prove that the claim was valid or worth more than the sum conceded to have been collected, he is not stantial injury is shown to have resulted therefrom, the recovery will be limited to a nominal sum.[19] The measure of damage is generally the same in the case of a wilful violation of duty by an attorney.[20] Some courts, however, allow punitive damages where the wrong shows malice, fraud, or such gross negligence or recklessness as to indicate a wilful or wanton disregard of the client's rights.[1]

An attorney has been held not to be chargeable for interest upon the principal of debts, intrusted to him for collection, which, through his negligence, have been lost to his client, nor is he generally liable for interest upon the money collected until there has been a demand, unless he has withheld it for an unreasonable time,[2] or unless he has made use of such moneys for his own profit.[3]

The attorney may show any facts which tend to mitigate the damages,[4] unless proof is barred by a previous judicial disposition of the matter.[5] An attorney who is liable for the loss to a client occasioned by his error will be credited with the amount of a reasonable fee and traveling expenses for the rendering of services urgently needed by the client.[6]

C. Enforcement by Summary Proceedings

§ 143. Generally.—Attorneys are answerable to the summary jurisdiction of the court for any dereliction of duty[7] except mere negligence or mismanagement.[8] A court may enforce honorable conduct on the part of its attorneys and compel them to act honestly toward their clients by means of fine, imprisonment, or disbarment.[9] The power is based upon the relationship of the attorney to the court and the authority which the court has over its own officers to prevent them from, or punish them for, committing acts of dishonesty or impropriety calculated to bring contempt upon the administration of justice.[10] A court may, in the exercise of its summary jurisdiction in this regard, compel an attorney to pay over or account for moneys or property belonging to his client which he has received in his official capacity and withholds from his client,[11] as, for instance, where the attorney retains money col-

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entitled to recover damages beyond such sum. Vooth v. McEachen, 181 N. Y. 28, 73 N. E. 488, 2 Ann. Cas. 601.

The measure of damages for negligence in passing as clear a title encumbered with lien is the amount necessary to pay off the liens. Lawall v. Groman, 180 Pa. 532, 37 A. 98, 57 Am. St. Rep. 662.

[19] Pennington v. Yell, 11 Ark. 212, 52 Am. Dec. 262.

Annotation: Ann. Cas. 1917B, 38.

[20] Vooth v. McEachen, 181 N. Y. 28, 73 N. E. 488, 2 Ann. Cas. 601.

[1] Annotation: Ann. Cas. 1917B, 40.

[2] Annotation: 18 L.R.A 457.

In Gunn v. Howell, 35 Ala. 144, 73 Am. Dec. 484, it is held that a client has no right to interest on funds collected by his attorney, who was subsequently garnished, unless a previous demand was made upon him.

[3] Williams v. Storrs, 6 Johns. Ch. (N. Y.) 353, 10 Am. Dec. 340.

[4] Annotation: Ann. Cas. 1917B, 41.

[5] Smallwood v. Norton, 20 Me. 83, 37 Am. Dec. 39.

[6] Re Woods, 158 Tenn. 383, 13 S. W. (2d) 800, 62 A.L.R. 904.

[7] Lynde v. Lynde, 64 N. J. Eq. 736, 52 A. 694, 58 L.R.A. 471, 97 Am. St. Rep. 692; Re Evans, 22 Utah, 366, 62 P. 913, 53 L.R.A. 952, 83 Am. St. Rep. 794.

Where there appears to have been no dishonesty on the part of the attorney, the client will be left to his action. Re Paschal (Texas v. White) 10 Wall. (U. S.) 483, 19 L. ed. 992.

[8] Annotation: Ann. Cas. 1917B, 47.

[9] Re Wall, 107 U. S. 265, 27 L. ed. 552, 2 S. Ct. 569; Roquemore v. Sovereign Camp, W. W. 226 Ala. 279, 146 So. 619, citing R. C. L.

[10] Re Paschal (Texas v. White) 10 Wall. (U. S.) 483, 19 L. ed. 992; Lynde v. Lynde, 64 N. J. Eq. 736, 52 A. 694, 58 L.R.A. 471, 97 Am. St. Rep. 692; Anderson v. Bosworth, 15 R. I. 443, 8 A. 339, 2 Am. St. Rep. 910.

Annotation: 22 A.L.R. 1501; L.R.A. 1918D, 831.

[11] Haden v. Lovett, 133 Ga. 388, 65 S. E. 853, 18 Ann. Cas. 114; Hess v. Conway, 92 Kan. 787, 142 P. 253, 4 A.L.R. 1580, on rehearing in 93 Kan. 246, 144 P. 205, 4 A.L.R. 1587, affirmed in 241 U. S. 624, 60 L. ed. 1211, 36 S. Ct. 681; Lynde v. Lynde, 64 N. J. Eq. 736, 52 A. 694, 58 L.R.A. 471, 97 Am. St. Rep. 692; Re Niagara, L. & O. Power Co. 203 N. Y. 493, 97 N. E. 33, 38 L.R.A.(N.S.) 207, Ann. Cas. 1913B, 234; Peirce v. Palmer,

lected by him for his client,[12] after demand for the same has been duly made.[13] The exercise of this jurisdiction is not, however, confined to cases where the attorney has retained money collected for his client.[14] While it is usually invoked to compel attorneys to do justice toward their clients in matters connected with litigation, it is not confined to such matters, but extends to any case where the employment of the attorney or solicitor is so connected with his professional character as to afford a presumption that his character formed the ground of his employment by the client.[15] Nor will a court desist from requiring its own attorney to do his duty simply because the transaction in question arose in litigation in another court, or from requiring an attorney to perform his duty although he is the attorney of another court practicing in the court which exercises the summary jurisdiction.[16]

§ 144. As Affected by Right to Jury Trial.—A summary proceeding against an attorney charged with wrongfully withholding money or property belonging to his client does not necessarily infringe on any right of the attorney to a trial by jury,[17] and in the absence of statutory regulation, the question whether the court should proceed in a summary manner or should remit the client to a trial at law by a jury is not one governed by any rigid rule which can be abstractly and formally stated, but is a matter resting in the sound discretion of the court.[18]

Upon the question of the effect of good faith on the part of the attorney on his right to a jury trial, the courts are divided. Some hold that the attorney's good faith will not defeat the court's summary jurisdiction,[19] while many hold that it will,[20] even though summary proceedings are authorized by

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31 R. I. 432, 77 A. 201, Ann. Cas. 1912B, 181; Re Kennedy, 120 Pa. 497, 14 A. 397, 6 Am. St. Rep. 724; Burns v. Allen, 15 R. I. 32, 23 A. 35, 2 Am. St. Rep. 844; Windsor v. Brown, 15 R. I. 182, 9 A. 135, 2 Am. St. Rep. 892; Anderson v. Bosworth, 15 R. I. 443, 8 A. 339, 2 Am. St. Rep. 910.

Annotation: L.R.A.1918D, 830; 2 Am. St. Rep. 847; 18 Ann. Cas. 115.

It is not essential that the money should have been received in any suit or legal proceeding, or that the attorney should have been employed to commence legal proceedings. Annotation: L.R.A.1918D, 830; 2 Am. St. Rep. 854.

[12] Re Paschal (Texas v. White) 10 Wall. (U. S.) 483, 19 L. ed. 992; White v. Ward, 157 Ala. 345, 47 So. 166, 18 L.R.A.(N.S.) 568; Re Kennedy, 120 Pa. 497, 14 A. 397, 6 Am. St. Rep. 724; Windsor v. Brown, 15 R. I. 182, 9 A. 135, 2 Am. St. Rep. 892; Burns v. Allen, 15 R. I. 32, 23 A. 35, 2 Am. St. Rep. 844.

[13] Annotation: 2 Am. St. Rep. 855.

[14] Peirce v. Palmer, 31 R. I. 432, 77 A. 201, Ann. Cas. 1912B, 181.

Where a judgment is entered by an attorney by confession against his client, partly for costs, the court may, on motion, order an inquiry as to the consideration, and stay the proceedings in the meantime. Starr v. Vanderheyden, 9 Johns. (N. Y.) 253, 6 Am. Dec. 275.

The court may require an attorney to deliver to his client documents belonging to the latter and retained by the attorney, though it will not thus enforce ordinary contract obligations. Re Dunn, 205 N. Y. 398, 98 N. E. 914, Ann. Cas. 1913E, 536; Re Niagara, L. & O. Power Co. 203 N. Y. 493, 97 N. E. 33, 38 L.R.A.(N.S.) 207, Ann. Cas. 1913B, 234; Windsor v. Brown, 15 R. I. 182, 9 A. 135, 2 Am. St. Rep. 892. Annotation: 2 Am. St. Rep. 849; Ann. Cas. 1913B, 236.

[15] Hess v. Conway, 92 Kan. 787, 142 P. 253, 4 A.L.R. 1580, on rehearing in 93 Kan. 246, 144 P. 205, 4 A.L.R. 1587, affirmed in 241 U. S. 624, 60 L. ed. 1211, 36 S. Ct. 681; Lynde v. Lynde, 64 N. J. Eq. 736, 52 A. 694, 58 L.R.A. 471, 97 Am. St. Rep. 692; Anderson v. Bosworth, 15 R. I. 443, 8 A. 339, 2 Am. St. Rep. 910.

Annotation: L.R.A.1918D, 830; 18 Ann. Cas. 117.

[16] Lynde v. Lynde, 64 N. J. Eq. 736, 52 A. 694, 58 L.R.A. 471, 97 Am. St. Rep. 692.

Annotation: 2 Am. St. Rep. 847.

[17] Davies v. Patterson, 132 Ark. 484, 201 S. W. 504, L.R.A.1918D, 825; Balogh v. Jackson, 272 Pa. 482, 116 A. 377, 22 A.L.R. 1497; Burns v. Allen, 15 R. I. 32, 23 A. 35, 2 Am. St. Rep. 844.

Annotation: 22 A.L.R. 1502; L.R.A. 1918D, 831.

[18] Charest v. Bishop, 137 Minn. 102, 162 N. W. 1063, citing R. C. L.

Annotation: 22 A.L.R. 1504; L.R.A. 1918D, 832, 833.

[19] Annotation: 22 A.L.R. 1509; L.R.A. 1918D, 835.

[20] Re Paschal (Texas v. White) 10 Wall. (U. S.) 483, 19 L. ed. 992; Balogh v. Jackson, 272 Pa. 482, 116 A. 377, 22 A.L.R. 1497; Re Kennedy, 120 Pa. 497, 14 A. 397, 6 Am. St. Rep. 724; Krickau v. Williams 36 R. I. 85, 89 A. 152, Ann. Cas. 1916C, 1145; Peirce v. Palmer, 31 R. I. 432, 77 A. 201, Ann. Cas. 1912B, 181; Windsor v. Brown. 15 R. I. 182, 9 A. 135, 2 Am. St. Rep. 892; Burns v.

statute.[1] Also, according to some decisions, if, on the application for a rule compelling the payment over of money, an issue of fact is raised as to the existence of the relation, the attorney is entitled to a trial by jury.[2]

§ 145. **Necessity of Relation of Attorney and Client.**—It is well established that a court has no jurisdiction to grant summary relief against an attorney at the instance of one who does not sustain towards him the relation of client,[3] or to compel an attorney to perform any act in matters unconnected with his professional character.[4] The reason for this rule seems to be based on the right of an attorney, except where the relation of attorney and client exists, to have his liabilities established in the ordinary channels of legal procedure.[5] It has even been held, though the view has been questioned, that the right will not pass to an assignee of the client.[6]

§ 146. **Procedure.**—The usual method of instituting summary proceedings against an attorney is by motion or petition addressed to the court and asking for a rule against the attorney to appear and show cause why the prayer of the complainant should not be granted.[7] However, the form of procedure is not material [8] so long as the essentials of fair notice and opportunity to be heard are observed.[9] The respondent is entitled to cross-examine the witness produced to testify against him in such proceedings.[10] It is a common practice for the court in such proceedings to direct a reference to aid it in determin-

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Allen, 15 R. I. 32, 23 A. 35, 2 Am. St. Rep. 844.

Annotation: 22 A.L.R. 1509; L.R.A.1918D, 835.

In this class of cases there is a preliminary inquiry by the court as to whether the dispute is in good faith and meritorious, and only if it is found to be such is the issue remitted to a jury to determine the amount due. If the court reaches the conclusion, on the preliminary inquiry, that there was bad faith, overreaching, fraud, or dishonesty on the attorney's part, it proceeds summarily to dispose of the matter by order. Balogh v. Jackson, 272 Pa. 482, 116 A. 377, 22 A.L.R. 1497.

[1] Davies v. Patterson, 132 Ark. 484, 201 S. W. 504, L.R.A.1918D, 825.

Annotation: 22 A.L.R. 1512.

[2] Re Kennedy, 120 Pa. 497, 14 A. 397, 6 Am. St. Rep. 724.

[3] Haden v. Lovett, 133 Ga. 388, 65 S. E. 853, 18 Ann. Cas. 114; Hess v. Conway, 92 Kan. 787, 94 Kan. 246, 142 P. 253, 144 P. 205, 4 A.L.R. 1580, affirmed in 241 U. S. 624, 60 L. ed. 1211, 36 S. Ct. 681; Re Niagara L. & O. Power Co. 203 N. Y. 493, 97 N. E. 33, 38 L.R.A.(N.S.) 207, Ann. Cas. 1913B, 234; Re Kennedy, 120 Pa. 497, 14 A. 397, 6 Am. St. Rep. 724; Windsor v. Brown, 15 R. I. 182, 9 A. 135, 2 Am. St. Rep. 892.

Annotation: 22 A.L.R. 1514; 18 Ann. Cas. 115; Ann. Cas. 1913B, 236; Ann. Cas. 1916C, 1147.

One who denies that an attorney ever acted for him cannot maintain a summary proceeding to compel delivery by the attorney of papers held under a claim of attorney's lien for services performed, even though the retention is improper, even by offering to pay what is due the attorney under an employment by another litigant. Re Niagara L. & O. Power Co. 203 N. Y. 493, 97 N. E. 33, 38 L.R.A.(N.S.) 207, Ann. Cas. 1913B, 234.

[4] Krickau v. Williams, 36 R. I. 85, 89 A. 152, Ann. Cas. 1916C, 1145.

Annotation: Ann. Cas. 1916C, 1147.

The attorney cannot, by consent, confer such jurisdiction on the court. Annotation: 18 Ann. Cas. 118.

[5] Annotation: 18 Ann. Cas. 115.

[6] Re Niagara, L. & O. Power Co. 203 N. Y. 493, 97 N. E. 33, 38 L.R.A.(N.S.) 207, Ann. Cas. 1913B, 234.

[7] White v. Ward, 157 Ala. 345, 47 So. 166, 18 L.R.A.(N.S.) 568; Haden v. Lovett, 133 Ga. 388, 65 S. E. 853, 18 Ann. Cas. 114; Lynde v. Lynde, 64 N. J. Eq. 736, 52 A. 694, 58 L.R.A. 471, 97 Am. St. Rep. 692; Starr v. Vanderheyden, 9 Johns. (N. Y.) 253, 6 Am. Dec. 275; Re Niagara, L. & O. Power Co. 203 N. Y. 493, 97 N. E. 33, 38 L.R.A.(N.S.) 207, Ann. Cas. 1913B, 234; Re Kennedy, 120 Pa. 497, 14 A. 397, 6 Am. St. Rep. 724; Anderson v. Bosworth, 15 R. I. 443, 8 A. 339, 2 Am. St. Rep. 910; Windsor v. Brown, 15 R. I. 182, 9 A. 135, 2 Am. St. Rep. 892.

[8] Hess v. Conway, 93 Kan. 246, 144 P. 205, 4 A.L.R. 1587, affrmed in 241 U. S. 624, 60 L. ed. 1211, 36 S. Ct. 681.

[9] White v. Ward, 157 Ala. 345, 47 So. 166, 18 L.R.A.(N.S.) 568; Hess v. Conway, 93 Kan. 246, 144 P. 205, 4 A.L.R. 1587, affirmed in 241 U. S. 624, 60 L. ed. 1211, 36 S. Ct. 681.

An attorney proceeded against summarily under a statute for failure to pay over money collected for his client is not deprived of the right to defend on the merits in case he fails to pay the money into court, by a provision of the statute that he may avoid interest and penalty by payment of the money into court to await judgment. White v. Ward, 157 Ala. 345, 47 So. 166, 18 L.R.A.(N.S.) 568.

[10] Peirce v. Palmer, 31 R. I. 432, 77 A, 201, Ann. Cas. 1812B, 181.

ing disputed questions,[11] and it may create a committee to assist it in the investigation of the complaint, though it cannot delegate any of its own powers to such committee. It cannot empower such committee to compel the attendance before it of parties or witnesses, or to administer a binding oath to those who do appear before it.[12]

A summary proceeding against an attorney to compel him to pay over money collected for his client is not equivalent to an action of debt or assumpsit, or a substitute for the ordinary action of money had and received; it is quasi criminal or penal in character.[13]

The order in a summary proceeding against an attorney is a final determination of his rights and should be granted with great caution[14] and only where it cannot be reasonably disputed that there has been misconduct on his part,[15]—where the case is free of reasonable doubt.[16]

If an attorney has a lien upon funds in his hands for his disbursements and professional fees, the court will deny a motion that he pay the money into court,[17] but the attorney cannot defeat the summary jurisdiction of the court by a mere unsupported allegation that he retains the money for legal services and expenses.[18]

The court does not undertake primarily to settle the rights and credits of the parties, but only to require that its officers do not make illegal exactions or deny to clients their indisputable rights.[19] But while it is not the province of the court to adjust accounts between counsel and client or to collect disputed claims for clients against attorneys, it will, nevertheless, to enforce good faith and fair dealing, require the attorney to pay so much as is beyond dispute.[20]

VIII. LIABILITY OF ATTORNEY TO THIRD PERSONS

§ 147. Generally.—An attorney is not ordinarily liable to third persons for the acts of his client[1] or for his own acts, committed in the exercise of his proper functions as attorney, pertinent to the matter in question.[2] An attorney is liable only to his client for negligence in the conduct of his professional duties, arising only from ignorance or want of care. Exceptions to this general rule, if they may be in strictness deemed such, are made where the attorney has been guilty of fraud or collusion, or where he has been guilty of a malicious or tortious act. Where, however, neither of these elements enters into the transaction, the rule is universal that for an injury arising from mere negligence, however gross, there must exist, between the party inflicting the injury and the one injured, some privity, by contract or otherwise, by reason of which the former owes some legal duty to the latter,[3] unless the act is one imminently dangerous to the lives of others or one performed in the pursuance of some legal duty.[4] Ordinarily an action will not lie against an attorney to recover money collected by him on a judgment or court order, subsequently determined to be erroneous, and paid over to his client prior to the reversal, where no fraud or contempt is shown in the procurement of the erroneous judgment or order.[5] However, an action for money had and received may be sustained against him if he still retains the money in his possession, even though it is retained in payment of a debt due from the client to him.[6]

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[11] Annotation: 22 A.L.R. 1514; L.R.A. 1918D, 839.

[12] Peirce v. Palmer, 31 R. I. 432, 77 A. 201, Ann. Cas. 1912B, 181.

[13] Re Paschal (Texas v. White) 10 Wall. (U. S.) 483, 19 L. ed. 992; Davies v. Patterson, 132 Ark. 484, 201 S. W. 504, L.R.A. 1918D, 825.

[14] Peirce v. Palmer, 31 R. I. 432, 77 A. 201, Ann. Cas. 1912B, 181.
Annotation: 2 Am. St. Rep. 855.

[15] Peirce v. Palmer, 31 R. I. 432, 77 A. 201, Ann. Cas. 1912B, 181; Burns v. Allen, 15 R. I. 32, 23 A. 35, 2 Am. St. Rep. 844.

[16] Annotation: 22 A.L.R. 1505; L.R.A. 1918D, 835.

[17] Re Paschal (Texas v. White) 10 Wall. (U. S.) 483, 19 L. ed. 992.
One cannot secure a summary order for the delivery, by an attorney not employed by him, of papers upon which the attorney claims a lien for services, by offering to pay what is due the attorney under an employment by another litigant. Re Niagara, L. & O. Power Co. 203 N. Y. 493, 97 N. E. 33, 38 L.R.A.(N.S.) 207, Ann. Cas. 1913B, 234.

[18] Annotation: L.R.A.1918D, 834.

[19] Burns v. Allen, 15 R. I. 32, 23 A. 35, 2 Am. St. Rep. 844.

[20] Windsor v. Brown, 15 R. I. 182, 9 A. 135, 2 Am. St. Rep. 892.
Annotation: 22 A.L.R. 1508.

[1] Anderson v. Canaday, 37 Okla. 171, 131 P. 697, L.R.A.1915A, 1186, Ann. Cas. 1915B, 714.

[2] Waugh v. Dibbens, 61 Okla. 221, 160 P. 589, L.R.A.1917B, 360.

Of course, where an attorney is actuated by malicious motives or shares the illegal motives of his client, he is personally liable with the client for damage sustained by a third person,[7] and if he acts, without authority, to the injury of a third person, he is liable.[8]

The questions of the liability of an attorney, acting in behalf of his client, for procuring the arrest or detention of a third person,[9] and of his liability for malicious prosecution,[10] are discussed under other titles in this work. The question of his liability for the wrongful levy of an execution or attachment is discussed in the succeeding section.

§ 148. **Wrongful Execution or Attachment.**—An attorney is liable to third persons for damages for causing an execution or attachment to be issued only when he acts dishonestly or with some sinister view or improper purpose of his own which in law amounts to malice.[11] He does not, ordinarily, make himself liable as a trespasser by communicating to the sheriff, on behalf of his client, instructions to levy execution upon specified property afterwards proved not to be property of the execution debtor, or by executing, in his client's name and by his authority, a bond indemnity to the sheriff,[12] although he may become liable under certain circumstances.[13]

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[3] National Sav. Bank v. Ward, 100 U. S. 195, 25 L. ed. 621; Buckley v. Gray, 110 Cal. 339, 42 P. 900, 31 L.R.A. 862, 52 Am. St. Rep. 88; Roddy v. Missouri P. R. Co. 104 Mo. 234, 15 S. W. 1112, 12 L.R.A. 746, 24 Am. St. Rep. 333; Lowall v. Groman, 180 Pa. 532, 37 A. 98, 57 Am. St. Rep. 662.

Re Fitzpatrick, 54 Ont. L. Rep. 3, 13 B. R. C. 145, [1924] 1 D. L. R. 981.

Annotation: Ann. Cas. 1917B, 45; 13 B. R. C. 152.

The fact that through ignorance an attorney gives his client bad advice, on which he acts to the hurt of another, will not make the attorney liable to that other. Anderson v. Canaday, 37 Okla. 171, 131 P. 697, L.R.A.1915A, 118, Ann. Cas. 1915B, 714.

An attorney is not liable to the son of a testatrix for gross negligence in so drawing the will as not to carry out her desires in the disposition of her property, even though the son suffers great pecuniary loss thereby. Buckley v. Gray, 110 Cal. 339, 42 P. 900, 31 L.R.A. 862.

[4] National Sav. Bank v. Ward, 100 U. S. 195, 25 L. ed. 621.

[5] Holland v. McGill, 107 Fla. 444, 145 So. 210, 87 A.L.R. 171.

Annotation: 87 A.L.R. 174.

[6] Annotation: 87 A.L.R. 175, 176.

[7] Anderson v. Canaday, 37 Okla. 171, 131 P. 697, L.R.A.1915A, 1186, Ann. Cas. 1915B, 714.

An attorney of one of the parties in an arbitration proceeding, who fraudulently conspires with the arbitrators to bring about an unjust award in favor of his client, is liable to the party injured although the judgment on the award remains unreversed. Hoosac Tunnel Dock & Elevator Co. v. O'Brien, 137 Mass. 424, 50 Am. Rep. 323.

[8] Harshey v. Blackmarr, 20 Iowa, 161, 89 Am. Dec. 520; Marvel v. Manouvrier, 14 La. Ann. 3, 74 Am. Dec. 424; McEachern v. Brackett, 8 Wash. 652, 36 P. 690, 40 Am. St. Rep. 922.

Annotation: 88 A.L.R. 34.

[9] See False Imprisonment [Also 11 R. C. L. p. 809, § 22].

[10] See Malicious Prosecution [Also 18 R. C. L. p. 63, § 44].

[11] Annotation: 87 A.L.R. 178.

If an attorney so fraudulently manipulates an execution, levy, and sale in the enforcement of a judgment procured for his client as to enable himself, as purchaser at the judicial sale, to procure in himself title to the property for a grossly inadequate consideration, he is liable to a suit by the judgment debtor to set the sale aside. Byers v. Surget, 19 How. (U. S.) 303, 15 L. ed. 670.

[12] Ford v. Williams, 13 N. Y. 577, 67 Am. Dec. 83.

[13] Vail v. Lewis, 4 Johns. (N. Y.) 450, 4 Am. Dec. 300.

§ 149. On Contracts Made in Interest of Client.—The general principle of agency, that a contract executed by an agent acting within the scope of his authority, on behalf of his principal, imposes no personal liability upon the agent unless credit is given expressly and exclusively to the agent, who intends to assume personal liability,[14] is, generally speaking, applicable to contracts executed by attorneys on behalf of their clients,[15] although there is authority holding the contrary view where the attorney gives no express notice of his agency.[16] Some authorities hold the attorney personally responsible on an implied contract for the fees of a sheriff, constable, bailiff, marshal, or clerk on writs delivered to such an officer for service, execution, or entry,[17] as well as for fees of examiners;[18] others deny all liability, in the absence of circumstances indicating a contrary intention[19] or of a custom making him liable,[20] even where the attorney indorses his name as such on the back of the writ.[1] It has been held that the attorney is not personally liable for the expenses and fees of witnesses,[2] referees, commissioners,[3] court stenographers,[4] and expert accountants,[5] or for the expense of taking photographs[6] or of printing briefs, abstracts, and cases and points on appeal,[7] in the absence of an express stipulation, custom, or conduct implying that the attorney will pay such expenses.[8]

Of course, the attorney is bound as any other agent if he expressly undertakes to be liable personally[9] for such incidental expenses of an action.[10] Also, under the general principles of agency,[11] he is personally liable upon contracts entered into without disclosure of the fact that he was acting for a client,[12] or where he contracts without authority to do so.[13]

An attorney who knows that the property against which the levy is directed is claimed by a third person, and who has received from his client a sum of money to reimburse the officer for any loss he might sustain from the attachment, is to be regarded as personally requesting the service and personally liable to reimburse the officer if the levy turns out to be wrongful. Higgins v. Russo, 72 Conn. 238, 43 A. 1050, 77 Am. St. Rep. 307.

[14] See AGENCY, Vol. 2, p. 247, § 315.

[15] Right Printing Co. v. Stevens, 107 Vt. 359, 179 A. 209, 100 A.L.R. 528; Wires v. Briggs, 5 Vt. 101, 26 Am. Dec. 284.
Annotation: 100 A.L.R. 534.

[16] Judd & Detweiler v. Gittings, 43 App. D. C. 304, Ann. Cas. 1917B, 518.
Annotation: 100 A.L.R. 537.

[17] Higgins v. Russo, 72 Conn. 238, 43 A. 1050, 77 Am. St. Rep. 307; Heath v. Bates, 49 Conn. 342, 44 Am. Rep. 234; Tilton v. Wright, 74 Me. 214, 43 Am. Rep. 578.
Annotation: 100 A.L.R. 539; Ann. Cas. 1917B, 521.

Accordingly, an attorney is responsible to the clerk of the court for the fees on writs handed by him to such clerk for entry. Writs are usually handed to the sheriff for service and to the clerks of courts for entry, by the attorney by whom they were made. The attorney has a lien on the judgment recovered, for his fees and disbursements included in the taxable bill of costs, which embraces both the service of the writ and the entry of the action. Neither the sheriff nor the clerk is obliged to perform the services required without a prepayment of his respective fees, and when the sheriff serves and the clerk enters the action without prepayment, a promise on the part of the attorney to pay each his respective dues may be reasonably inferred unless notice to the contrary be seasonably given. The same rule has been held to apply with regard to the fees of masters, registers, and other officers of courts of record. Tilton v. Wright, 74 Me. 214, 43 Am. Rep. 578.

[18] Annotation: 100 A.L.R. 545; Ann. Cas. 1917B, 524.

[19] Annotation: 100 A.L.R. 542; Ann. Cas. 1917B, 521.

[20] Annotation: Ann. Cas. 1917B, 523.

[1] Wires v. Briggs, 5 Vt. 101, 26 Am. Dec. 284.

[2] Annotation: 100 A.L.R. 544; Ann. Cas. 1917B, 523; 11 Eng. Rul. Cas. 175.

[3] Annotation: 100 A.L.R. 545; Ann. Cas. 1917B, 524.

[4] Annotation: 100 A.L.R. 546 (citing cases on each side of the question); Ann. Cas. 1917B, 525; 11 Eng. Rul. Cas. 175.

[5] Annotation: 100 A.L.R. 546; Ann. Cas. 1917B, 525.

[6] Annotation: Ann. Cas. 1917B, 526.

[7] Annotation: 100 A.L.R. 547; Ann. Cas. 1917B, 526 (also citing contrary authority).

[8] Judd & Detweiler v. Gittings, 43 App. D. C. 304, Ann. Cas. 1917B, 518; Right Printing Co. v. Stevens, 107 Vt. 359, 179 A. 209, 100 A.L.R. 528.
Annotation: 100 A.L.R. 547; Ann. Cas. 1917B, 525.

[9] Annotation: 100 A.L.R. 537.

[10] Annotation: Ann. Cas. 1917B, 520.

[11] See AGENCY, Vol. 2, p. 250, § 319, p. 316, § 404.

[12] Annotation: 100 A.L.R. 538.

[13] Annotation: 100 A.L.R. 539.

§ 150. Liability, as Purchaser or Assignee, to Equities against Client.—An attorney who takes money or property from his client in payment of his fees,[14] or a mortgage to secure his fees, knowing of the existence of a claim against such money or property, takes subject to such prior claim,[15] and if he purchases at a judicial sale under execution of his client's judgment, the law imputes to him knowledge of defects in the legal proceedings, and his title falls with the reversal of the judgment[16] or the invalidation of the proceedings.[17] An attorney who purchases property of his client pendente lite cannot be a bona fide purchaser as against the opposite party.[18]

§ 151. Liability to Assistant Counsel or Law Clerk for Compensation.—An attorney is responsible for the fees of associate or assistant counsel employed by him, especially when such counsel are employed without authority from his client,[19] and he is liable to an action to recover such fees or a just share of the compensation received from the client.[20] An associate or assistant counsel has a lien for his services upon the fund received by his employer as compensation from the client, under an agreement that he shall receive a percentage of the fee in payment for his assistance, and he may intervene in an action by the employer to recover such fee or to protect his interest therein.[1]

The rule that one not admitted to the practice of law cannot recover for legal services rendered by him to a client does not preclude a law clerk from recovering from his employer, or the latter's personal representative, compensation for work done at his employer's request, even though it was work which the clerk could not legally perform.[2]

§ 152. Liability to Layman for Procuring Employment.—A contract by an attorney to divide fees with a third person if the latter will procure or assist in procuring litigation or employment for him is contrary to public policy, and, as a general rule, no recovery can be had against the attorney for services rendered under any such contract.[3] However, some courts allow a recovery

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[14] Puffer v. Hazzard, 240 Mass. 195, 133 N. E. 109, 19 A.L.R. 63.

[15] Senneff v. Brackey, 165 Iowa, 525, 146 N. W. 24, 1 A.L.R. 978.

[16] Galpin v. Page, 18 Wall. (U. S.) 350, 21 L. ed. 959; Johnson v. McKinnon, 54 Fla. 221, 45 So. 23, 13 L.R.A.(N.S.) 874, 127 Am. St. Rep. 135, 14 Ann. Cas. 180; Stroud v. Casey, 25 Tex. 740, 78 Am. Dec. 556; Singly v. Warren, 18 Wash. 434, 51 P. 1066, 63 Am. St. Rep. 896.

Annotation: 29 A.L.R. 1086; 14 Ann. Cas. 185.

An attorney who has prepared deeds of trust and has been consulted as to the purposes for which they were made cannot afterwards, on purchasing the land included therein on an execution sale, maintain a suit to set aside such deeds as fraudulent. Davis v. Kline, 96 Mo. 401, 9 S. W. 724, 2 L.R.A. 78.

[17] Schroeder v. Young, 161 U. S. 334, 40 L. ed. 721, 16 S. Ct. 512.

[18] Gay v. Parpart, 106 U. S. 679, 27 L. ed. 256, 1 S. Ct. 456.

[19] Annotation: 100 A.L.R. 546.

[20] Robertson v. Gordon, 226 U. S. 311, 57 L. ed. 236, 33 S. Ct. 105; Owen v. Dudley, 217 U. S. 488, 54 L. ed. 851, 30 S. Ct. 602.

[1] Barnes v. Alexander, 232 U. S. 117, 58 L. ed. 530, 34 S. Ct. 276.

[2] Ferris v. Snively, 172 Wash. 167, 19 P. (2d) 942, 90 A.L.R. 278.

Annotation: 90 A.L.R. 288.

[3] Meguire v. Corwine, 101 U. S. 108, 25 L. ed. 899; Alpers v. Hunt, 86 Cal. 78, 24 P. 846, 9 L.R.A. 483, 21 Am. St. Rep. 17; Chreste v. Louisville R. Co. 167 Ky. 75, 180 S. W. 49, L.R.A.1917B, 1123, Ann. Cas. 1917C, 867; Holland v. Sheehan, 108 Minn. 362, 122 N. W. 1, 23 L.R.A.(N.S.) 510, 17 Ann. Cas. 687; Langdon v. Conlin, 67 Neb. 243, 93 N. W. 389, 60 L.R.A. 429, 108 Am. St. Rep. 643, 2 Ann. Cas. 834; Waychoff v. Waychoff, 309 Pa. 300, 163 A. 670, 86 A.L.R. 190; Goodier v. Hamilton, 172 Wash. 60, 19 P. (2d) 392, citing R. C. L.

Annotation: 86 A.L.R. 195; L.R.A.1917B, 1130; 2 Ann. Cas. 836; 17 Ann. Cas. 690.

Such an agreement with one who is not an attorney at law is especially void as against public policy where the statutes provide for disbarring attorneys who lend their names to be used in legal proceedings by persons who are not attorneys. Alpers v. Hunt, 86 Cal. 78, 24 P. 846, 9 L.R.A. 483, 21 Am. St. Rep. 17.

In some jurisdictions it is provided that before any allowance of attorneys' fees shall be made by the court, such court shall be fully satisfied by the affidavit of the attorney engaged in the cause that there has been, and is, no agreement, express or implied, between the attorney and any other thereon by the layman, holding that he is not in pari delicto with the attorney.[4]

IX. COMPENSATION OF ATTORNEYS

A. Right to Compensation

§ 153. Generally.—In England the profession of an advocate is regarded as merely honorary, and he cannot sustain a suit for his fee, which is considered as a gift or honorarium;[5] solicitors or attorneys are not, however, prohibited from recovering professional fees by suit,[6] and according to some decisions, the incapacity of the barrister to contract for fees is apparently confined to contracts concerning advocacy in litigation.[7] The English rule does not prevail in the United States, and it is almost universally conceded by the courts of the various states that all lawyers are entitled to compensation for services rendered to their clients and that in the absence of an express agreement as to the amount of compensation which they are to receive, they are entitled to a reasonable compensation for the services rendered.[8] Moreover, this right of an attorney to compensation for his services is not dependent upon whether such services have been beneficial to his client.[9] The employment of counsel is held not to differ in its incidents, or in the rules governing it, from the employment of an agent in any capacity or business.[10] Generally no distinction is made between solicitors or attorneys and counsel or barristers.[11] In New Jersey, however, an attorney is entitled to compensation

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person except a practising attorney engaged with him as attorney in the cause, for any division or sharing of the fee to be taxed; and no fee shall be taxed except in favor of a regular attorney and in compensation for services actually rendered in the cause. In such cases the filing of the required affidavit is a condition precedent to the allowance of an attorney's fee. Fletcher v. Kelly, 88 Iowa, 475, 55 N. W. 474, 21 L.R.A. 347.

As to the effect of such an agreement upon the attorney's right to compensation, see infra, § 218.

[4] Irwin v. Curie, 171 N. Y. 409, 64 N. E. 161, 58 L.R.A. 830.

Annotation: 86 A.L.R. 197; L.R.A.1917B, 1130; 2 Ann. Cas. 836; 17 Ann. Cas. 690.

[5] Kennedy v. Broun, 13 C. B. N. S. 677, 143 Eng. Reprint, 268, 1 Eng. Rul. Cas. 789.

Annotation: 127 Am. St. Rep. 843; 1 Eng. Rul. Cas. 801.

A similar rule prevailed under the Roman law in ancient times but later, while no promise to pay was implied from the fact of the rendition of the service, yet an express promise of the client to pay was enforceable. In modern times, however, the civil law permits an advocate to recover for his services. Annotation: 127 Am. St. Rep. 841, 842.

[6] Annotation: 127 Am. St. Rep. 844.

[7] Kennedy v. Broun, 13 C. B. N. S. 677, 143 Eng. Reprint, 268, 1 Eng. Rul. Cas. 789.

Annotation: 1 Eng. Rul. Cas. 801.

[8] Davis v. Webber, 66 Ark. 190, 49 S. W. 822, 45 L.R.A. 196, 74 Am. St. Rep. 81; Re Cutler, 204 Iowa, 739, 212 N. W. 573, 217 N. W. 448, 54 A.L.R. 527; Reece v. Kyle, 49 Ohio St. 475, 31 N. E. 747, 16 L.R.A. 723; Mellon v. Fulton, 22 Okla. 636, 98 P. 911, 19 L.R.A.(N.S.) 960; Clendinen v. Black, 18 S. C. L. (2 Bail.) 488, 23 Am. Dec. 149; Ingersoll v. Coal Creek Coal Co. 117 Tenn. 263, 98 S. W. 178, 9 L.R.A.(N.S.) 282, 119 Am. St. Rep. 1003, 10 Ann. Cas. 829; Watson v. Johnson, 174 Wash. 12, 24 P. (2d) 592, 89 A.L.R. 1527.

Annotation: 127 Am. St. Rep. 844.

The English rule was formerly recognized in Pennsylvania, but it has long since been set aside by the courts of that state. Annotation: 127 Am. St. Rep. 852.

Statutes in some states have abrogated the common-law rule with respect to the right of attorneys to compensation for their services. State v. National Surety Co. 29 Idaho, 670, 161 P. 1026, 2 A.L.R. 251.

[9] Shouse v. Consolidated Flour Mills Co. 132 Kan. 108, 294 P. 657, citing R. C. L.; Re Freshour, 174 Mich. 114, 140 N. W. 517, 45 L.R.A.(N.S.) 67, Ann. Cas. 1915A, 726; Kanneberg v. Evangelical Creed Congregation, 146 Wis. 610, 131 N. W. 353, 39 L.R.A.(N.S.) 138, Ann. Cas. 1912C, 376.

Annotation: Ann. Cas. 1912C, 380 (attorney employed by majority stockholders of corporation in suit resulting favorably to minority).

An attorney filing a chattel mortgage with an assignee for creditors of the mortgagor and proving up after filing the proper affidavit, is entitled to have attorneys' fees taxed as provided in the notes which the mortgage secures. Re Cutler, 204 Iowa, 739, 212 N. W. 573, 217 N. W. 448, 54 A.L.R. 527.

[10] Chreste v. Louisville R. Co. 167 Ky. 75, 180 S. W. 49, L.R.A.1917B, 1123, Ann. Cas. 1917C, 867; Mellon v. Fulton, 22 Okla. 636, 98 P. 911, 19 L.R.A.(N.S.) 960.

Annotation: 19 L.R.A.(N.S.) 960; 127 Am. St. Rep. 846.

[11] Chreste v. Louisville R. Co. 167 Ky. 75, 180 S. W. 49, L.R.A.1917B, 1123, Ann. Cas.

for services as an advocate only when there is an express contract to pay therefor; in the absence of such a contract, his services are presumed to be gratuitous.[12] In New Jersey, however, a distinction is drawn between the services of a lawyer in the capacity of an attorney at law, and those rendered by him as an advocate, and it is held that he may recover for his services in the former capacity.[13]

Other titles discuss the right of an attorney to compensation for services rendered to persons under disability, such as infants or insane persons,[14] or for services rendered to persons acting in a representative or fiduciary capacity, such as executors and administrators, guardians, and trustees.[15]

§ 154. Necessity of Employment or Retainer.—The right of an attorney at law to demand payment for his services depends on the fact of employment. He cannot recover from one who did not employ him or authorize his employment by the person who did employ him, however valuable the result of his services may have been to such person.[16] Thus, the client is not liable for the fees of other counsel employed by his attorney unless he authorizes or ratifies such employment.[17] Acceptance of, or acquiescence in, the services rendered by an attorney may, however, raise an implied promise to pay therefor, which will supply the place of a contract of employment.[18] It has accordingly been held that if an attorney has rendered valuable services to one who has received the benefit thereof, a promise to pay their reasonable value is presumed, unless the circumstances show that such services were intended to be gratuitous.[19] However, the party sought to be charged must be free to take or reject the benefit of such services,[20] and the acquiescence must be such as presumed volition on his part; circumstances giving one no choice but to accept the benefits of the attorney's services are not sufficient.[1]

§ 155. —Liability of Third Person Benefited by Attorney's Services to Another.—The mere fact that the services which an attorney renders his client are beneficial to a third person, as where services rendered for a corporate

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1917C, 867; Ingersoll v. Coal Creek Coal Co. 117 Tenn. 263, 98 S. W. 178, 9 L.R.A.(N.S.) 282, 119 Am. St. Rep. 1003, 10 Ann. Cas. 829.

[12] Schomp v. Schenck, 40 N. J. L. 195, 29 Am. Rep. 219; Bentley v. Fidelity & D. Co. 75 N. J. L. 828, 69 A. 202, 127 Am. St. Rep. 837, 15 Ann. Cas. 1178.

[13] Schomp v. Schenck, 40 N. J. L. 195, 29 Am. Rep. 219.

[14] See INFANTS [Also 14 R. C. L. p. 213]; INSANE AND OTHER INCOMPETENT PERSONS [Also 14 R. C. L. p. 546].

[15] See EXECUTORS AND ADMINISTRATORS [Also 11 R. C. L. p. 233, § 260]; GUARDIAN AND WARD [Also 12 R. C. L. p. 1135, § 32]; TRUSTS [Also 26 R. C. L. p. 1340, § 205].

[16] Orwig v. Chicago, R. I. & P. R. Co. 217 Iowa, 521, 250 N. W. 148, 90 A.L.R. 258; O'Doherty v. Bickel, 166 Ky. 708, 179 S. W. 848, Ann. Cas. 1917A, 419; Louisiana & N. W. R. Co. v. Athens Lumber Co. 134 La. 788, 64 So. 714, L.R.A.1915B, 856; Forman v. Sewerage & Water Bd. 119 La. 49, 43 So. 908, 12 Ann. Cas. 773; Roselius v. Delachaise, 5 La. Ann. 481, 52 Am. Dec. 597; Higginson v. Fall River, 226 Mass. 423, 115 N. E. 764, 2 A.L.R. 1209 (unauthorized employment by city officer); Re Baxter, 94 Mont. 257, 22 P. (2d) 182; Fields v. Fields, 139 Or. 41, 7 P. (2d) 975, citing R. C. L.; Re Gratton, 136 Or. 224, 298 P. 231, 79 A.L.R. 517; Re Failing, 113 Or. 6, 228 P. 821, 231 P. 148, citing R. C. L.

Annotation: 12 Ann. Cas. 773; Ann. Cas. 1917A, 423.

[17] Orwig v. Chicago, R. I. & P. R. Co. 217 Iowa, 521, 250 N. W. 148, 90 A.L.R. 258; Bentley v. Fidelity & D. Co. 75 N. J. L. 828, 69 A. 202, 127 Am. St. Rep. 837, 15 Ann. Cas. 1178.

Annotation: 90 A.L.R. 268, 269.

[18] O'Doherty v. Bickel, 166 Ky. 708, 179 S. W. 848, Ann. Cas. 1917A, 419; Follmer v. State, 94 Neb. 217, 142 N. W. 908, Ann. Cas. 1914D, 151.

[19] Young v. Bruere, 78 Cal. App. 127, 248 P. 301, citing R. C. L.; Taussig v. St. Louis & K. R. Co. 166 Mo. 28, 65 S. W. 969, 89 Am. St. Rep. 674.

If a receiver permits without objection the continuation of a suit by an attorney employed by the debtor, such attorney is entitled to a just compensation. City Bank v. Bryan, 76 W. Va. 481, 86 S. E. 8, L.R.A. 1915F, 1219.

[20] Re Hamilton, 96 Mont. 551, 33 P. (2d) 258, citing R. C. L.; Parshley v. Third Methodist Church, 147 N. Y. 583, 42 N. E. 15, 30 L.R.A. 574.

[1] O'Doherty v. Bickel, 166 Ky. 708, 179 S. W. 848, Ann. Cas. 1917A, 419.

officer benefit the corporation[2] or those rendered for certain stockholders who have employed an attorney benefit other stockholders,[3] does not entitle the attorney to recover compensation from the person or persons thus benefited.[4] Even though, where an attorney represents a party to a suit, a presumption arises that the services are rendered with the consent of the party, if more than one party is interested in the suit, it does not follow from the fact that the attorney is employed by one of the parties and acts in the case with the knowledge of the other parties that the latter, in order to escape liability, should inform the attorney that they will not consider themselves liable.[5] Nor will a client who engages an attorney and pays his compensation be allowed to recover from the person benefited by the attorney's services a proportionate share of such compensation[6] in the absence of anything showing an express agreement to share the expenses of counsel, that the person benefited had knowledge of and accepted the services of the attorney so retained,[7] as in the case of a newly formed corporation which accepts the benefits of legal services performed by an attorney engaged by the promoters,[8] or that the attorney conducted the litigation for the benefit not only of the client who employed him, but of all claimants who should contribute to the expenses of the litigation, and with the understanding that he should receive fees from such persons.[9]

§ 156. Right of Unlicensed Attorney to Fees.—The great weight of authority is to the effect that compensation for strictly legal services cannot be recovered by one who has not been admitted to practice before the court or in the jurisdiction where the services were rendered.[10] Under this rule, a partnership consisting of a duly licensed attorney and an unlicensed attorney cannot maintain a joint action for legal services.[11] According to some decisions one not admitted or licensed to practice in the state where services are performed and recovery sought cannot, where he has held himself out as qualified to practice in that state, recover notwithstanding that he is a duly admitted attorney in another state.[12] In this connection, it is to be noted that the courts of one state generally permit attorneys of other states to appear on the trial or argument of cases.[13] Moreover, a statute which merely provides that a person not admitted to practice, who represents himself to be a licensed attorney shall be punished does not bar a recovery by a licensed attorney of a foreign state for legal services rendered in the domestic state where he first informed his client that he was not admitted in the local state and that it would also be necessary to have a local counsel to appear of record.[14] And, of course, where the services are not performed in a court of record and are of a character the performance of which would not constitute the practice of law, an unlicensed person may recover therefor.[15]

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[2] Annotation: Ann. Cas. 1917A, 423.

An attorney may not have an express contract with the promoters of a corporation that they, in consideration of his assisting to accomplish their scheme, will make him the permanent attorney of the company, and at the same time have an implied contract with the company for payment for the same services. Sullivan v. Detroit, Y. & A. A. R. Co. 135 Mich. 661, 98 N. W. 756, 64 L.R.A. 673, 106 Am. St. Rep. 403.

[3] O'Doherty v. Bickel, 166 Ky. 708, 179 S. W. 848, Ann. Cas. 1917A, 419.

[4] Ibid.

Annotation: Ann. Cas. 1917A, 423.

[5] Annotation: 12 Ann. Cas. 776.

[6] Louisiana & N. W. R. Co. v. Athens Lumber Co. 134 La. 788, 64 So. 714, L.R.A. 1915B, 856.

Where parties take upon themselves the defense of a suit, after notifying the real defendant of the pendency of the action, they must pay their attorneys' fees. Gaines v. Poor, 3 Met. (Ky.) 503, 79 Am. Dec. 559.

[7] Annotation: L.R.A.1915B, 856.

[8] Ramsey v. Brooke County Bldg. & L. Asso. 102 W. Va. 119, 135 S. E. 249, 49 A.L.R. 668.

[9] Central R. & Bkg. Co. v. Pettus, 113 U. S. 116, 28 L. ed. 915, 5 S. Ct. 387.

[10] Creditors Nat. Clearing House v. Bannwart, 227 Mass. 579, 116 N. E. 886, Ann. Cas. 1918C, 130 (corporation engaged in law practice); Ferris v. Snively, 172 Wash. 167, 19 P. (2d) 942, 90 A.L.R. 278.

Annotation: 4 A.L.R. 1088, s. 30 A.L.R. 851, and 42 A.L.R. 1228; 12 L.R.A.(N.S.) 614; 24 L.R.A.(N.S.) 751.

A law clerk not admitted to practice cannot recover from his employer's estate for legal services rendered to such estate. Ferris v. Snively, 172 Wash. 167, 19 P. (2d) 942, 90 A.L.R. 278.

In the absence of a statutory provision or rule of court prohibiting it, however, a person properly qualified and practicing as an attorney may recover for legal services rendered, even though he may not have been formally admitted to practice in the court where the services were rendered. Annotation: 4 A.L.R. 1087, s. 30 A.L.R. 851, and 42 A.L.R. 1228.

[11] Annotation: 4 A.L.R. 1090, s. 30 A.L.R. 851, and 42 A.L.R. 1228; 2 L.R.A.(N.S.) 394; 12 L.R.A. (N.S.) 614; 24 L.R.A.(N.S.) 751.

[12] Annotation: 4 A.L.R. 1088, s. 30 A.L.R. 851, and 42 A.L.R. 1228.

§ 157. **Attorneys Appointed to Defend Indigents or Prosecute Disbarment Proceedings.**—According to the great weight of authority, an attorney assigned or appointed by the court to defend or assist in the defense of an indigent accused[16] cannot recover compensation from the public for his services in the absence of a statute providing therefor.[17] An attorney, being an officer of the court, like other officers takes his office cum onere; one of the burdens of such office, which custom has recognized, is the gratuitous service rendered to a poor person at the suggestion of the court.[18] In such a requirement, according to the majority view, there is no violation of the constitutional prohibition against the taking of property without compensation or without due process of law; nor does the constitutional guaranty of the right of an accused to be heard by counsel impose any liability on the part of the national, state, or county government rendering it liable for the fees of counsel thus assigned.[19]

Some courts, however, take the position that an attorney is under no obligation to render gratuitous services for an indigent defendant in a criminal case[20] and cannot be required by statute to do so.[21] In these jurisdictions, where, in pursuance of statute, an attorney is appointed to defend an indigent person and has performed services in the defense of such person, the county must pay for such services.[22]

Whether or not an attorney for an indigent defendant is entitled to compensation for services rendered on an appeal from a conviction depends upon the provisions of the statute;[1] some statutes are held broad enough to include such services.[2]

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[13] See supra, § 16.

[14] Brooks v. Volunteer Harbor, A. A. M. M. P. 233 Mass. 168, 123 N. E. 511, 4 A.L.R. 1086.

[15] Annotation: 4 A.L.R. 1087, s. 30 A.L.R. 851, and 42 A.L.R. 1228.

[16] See supra, § 33.

[17] Case v. Shawnee County, 4 Kan. 511, 96 Am. Dec. 190; Dismukes v. Noxubee County, 58 Miss. 612, 38 Am. Rep. 339; Wayne County v. Waller, 90 Pa. 99, 35 Am. Rep. 636; Pardee v. Salt Lake County, 39 Utah, 482, 118 P. 122, 36 L.R.A.(N.S.) 377, Ann. Cas. 1913E, 200.

Annotation: 36 L.R.A.(N.S.) 377; 42 L.R.A.(N.S.) 528; Ann. Cas. 1913E, 206.

Generally, as to attorneys' claims against the state for fees, see annotation: 42 L.R.A. 51.

The power to provide compensation under such circumstances rests with the legislatures, and not the courts. Pardee v. Salt Lake County, 39 Utah, 482, 118 P. 122, 36 L.R.A.(N.S.) 377, Ann. Cas. 1913E, 200.

[18] Wayne County v. Waller, 90 Pa. 99, 35 Am. Rep. 636.

Annotation: 36 L.R.A.(N.S.) 378.

[19] Pardee v. Salt Lake County, 39 Utah, 482, 118 P. 122, 36 L.R.A.(N.S.) 377, Ann. Cas. 1913E, 200.

Annotation: 36 L.R.A.(N.S.) 379, 380; 44 L.R.A.(N.S.) 1196; Ann. Cas. 1913E, 206.

[20] Hyatt v. Hamilton County, 121 Iowa, 292, 96 N. W. 855, 63 L.R.A. 614, 100 Am. St. Rep. 354; Dane County v. Smith, 13 Wis. 585, 80 Am. Dec. 754.

Annotation: 36 L.R.A.(N.S.) 381; 42 L.R.A.(N.S.) 527; 17 Ann. Cas. 333; Ann. Cas. 1913E, 207.

[21] Clay County v. McGregor, 171 Ind. 634, 87 N. E. 1, 17 Ann. Cas. 333; Dane County v. Smith, 13 Wis. 585, 80 Am. Dec. 754.

An attorney cannot be compelled, under penalty of disbarment or of being in contempt, to render gratuitous services for a pauper defendant in a criminal case. Clay County v. McGregor, 171 Ind. 634, 87 N. E. 1, 17 Ann. Cas. 333.

[22] Hyatt v. Hamilton County, 121 Iowa, 292, 96 N. W. 855, 63 L.R.A. 614, 100 Am. St. Rep. 354; Dane County v. Smith, 13 Wis. 585, 80 Am. Dec. 754.

Annotation: 36 L.R.A.(N.S.) 383; 42 L.R.A.(N.S.) 527.

An attorney appointed by the court to act for the public in the prosecution of disbarment proceedings is entitled to reasonable compensation, to be paid by the county in which his services are performed, where the statute requiring such service is silent upon the subject of compensation;[3] but he is not so entitled where the statute expressly prohibits the allowance of compensation for the services thus rendered, no constitutional right of an attorney being infringed by such a statute.[4]

§ 158. Right to Retaining Fee.—A "retainer" or "retaining fee" is a preliminary fee given to secure the services of the solicitor or attorney and to induce him to act for the client.[5] The proper scope and application of the right to charge retainers are to remunerate counsel for being deprived, by being retained for one party, of the opportunity of rendering services for, and receiving pay from, the other party to the action.[6]

The Canadian courts have held that a retaining fee from a client to his solicitor is a mere gratuity. Thus, a promise to pay such a fee is without consideration, and the solicitor has no right to deduct the amount from funds of the client that may come into his hands.[7] In this country, however, there is apparently no question as to the validity of a contract to pay a retaining fee; and if such an agreement is made, the attorney is entitled to the retainer in addition to compensation for the services rendered.[8] According to some decisions, he may recover the agreed retaining fee regardless of the rendition of the contemplated services.[9] Other courts hold, however, that he cannot recover it if he does not actually perform the services contemplated.[10]

With regard to whether an attorney, in the absence of an express agreement, on being employed generally or to prosecute or defend a suit, or a series of suits, has the right to charge a retaining fee, the decisions are in conflict. According to the view taken by some courts, no special contract is necessary to entitle an attorney actually retained in a suit to charge a reasonable retainer, but in proper cases such a contract may be implied[11] and the fee may be recovered under the common counts.[12] Other courts, however, take the view that an agreement to pay a retaining fee is not to be implied.[13]

A distinction between the implied right of the attorney to his retaining

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[1] Annotation: 100 A.L.R. 331.

[2] State v. Hudson, — R. I. —, 179 A. 130, 100 A.L.R. 313.

[3] Hyatt v. Hamilton County, 121 Iowa, 292, 96 N. W. 855, 63 L.R.A. 614, 100 Am. St. Rep. 354.

[4] Brown v. Warren County, 156 Iowa, 20, 135 N. W. 4, 137 N. W. 474, 42 L.R.A.(N.S.) 527, Ann. Cas. 1915B, 185.

Annotation: 44 L.R.A.(N.S.) 1196; Ann. Cas. 1915B, 187.

[5] Pickens Co. v. Thomas, 152 Ga. 648, 111 S. E. 27, 21 A.L.R. 1438.

Re Solicitor, 22 Ont. L. Rep. 30, 19 Ann. Cas. 488.

Annotation: 19 Ann. Cas. 489.

[6] Pickens Co. v. Thomas, 152 Ga. 648, 111 S. E. 27, 21 A.L.R. 1438; McLellan v. Hayford, 72 Me. 410, 39 Am. Rep. 343.

Annotation: 19 L.R.A.(N.S.) 960.

[7] Re Solicitor, 22 Ont. L. Rep. 30, 19 Ann. Cas. 488.

[8] Pickens Co. v. Thomas, 152 Ga. 648, 111 S. E. 27, 21 A.L.R. 1438.

[9] Annotation: 21 A.L.R. 1442; 19 Ann. Cas. 489.

An attorney who is retained to transact business for a client and who remains at his office at the client's request for several days to care for such business is entitled to a reasonable retainer fee and reasonable compensation for his time in waiting. Jones v. Brantley, 121 Miss. 721, 83 So. 802, 8 A.L.R. 1353.

[10] Annotation: 21 A.L.R. 1445.

[11] Jones v. Brantley, 121 Miss. 721, 83 So. 802, 8 A.L.R. 1353; Mellon v. Fulton, 22 Okla. 636, 98 P. 911, 19 L.R.A.(N.S.) 960.

Annotation: 21 A.L.R. 1446; 19 L.R.A. (N.S.) 960.

[12] Annotation: 19 L.R.A.(N.S.) 961.

[13] Windett v. Union Mut. L. Ins. Co. 144 U. S. 581, 36 L. ed. 551, 12 S. Ct. 751; Pickens Co. v. Thomas, 152 Ga. 648, 111 S. E. 27, 21 A.L.R. 1438; McLellan v. Hayford, 72 Me. 410, 39 Am. Rep. 343.

Annotation: 21 A.L.R. 1448; 19 L.R.A. (N.S.) 961; 19 Ann. Cas. 489.

An attorney employed as general counsel

fee when not called on to render the services contemplated by his employment and his right to such fee over and above the value of the services which are actually rendered has been drawn by some courts, which have denied the right to the retainer in the latter case.[14] According to other decisions, where an attorney, under the terms of his general employment, debars himself from employment by others whose interests are antagonistic to those of his client so employing him, such service is a proper item of charge in a suit for services rendered under such general employment.[15]

B. Contracts for Compensation

§ 159. Generally.—Before an attorney undertakes the business of a client, he may contract with reference to compensation for his services; no confidential relation then exists and the parties deal with each other at arm's length.[16] Such contracts are not within the rule of presumption against the attorney which obtains in contracts between the attorney and client after the relation has been established.[17] A contract made under such circumstances is as valid and unobjectionable as if made between other persons not occupying fiduciary relations, and who are, in all respects, competent to contract with each other,[18] and it will be upheld and enforced if it is fair and reasonable,[19] is not champertous,[1] or does not for other reasons contravene public policy.[2] If, however, it appears that the contract was induced by fraud or misrepresentation, or that, in view of the nature of the claim, the compensation is so excessive as to evince a purpose on the part of the attorney to obtain an improper or undue advantage over the client, the contract will not be enforced.[3] A doubtful or ambiguous contract for professional services and for the compensation of an attorney who drew it should be construed in favor of the client.[4]

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for a specified time, without any agreement as to retaining fee, who is to be paid a separate fee for every specific legal service rendered is not entitled, as a matter of right, at the end of his employment to a retaining fee in addition to the fees paid him for the specific services rendered. Pickens Co. v. Thomas, 152 Ga. 648, 111 S. E. 27, 21 A.L.R. 1438;

[14] McLellan v. Hayford, 72 Me. 410, 39 Am. Rep. 343.
Annotation: 19 Ann. Cas. 489.

[15] Mellon v. Fulton, 22 Okla. 636, 98 P. 911, 19 L.R.A.(N.S.) 960.
Annotation: 19 L.R.A.(N.S.) 960; 19 Ann. Cas. 489.

[16] Hughes v. Dundee Mortg. & T. Invest. Co. 140 U. S. 98, 35 L. ed. 354, 11 S. Ct. 727; Elmore v. Johnson, 143 Ill. 513, 32 N. E. 413, 21 L.R.A. 366, 36 Am. St. Rep. 401; Roten v. Tesdell, 195 Iowa, 1329, 192 N. W. 442, 30 A.L.R. 180; Chreste v. Louisville R. Co. 167 Ky. 75, 180 S. W. 49, L.R.A.1917B, 1123, Ann. Cas. 1917C, 867; Re Marron, 22 N. M. 252, 160 P. 391, L.R.A.1917B, 378; White v. Burch (Tex. Civ. App.) 33 S. W. (2d) 512, citing R. C. L.; Hubbard v. George, 81 W. Va. 538, 94 S. E. 974, L.R.A.1918C, 835.
Annotation: 36 Am. St. Rep. 415.

[17] Rust v. Larue, 4 Litt. (Ky.) 412, 14 Am. Dec. 172; Re Howell, 215 N. Y. 466, 109 N. E. 572, Ann. Cas. 1917A, 527 (apparently recognizing the rule).
Annotation: 2 A.L.R. 844.

[18] Dickinson v. Bradford, 59 Ala. 581, 31 Am. Rep. 23; Shirk v. Neible, 156 Ind. 66, 59 N. E. 281, 83 Am. St. Rep. 150; Chreste v. Louisville R. Co. 167 Ky. 75, 180 S. W. 49, L.R.A.1917B, 1123, Ann. Cas. 1917C, 867; Rust v. Larue, 4 Litt. (Ky.) 412, 14 Am. Dec. 172; Oxborough v. St. Martin, 151 Minn. 514, 187 N. W. 707, 21 A.L.R. 350.
Annotation: 83 Am. St. Rep. 159.
In some jurisdictions it is expressly provided by statute that the measure of the attorney's compensation shall be left to the agreement, express or implied, between him and his client. Annotation: 83 Am. St. Rep. 163, 164.

[19] Baca v. Padilla, 26 N. M. 223, 190 P. 730, 11 A.L.R. 1188.

[1] Chreste v. Louisville R. Co. 167 Ky. 75, 180 S. W. 49, L.R.A.1917B, 1123, Ann. Cas. 1917C, 867.

[2] See infra, §§ 176, 177.

[3] Pindall v. Waterman, 84 Ark. 575, 106 S. W. 964, 120 Am. St. Rep. 87 (relief granted by court of equity on the grounds that the contract was unlawful and oppressive, and that an unconscientious advantage had been taken); Chreste v. Louisville R. Co. 167 Ky. 75, 180 S. W. 49, L.R.A.1917B, 1123, Ann. Cas. 1917C, 867; Morehouse v. Brooklyn Heights R. Co. 185 N. Y. 520, 78 N. E. 179, 7 Ann. Cas. 377.

[4] Burho v. Carmichiel, 117 Minn. 211, 135 N. W. 386, Ann. Cas. 1913D, 305; Falloon v. Miles, 102 Neb. 843, 170 N. W. 191, 2 A.L.R. 840.

If an attorney and his client agree upon a conveyance of land involved in the litigation as part or all of the fees, such agreement must be in writing in order to be valid under the statute of frauds.[5]

§ 160. Contracts Made during Existence of Relation of Attorney and Client.—The law does not incapacitate an attorney from contracting with his client for compensation during the existence of the relation of attorney and client; such contracts are not void merely by reason of the existence of that relation, and will be enforced when they are fair and reasonable and are freely and voluntarily executed with full understanding by the client.[6] In a number of jurisdictions the right to enter into such contracts has been specifically recognized by statute.[7] Some courts, however, hold that while the relationship exists, an attorney cannot bind his client in any manner to make him greater compensation for his services than he would have the right to demand if no contract had been made during the existence of the relationship;[8] and all courts agree that if the contract is suspicious, oppressive, or fraudulent,[9] exacts an unreasonable or exorbitant fee,[10] or was made without a fair and full disclosure of the facts on which it is predicated,[11] it cannot be enforced against the client. It is well settled, also, that contracts between attorney and client made after the relation has been established are construed most strongly against the attorney[12] and are regarded with suspicion and jealousy and closely scrutinized by the courts.[13] In many instances they have been declared to be voidable, even though they would be deemed unobjectionable be-

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[5] Oxborough v. St. Martin, 151 Minn. 514, 187 N. W. 707, 21 A.L.R. 350; Farrin v. Matthews, 62 Or. 517, 124 P. 675, 41 L.R.A. (N.S.) 184; Jackson v. Stearns, 58 Or. 57, 113 P. 30, 37 L.R.A.(N.S.) 639, Ann. Cas. 1913A, 284; Lace v. Smith, 34 R. I. 1, 82 A. 268, Ann. Cas. 1913E, 945.

Annotation: 21 A.L.R. 352.

[6] Dickinson v. Bradford, 59 Ala. 581, 31 Am. Rep. 23; Kidd v. Williams, 132 Ala. 140, 31 So. 458, 56 L.R.A. 879; Chreste v. Louisville R. Co. 167 Ky. 75, 180 S. W. 49, L.R.A. 1917B, 1123, Ann. Cas. 1917C, 867; Morton v. Forsee, 249 Mo. 409, 155 S. W. 765, Ann. Cas. 1914D, 197.

Annotation: 19 A.L.R. 848; 83 Am. St. Rep. 162; Ann. Cas. 1917A, 531.

[7] Eriksson v. Boyum, 150 Minn. 192, 184 N. W. 961, citing R. C. L.; Morton v. Forsee, 249 Mo. 409, 155 S. W. 765, Ann. Cas. 1914D, 197.

Annotation: 19 A.L.R. 847; Ann. Cas. 1917A, 531.

[8] Stern v. Hyman, 182 N. C. 422, 109 S. E. 79, 19 A.L.R. 844, holding that a contract between an attorney and his client for a percentage of the recovery in a matter for which the services of the attorney had been engaged was void.

[9] Ware v. Russell, 70 Ala. 174, 45 Am. Rep. 82; Elmore v. Johnson, 143 Ill. 513, 32 N. E. 413, 21 L.R.A. 366, 36 Am. St. Rep. 401; Shirk v. Neible, 156 Ind. 66, 59 N. E. 281, 83 Am. St. Rep. 150; Donaldson v. Eaton, 136 Iowa, 650, 114 N. W. 19, 14 L.R.A.(N.S.) 1168, 125 Am. St. Rep. 275; Burnham v. Heselton, 82 Me. 495, 20 A. 80, 9 L.R.A. 90.

Annotation: 19 A.L.R. 853.

An attorney cannot, after the commencement of the relation, lawfully stipulate with his client for excessive fees or take unreasonable securities from him. Shirk v. Neible, 156 Ind. 66, 59 N. E. 281, 83 Am. St. Rep. 150.

[10] Ritz v. Carpenter, 43 S. D. 236, 178 N. W. 877, 19 A.L.R. 840; Cooper v. Bell, 127 Tenn. 142, 153 S. W. 844, Ann. Cas. 1914B, 980.

Annotation: Ann. Cas. 1914B, 983.

[11] Donaldson v. Eaton, 136 Iowa, 650, 114 N. W. 19, 14 L.R.A.(N.S.) 1168, 125 Am. St. Rep. 275; Burnham v. Heselton, 82 Me. 495, 20 A. 80, 9 L.R.A. 90; Ritz v. Carpenter, 43 S. D. 236, 178 N. W. 877, 19 A.L.R. 840.

Annotation: 19 A.L.R. 854; Ann. Cas. 1917A, 536.

[12] Re Howell, 215 N. Y. 466, 109 N. E. 572, Ann. Cas. 1917A, 527.

Annotation: 2 A.L.R. 844.

[13] Kidd v. Williams, 132 Ala. 140, 31 So. 458, 56 L.R.A. 879; Ware v. Russell, 70 Ala 174, 45 Am. Rep. 82; Dickinson v. Bradford, 59 Ala. 581, 31 Am. Rep. 23; Halstead v. Florence Citrus Growers' Asso. 104 Fla. 21, 139 So. 132, citing R. C. L.; Elmore v. Johnson, 143 Ill. 513, 32 N. E. 413, 21 L.R.A. 366, 36 Am. St. Rep. 401; Chreste v. Louisville R. Co. 167 Ky. 75, 180 S. W. 49, L.R.A. 1917B, 1123, Ann. Cas. 1917C, 867; Morton v. Forsee, 249 Mo. 409, 155 S. W. 765, Ann. Cas. 1914D, 197; Moore v. Rochester Weaver Min. Co. 42 Nev. 164, 174 P. 1017, 19 A.L.R. 830; Lynde v. Lynde, 64 N. J. Eq. 736, 52 A. 694, 58 L.R.A. 471, 97 Am. St. Rep. 692; Re Howell, 215 N. Y. 466, 109 N. E. 572, Ann. Cas. 1917A, 527.

Annotation: 19 A.L.R. 851; Ann. Cas. 1917A, 533.

The rule restricting recovery under such circumstances is based on the confidential relations existing between attorney and client and is enforced, not on the ground that there has been fraud, but in order to prevent fraud and as a matter of sound tween other parties.[14] In fact, there is a presumption of unfairness and invalidity.[15]

§ 161. —**Increasing Attorney's Compensation.**—Ordinarily, an agreement made by a client with his counsel, after the latter has been employed, by which the original contract is varied and greater compensation is secured to the counsel is invalid,[16] especially if the additional fee is exorbitant.[17] The attorney cannot exact an increased compensation from his client through the use of information gained in the performance of his duties[18] or, except for the best of reasons, under a threat to withdraw from the case.[19] Moreover, the attorney does not have the legal option to require of the client, as a condition of his further service in a matter for which he was retained without a contract as to compensation, the making of an express contract.[20] When, however, additional services outside the scope of the original employment are contemplated, a contract for additional compensation for such services executed during the existence of the relation of attorney and client is valid and enforceable if it is fair and reasonable and free from fraud and duress,[1] although it has been sometimes held that such contracts should be closely scrutinized.[2] And, of course, the attorney's employment in one suit will not deprive him, while it is pending, of his right to make a contract for compensation for his services in another, or for any other professional business with the same client.[3] An attorney may contract with his client for a special fee in a special case where the client is a corporation which the attorney is serving at a salary which may be changed at the option of the corporation and when the period of the attorney's employment is subject to the same condition.[4]

§ 162. **Contracts Made after Completion of Services or Termination of Relation.**—A contract between attorney and client as to the compensation which the attorney is to receive for legal services, entered into after the complete performance of those services, is, assuming that the client was fully informed

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public policy. Stern v. Hyman, 182 N. C. 422, 109 S. E. 79, 19 A.L.R. 844.

[14] Ware v. Russell, 70 Ala. 174, 45 Am. Rep. 82; Elmore v. Johnson, 143 Ill. 513, 32 N. E. 413, 21 L.R.A. 366, 36 Am. St. Rep. 401; Chreste v. Louisville R. Co. 167 Ky. 75, 180 S. W. 49, L.R.A.1917B, 1123, Ann. Cas. 1917C, 867.

[15] See infra, § 189.

[16] Lecatt v. Sallee, 3 Port. (Ala.) 115, 29 Am. Dec. 249; Bailey v. Devine, 123 Ga. 653, 51 S. E. 603, 107 Am. St. Rep. 153; Elmore v. Johnson, 143 Ill. 513, 32 N. E. 413, 21 L.R.A. 366, 36 Am. St. Rep. 401; Thurston v. Travelers Ins. Co. 128 Neb. 141, 258 N. W. 66, citing R. C. L.; Re Howell, 215 N. Y. 466, 109 N. E. 572, Ann. Cas. 1917A, 527; Egan v. Burnight, 34 S. D. 473, 149 N. W. 176, Ann. Cas. 1917A, 539; Colley v. Buie (Tex. Civ. App.) 284 S. W. 702 (reversed on other grounds in (Tex. Com. App.) 291 S. W. 876), citing R. C. L.; Laybourne v. Bray & Shifflett (Tex. Civ. App.) 190 S. W. 1159, citing R. C. L.; Hubbard v. George, 81 W. Va. 538, 94 S. E. 974, L.R.A.1918C, 835; Dorr v. Camden, 55 W. Va. 226, 46 S. E. 1014, 65 L.R.A. 348.

Annotation: 19 A.L.R. 856; 83 Am. St. Rep. 160; Ann. Cas. 1917A, 549.

[17] Ritz v. Carpenter, 43 S. D. 236, 178 N. W. 877, 19 A.L.R. 840.

[18] Dorr v. Camden, 55 W. Va. 226, 46 S. E. 1014, 65 L.R.A. 348.

Tyrrell v. Bank of London, 10 H. L. Cas. 26, 11 Eng. Reprint, 934, 2 Eng. Rul. Cas. 497.

Annotation: 2 Eng. Rul. Cas. 518.

[19] Moore v. Rochester Weaver Min. Co. 42 Nev. 164, 174 P. 1017, 19 A.L.R. 830.

[20] Egan v. Burnight, 34 S. D. 473, 149 N. W. 176, Ann. Cas. 1917A, 539.

Annotation: Ann. Cas. 1917A, 549.

[1] Bartlett v. Odd Fellows' Sav. Bank, 79 Cal. 218, 21 P. 743, 12 Am. St. Rep. 139.

Annotation: 19 A.L.R. 858; Ann. Cas. 1917A, 538.

A contract for compensation for conducting a suit, made under the belief that no defense would be set up, will not prevent a later agreement for additional compensation after a defense has been made. Annotation: 2 A.L.R. 846.

[2] Annotation: 83 Am. St. Rep. 160, 161.

[3] Lecatt v. Sallee, 3 Port. (Ala.) 115, 29 Am. Dec. 249; Kidd v. Williams, 132 Ala. 140, 31 So. 458, 56 L.R.A. 879.

Annotation: 19 A.L.R. 851; Ann. Cas. 1917A, 533.

[4] Bartlett v. Odd-Fellows' Sav. Bank, 79 Cal. 218, 21 P. 743, 12 Am. St. Rep. 139.

as to the business transacted, valid and enforceable; under such circumstances, the parties deal at arm's length, and they may fix the compensation at whatever figure they think proper.[5] It is not necessary that the client have independent advice if he is in a position to form an entirely free and unfettered judgment.[6]

A contract for a fixed fee may be changed after the death of the client, and a contract between the attorney and the representatives of the estate for a contingent fee may be substituted.[7]

§ 163. Contracts for Contingent Fees.—Contracts between attorney and client for a fee contingent on the success of the litigation [8] are generally recognized as valid and binding,[9] provided they are not obtained by fraud, mistake, undue influence, or suppression of facts on part of the attorney,[10] or there is nothing else in the contract which renders it contrary to public policy,[11] as in the case of contracts solicited by the attorney [12] or which prohibit the client from compromising or settling.[13] The contract is upheld even though made by a public body employing an attorney, provided the fee is reasonable,[14] or even though the fee is contingent upon the collection of claims against the United States[15] or the state,[16] unless prohibited by statute.[17]

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[5] Kidd v. Williams, 132 Ala. 140, 31 So. 458, 56 L.R.A. 879; Lecatt v. Sallee, 3 Port. (Ala.) 115, 29 Am. Dec. 249; Elmore v. Johnson, 143 Ill. 513, 32 N. E. 413, 21 L.R.A. 366, 36 Am. St. Rep. 401.

Annotation: 19 A.L.R. 850; 83 Am. St. Rep. 159, 160; Ann. Cas. 1917A, 533.

[6] Kidd v. Williams, 132 Ala. 140, 31 So. 458, 56 L.R.A. 879.

[7] Annotation: 83 Am. St. Rep. 160, 161.

[8] **A contingent fee is one which is made to depend upon success or failure in the effort to enforce a supposed right, whether** doubtful or not. Miles v. Cheyenne County, 96 Neb. 703, 148 N. W. 959, L.R.A.1917D, 258.

[9] Jeffries v. Mutual L. Ins. Co. 110 U. S. 305, 28 L. ed. 156, 4 S. Ct. 8; McPherson v. Cox, 96 U. S. 404, 24 L. ed. 746; Davis v. Webber, 66 Ark. 190, 49 S. W. 822, 45 L.R.A. 196, 74 Am. St. Rep. 81; Goldstone v. State Bar, 214 Cal. 490, 6 P. (2d) 513, 80 A.L.R. 701; Stanton v. Haskin, 1 MacArth. (D. C.) 558, 29 Am. Rep. 612; Sapp v. Davids, 176 Ga. 265, 168 S. E. 62, 85 A.L.R. 1361; Geer v. Frank, 179 Ill. 570, 53 N. E. 965, 45 L.R.A. 110; Re Sylvester, 195 Iowa, 1329, 192 N. W. 442, 30 A.L.R. 180; Graham v. Dubuque Specialty Mach. Works, 138 Iowa, 456, 114 N. W. 619, 15 L.R.A.(N.S.) 729; Shouse v. Consolidated Flour Mills Co. 128 Kan. 174, 277 P. 54, 64 A.L.R. 606; Stevens v. Sheriff, 76 Kan. 124, 90 P. 799, 11 L.R.A.(N.S.) 1153; Bell County Bd. of Edu. v. Lee, 239 Ky. 317, 39 S. W. (2d) 492, citing R. C. L.; Schmitz v. South Covington & C. Street R. Co. 131 Ky. 207, 114 S. W. 1197, 22 L.R.A.(N.S.) 776, 18 Ann. Cas. 1114; Rust v. Larue, 4 Litt. (Ky.) 411, 14 Am. Dec. 172; Scott v. Harmon, 109 Mass. 237, 12 Am. Rep. 685; Blaisdell v. Ahern, 144 Mass. 393, 11 N. E. 681, 59 Am. Rep. 99; Manning v. Sprague, 148 Mass. 18, 18 N. E. 673, 1 L.R.A. 516, 12 Am. St. Rep. 508; Kelley v. Judge of Recorder's Ct. (Kelley v. Boyne) 239 Mich. 204, 214 N. W. 316, 53 A.L.R. 273; Jones v. Jones, 333 Mo. 478, 63 S. W. (2d) 146, 90 A.L.R. 219; Lipscomb v. Adams, 193 Mo. 530, 91 S. W. 1046, 112 Am. St. Rep. 500; Duke v. Harper, 66 Mo. 51, 27 Am. Rep. 314; Miles v. Cheyenne County, 96 Neb. 703, 148 N. W. 959, L.R.A.1917D, 258; Stroemer v. Van Orsdel, 74 Neb. 132, 103 N. W. 1053, 107 N. W. 125, 4 L.R.A.(N.S.) 212, 121 Am. St. Rep. 713; Schomp v. Schenck, 40 N. J. L. 195, 29 Am. Rep. 219; Baca v. Padilla, 26 N. M. 223, 190 P. 730, 11 A.L.R. 1188; High Point Casket Co. v. Wheeler, 182 N. C. 459, 109 S. E. 378, 19 A.L.R. 391; Rohan v. Johnson, 33 N. D. 179, 156 N. W. 936, L.R.A. 1916E, 64, Ann. Cas. 1918A, 794; Greenleaf v. Minneapolis, St. P. & S. Ste. M. R. Co. 30 N. D. 112, 151 N. W. 879, Ann. Cas. 1917D, 908; Davy v. Fidelity & C. Ins. Co. 78 Ohio St. 256, 85 N. E. 504, 17 L.R.A.(N.S.) 443, 125 Am. St. Rep. 694; Reece v. Kyle, 49 Ohio St. 475, 31 N. E. 747, 16 L.R.A. 723; Lashley v. Moore, 112 Okla. 198, 240 P. 704, citing R. C. L.; Weaver v. Drake, 79 Okla. 277, 193 P. 45, citing R. C. L.; Re Faling, 113 Or. 6, 228 P. 821, 231 P. 148, citing R. C. L.; Perry v. Dicken, 105 Pa. 83, 51 Am. Rep. 181; Henderson v. Knoxville, 157 Tenn. 477, 9 S. W. (2d) 697, 60 A.L.R. 652; Moyers v. Memphis, 135 Tenn. 263, 186 S. W. 105, Ann. Cas. 1918C, 854; Croco v. Oregon Short Line R. Co. 18 Utah, 311, 54 P. 985, 44 L.R.A. 285; Smits v. Hogan, 35 Wash. 290, 77 P. 390, 1 Ann. Cas. 297; Dorr v. Camden, 55 W. Va. 226, 46 S. E. 1014, 65 L.R.A. 348.

Annotation: 1 L.R.A. 516; 65 L.R.A. 348; 74 Am. St. Rep. 90; 83 Am St. Rep. 170; 112 Am. St. Rep. 510; 1 Ann. Cas. 299.

Contracts for contingent fees are as much for the benefit of the client as of the attorney, especially in cases where the client has a meritorious cause of action, but no means with which to pay for legal services unless he can, with the sanction of law, make a contract for a contingent fee to be paid out of the proceeds of the litigation. Lipscomb v. Adams, 193 Mo. 530, 91 S. W. 1046, 112 Am. St. Rep. 500.

[10] See infra, § 164.

[11] See infra, §§ 164–166.

[12] Kelley v. Judge of Recorder's Ct. (Kelley v. Boyne) 239 Mich. 204, 214 N. W. 316, 53 A.L.R. 273; Ingersoll v. Coal Creek Coal Co. 117 Tenn. 263, 98 S. W. 178, 9 L.R.A. (N.S.) 282, 119 Am. St. Rep. 1003, 10 Ann. Cas. 829.

[13] Davy v. Fidelity & C. Ins. Co. 78 Ohio St. 256, 85 N. E. 504, 17 L.R.A.(N.S.) 443, 125 Am. St. Rep. 694.

In England, however, contracts for fees contingent upon success are invalid.[18]

§ 164. —Considerations Affecting Validity.—A contract for a contingent fee must be made in good faith, without suppression of facts or of apprehended difficulties, and without undue influence of any sort or degree; and the compensation bargained for must be just and fair, so that the transaction may be characterized throughout by good faith to the client. If the contract is shown to have been obtained by fraud, mistake, or undue influence, if it is so excessive in proportion to the services to be rendered as to be in fact oppressive or extortionate,[19] if the attorney suppresses the facts of the case, or if he uses any unfairness in securing it, the contract will be held invalid.[20] Such a contract cannot, however, be condemned solely because the proportion of the claim to be retained by the attorney is large[1] or because of the fact that the client was not skilled in estimating attorneys' services.[2] It is only when the attorney has taken advantage of the client by reason of his poverty or the surrounding circumstances to exact an unreasonable and unconscionable proportion of such claim that it is condemned.[3] The fact that the case involved less difficulty and work than was believed necessary at the time the fee was fixed will not render the fee unconscionable and unfair.[4] It has been held, however, that a contingent fee is only permitted to attorneys as a reward for skill and diligence exercised in the prosecution of doubtful and litigated claims, and is not allowed for the rendition of mere minor services which any layman or inexperienced attorney might perform, the true measure of which services can be ascertained on a quantum meruit.[5]

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[14] Shouse v. Consolidated Flour Mills Co. 128 Kan. 174, 277 P. 54, 64 A.L.R. 606; Miles v. Cheyenne County, 96 Neb. 703, 148 N. W. 959, L.R.A.1917D, 258; Moyers v. Memphis, 135 Tenn. 263, 186 S. W. 105, Ann. Cas. 1918C, 854.

Annotation: L.R.A.1917D, 263.

[15] Nutt v. Knut, 200 U. S. 12, 50 L. ed. 348, 26 S. Ct. 216, affirming 83 Miss. 365, 35 So. 686, 102 Am. St. Rep. 452; Ball v. Halsell, 161 U. S. 72, 40 L. ed. 622, 16 S. Ct. 554; Taylor v. Bemiss, 110 U. S. 42, 28 L. ed. 64, 3 S. Ct. 441; Stanton v. Embrey, 93 U. S. 548, 23 L. ed. 983; Wright v. Tebbits, 91 U. S. 252, 23 L. ed. 320; Ralston v. Dunaway, 123 Ark. 12, 184 S. W. 425, Ann. Cas. 1918C, 820; Newman v. Moyers, 47 App. D. C. 102, Ann. Cas. 1918E, 528, modified in 253 U. S. 182, 64 L. ed. 849, 40 S. Ct. 478; Manning v. Sprague, 148 Mass. 18, 18 N. E. 673, 1 L.R.A. 516, 12 Am. St. Rep. 508; Moyers v. Memphis, 135 Tenn. 263, 186 S. W. 105, Ann. Cas. 1918C, 854.

Annotation: 1 L.R.A. 516; 13 Am. St. Rep. 299.

An attorney may receive compensation on a contingent basis for services performed before the Internal Revenue Commission in ascertaining his client's tax obligation. Shouse v. Consolidated Flour Mills Co. 128 Kan. 174, 277 P. 54, 64 A.L.R. 606.

There are some early decisions to the effect that such contracts for the collection of claims against the United States, whether the claims are to be prosecuted before the courts, before Congress or the legislature, or before any of the executive departments, are against public policy and therefore void. Jones v. Blacklidge, 9 Kan. 562, 12 Am. Rep. 503. Annotation: 13 Am. St. Rep. 298.

[16] Manning v. Sprague, 148 Mass. 18, 18 N. E. 673, 1 L.R.A. 516, 12 Am. St. Rep. 508.

[17] Ball v. Halsell, 161 U. S. 72, 40 L. ed. 622, 16 S. Ct. 554; Trist v. Child (Burke v. Child) 21 Wall. (U. S.) 441, 22 L. ed. 623.

[18] Annotation: 83 Am. St. Rep. 168; 1 Ann. Cas. 299.

[19] Taylor v. Bemiss, 110 U. S. 42, 28 L. ed. 64, 3 S. Ct. 441; Davis v. Webber, 66 Ark. 190, 49 S. W. 822, 45 L.R.A. 196, 74 Am. St. Rep. 81; High Point Casket Co. v. Wheeler, 182 N. C. 459, 109 S. E. 378, 19 A.L.R. 391.

[20] Dorr v. Camden, 55 W. Va. 226, 46 S. E. 1014, 65 L.R.A. 348.

[1] High Point Casket Co. v. Wheeler, 182 N. C. 459, 109 S. E. 378, 19 A.L.R. 391; Moyers v. Memphis, 135 Tenn. 263, 186 S. W. 105, Ann. Cas. 1918C, 854.

[2] Jones v. Jones, 333 Mo. 478, 63 S. W. (2d) 146, 90 A.L.R. 219.

[3] Morehouse v. Brooklyn Heights R. Co. 185 N. Y. 520, 78 N. E. 179, 7 Ann. Cas. 377.

[4] Jones v. Jones, 333 Mo. 478, 63 S. W. (2d) 146, 90 A.L.R. 219.

The word "unjust," or "unconscionable," as applied to attorneys' contracts for contingent fees, means nothing more than that the amount of the fee contracted for, standing alone and unexplained, would be sufficient to show that an unfair advantage had been taken of the client, or that a legal fraud had been perpetrated on him. High Point Casket Co. v. Wheeler, 182 N. C. 459, 109 S. E. 378, 19 A.L.R. 391.

Whether an attorney is entitled to a contingent fee agreed to in a representative suit depends upon the circumstances of the particular case and the extent of the representative party's authority.[6]

A conditional obligation to pay an attorney an extra fee in case of success in an action in which the obligor is not a party is permitted upon a valid and sufficient consideration if such obligor is a party to other suits in which the same question is involved.[7]

§ 165. —Effect of Agreement to Pay Costs and Expenses.—Although a loan of money to the client by the attorney to enable him to carry on the suit and maintain himself during its pendency, which is to be repaid from the amount recovered, is not contrary to public policy,[8] many authorities regard an agreement by an attorney to undertake the conduct of a litigation on his own account, to pay the costs and expenses thereof, and to receive as his compensation a portion of the proceeds of the recovery, or of the thing in dispute, or to save his client harmless or indemnify him against all costs and expenses of the suit, as obnoxious to the law against champerty.[9] However, there is authority to the contrary,[10] particularly in jurisdictions where the statutes expressly leave the compensation of attorneys to the agreement of the parties,[11] although some courts take the view that such statutes do not affect the general rule stated.[12]

§ 166. —In Divorce and Alimony Proceedings.—A contract for the payment of a fee to an attorney contingent upon his procuring a divorce for his client or contingent in amount upon the amount of alimony to be obtained is void as against public policy.[13]

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[5] Dorr v. Camden, 55 W. Va. 226, 46 S. E. 1014, 65 L.R.A. 348.

[6] Annotation: 15 L.R.A.(N.S.) 729.

[7] Clay v. Ballard, 9 Rob. (La.) 308, 41 Am. Dec. 328.

[8] Johnson v. Great Northern R. Co. 128 Minn. 365, 151 N. W. 125, L.R.A.1917B, 1140.

In Reece v. Kyle, 49 Ohio St. 475, 31 N. E. 747, 16 L.R.A. 923, it was held that a promise by an attorney to render legal services in an effort to collect a judgment, for obtaining which the attorney has not been fully paid, and to advance costs and expenses in the first instance, one half to be repaid by the client in case of failure, will form, as between attorney and client, a valid consideration to support an assignment of a judgment the net proceeds of which are to be equally divided in case of success.

[9] Watkins v. Sedberry, 261 U. S. 571, 67 L. ed. 802, 43 S. Ct. 411; Peck v. Heurich, 167 U. S. 624, 42 L. ed. 302, 17 S. Ct. 927; United States ex rel. Payne v. Call (C. C. A. 5th) 287 F. 520, citing R. C. L.; Johnson v. Van Wyck, 4 App. D. C. 294, 41 L.R.A. 520; Sapp v. Davids, 176 Ga. 265, 168 S. E 62, 85 A.L.R. 1361; Geer v. Frank, 179 Ill. 570, 53 N. E. 965, 45 L.R.A. 110; Barngrover v. Pettigrew, 128 Iowa, 533, 104 N. W. 904, 2 L R.A.(N.S.) 260, 111 Am. St. Rep. 206; Adye v. Hanna, 47 Iowa, 264, 29 Am. Rep. 484; Scott v. Harmon, 109 Mass. 237, 12 Am. Rep. 685; Johnson v. Great Northern R Co. 128 Minn. 365, 151 N. W. 125, L.R.A. 1917B, 1140; Pennsylvania Co. v. Lombardo, 49 Ohio St. 1, 29 N. E. 573, 14 L.R.A. 785; Stark County v. Mischel, 42 N. D. 332, 173 N. W. 817, 6 A.L.R. 174; Martin v Clark, 8 R. I. 389, 5 Am. Rep. 586; Re Evans, 22 Utah, 366, 62 P. 913, 53 L.R.A. 952, 83 Am. St. Rep. 794, judgment vacated on rehearing in 42 Utah, 282, 130 P. 217; Roller v. Murray, 112 Va. 780, 72 S. E. 665, 38 L.R.A. (N.S.) 1202, Ann. Cas. 1913B, 1088.

Annotation: 6 A.L.R. 184; 14 L.R.A 785; 83 Am. St. Rep. 173; 1 Ann. Cas. 299.

In Jones v. Jones, 333 Mo. 478, 63 S. W. (2d) 146, 90 A.L.R. 219, the facts were held insufficient to show such an agreement.

A deed of land to an attorney in trust, under which he is to prosecute a suit for the possession of the property, pay the costs and expenses of such suit, sell the property, and receive as compensation a portion of such amount as may be received from the sale is obnoxious to the law against champerty. Peck v. Heurich, 167 U. S. 624, 42 L. ed. 302, 17 S. Ct. 927.

[10] Annotation: 6 A.L.R. 185.

[11] Grand Rapids & I. R Co. v. Cheboygan Circuit Judge, 161 Mich. 181, 126 N. W. 56, 137 Am. St. Rep. 495; Smits v. Hogan, 35 Wash. 290, 77 P. 390, 1 Ann. Cas. 297.

Annotation: 6 A.L.R. 185

[12] Re Evans, 22 Utah, 366, 62 P. 913, 53 L.R.A. 952, 83 Am. St. Rep. 794, judgment vacated on rehearing on other grounds in 42 Utah, 282, 130 P. 217; Croco v. Oregon Short Line R. Co. 18 Utah, 311, 54 P. 985, 44 L.R.A. 285.

Annotation: 6 A.L.R. 185.

§ 167. —Effect of Agreement as Equitable Assignment.—In a number of jurisdictions a contract for a contingent fee is deemed to amount to an equitable assignment of the judgment pro tanto[14] or to give the attorney an equitable interest[15] or a lien therein.[16] Other courts hold that such an agreement will not operate as an assignment[17] without an express stipulation to that effect.[18] It is clear that a contract that an attorney is to receive a certain percentage of the recovery is not such an assignment as will make it necessary to join him as a party plaintiff.[19]

C. Matters Affecting Attorney's Right

§ 168. Generally.—In actions by attorneys to recover compensation for professional services claimed to have been performed under a contract, express or implied, the usual rules as to defenses in actions ex contractu generally apply.[20] The defendant may set up by way of defense that the plaintiff was never employed by him or by his authority,[1] that the contract sued on was unfair or fraudulent[2] or was invalid as being champertous[3] or in contravention of public policy,[4] or that the attorney compromised the client's case against the express direction of the latter[5] or without his knowledge.[6]

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[13] McConnell v. McConnell, 98 Ark. 193, 136 S. W. 931, 33 L.R.A.(N.S.) 1074; Newman v. Freitas, 129 Cal. 283, 61 P 907, 50 L.R.A. 548; Re Sylvester, 195 Iowa, 1329, 192 N. W. 442, 30 A.L.R. 180; Donaldson v. Eaton, 136 Iowa, 650, 114 N. W. 19, 14 L.R.A. (N.S.) 1168, 125 Am. St. Rep. 275; Barngrover v. Pettigrew, 128 Iowa, 533, 104 N. W. 904, 2 L.R.A.(N.S.) 260, 111 Am. St. Rep. 206; Overstreet v. Barr, 255 Ky. 82, 72 S. W. (2d) 1014, citing R. C. L.; Jordan v. Westerman, 62 Mich. 170, 28 N. W. 826, 4 Am. St. Rep. 836; Lynde v. Lynde, 64 N. J. Eq. 736, 52 A. 694, 58 L.R.A. 471, 97 Am. St. Rep. 692; Baca v. Padilla, 26 N. M. 223, 190 P. 730, 11 A.L.R. 1188.

Annotation: 30 A.L.R. 189; 33 L.R.A. (N.S.) 1074; 44 L.R.A.(N.S.) 383; Ann. Cas. 1918E, 905; 13 Am. St. Rep. 299.

It is not to be supposed that a court would make an allowance to the wife of a gross sum for permanent alimony to be paid by the husband out of his estate if it had knowledge of the fact that the wife had contracted to pay any portion of what she should be awarded to her attorney. Such contracts are against public policy for the further reason that they tend to impair the family relation. Jordan v. Westerman, 62 Mich. 170, 28 N. W. 826, 4 Am. St. Rep. 836.

[14] Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge, 161 Mich. 181, 126 N. W. 56, 137 Am. St. Rep. 495; Fairbanks v. Sargent, 104 N. Y. 108, 9 N. E. 870, 6 L.R.A. 475, 58 Am. Rep. 490; High Point Casket Co. v. Wheeler, 182 N. C. 459, 109 S. E. 378, 19 A.L.R. 391; Bent v. Lipscomb, 45 W. Va. 183, 31 S. E. 907, 72 Am. St. Rep. 815.

Annotation: 2 A.L.R. 455, s. 19 A.L.R. 399.

In order that an agreement for a contingent fee may operate as an equitable assignment, there must be, in effect, a constructive appropriation of so much of the amount to be recovered as will confer upon the attorney a complete and present right to receive the same without the further intervention of the client: whether in a given case the agreement does constitute an equitable assignment is dependent upon the intent of the parties, as evidenced by the terms of the agreement, in the light of all the surrounding circumstances. High Point Casket Co. v. Wheeler, 182 N. C. 459, 109 S. E. 378, 19 A.L.R. 391.

[15] Coughlin v. New York C. & H. R. R. Co. 71 N. Y. 443, 27 Am. Rep. 75.

Annotation: 2 A.L.R. 455, s. 19 A.L.R. 399.

[16] See infra, § 221.

[17] Nutt v. Knut, 200 U. S. 12, 50 L. ed. 348, 26 S. Ct. 216; Kendall v. United States, 7 Wall. (U. S.) 113, 19 L. ed. 85; Nichols v Orr, 63 Colo. 333, 166 P. 561, 2 A.L.R. 449; Cameron v. Boeger, 200 Ill. 84, 65 N. W. 690, 93 Am. St. Rep. 165; Boogren v. St. Paul City R. Co. 97 Minn. 51, 106 N. W. 104, 3 L.R.A.(N.S.) 379, 114 Am. St. Rep. 691; Enos v. Keating, 39 Wyo. 217, 271 P. 6, 275 P. 131, 67 A.L.R. 430.

[18] Stearns v. Wollenberg, 51 Or. 88, 92 P. 1079, 14 L.R.A.(N.S.) 1095; Plummer v. Great Northern R. Co. 60 Wash. 214, 110 P. 989, 31 L.R.A.(N.S.) 1215.

Annotation: 2 A.L.R. 455, s. 19 A.L.R. 399.

[19] McDonald v. Chicago & N. W. R. Co. 26 Iowa, 124, 96 Am. Dec. 114.

[20] See generally Contracts [Also 6 R. C. L. p. 1034, § 391].

[1] See supra, § 154.

[2] See supra, §§ 159–162.

[3] See supra, § 165; infra, § 176.

[4] See supra, § 166; infra, § 176.

[5] Rogers v. Pettigrew, 138 Ga. 528, 75 S. E. 631, 42 L.R.A.(N.S.) 852, Ann. Cas. 1913D, 409.

Annotation: 42 L.R.A.(N.S.) 852; Ann. Cas. 1913D, 410.

[6] Duffy v Colonial Trust Co. 287 Pa. 348,

§ 169. Fraud, Bad Faith, Negligence.—If an attorney is guilty of actual fraud or bad faith toward his client in the matter of his employment or seeks to secure his personal advantage to the prejudice of his client, he is not entitled to any compensation for his services. The basis of this rule is good morals and a sound public policy, and it should be enforced in all cases where the fraud of the attorney is established by clear and satisfactory proof,[7] even though his conduct was not intentionally prejudicial to his client's interest.[8] The client may also show as a defense to a claim for compensation that the attorney's services were worthless because of his ignorance or negligence,[9] although in this regard it must be borne in mind that an attorney is not the insurer of the result in a case in which he is employed unless he makes a special contract to that effect and for that purpose.[10]

§ 170. Serving Adverse Interests.—An attorney is generally prohibited, except where his client, with full knowledge of the facts, consents or acquiesces, from representing adverse interests;[11] and if he does render such services, the parties having opposing or adverse interests growing out of the same transaction—as, for example, where services are rendered to both the plaintiff and the defendant in the same suit—no recovery can be had for the services rendered, in the absence of anything to show that he acted with the consent and acquiescence of the parties.[12]

§ 171. Failure of Performance, Withdrawal, or Abandonment of Case. — The right of an attorney who has withdrawn from a case or abandoned or terminated his employment to recover for services which he rendered before such withdrawal or abandonment depends principally upon whether or not such withdrawal was justifiable or was with the consent of the client. According to the weight of authority, an attorney who, without justifiable cause and without his client's consent, voluntarily abandons or withdraws from a case upon which he has entered before its termination and before he has fully performed the services required of him with respect thereto loses all right to compensation for services rendered,[13] although in some cases the attorney

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135 A. 204, 49 A.L.R. 406, writ of certiorari denied in 273 U. S. 765, 71 L. ed. 880, 47 S. Ct. 570.

[7] Donaldson v. Eaton, 136 Iowa, 650, 114 N. W. 19, 14 L.R.A.(N.S.) 1168, 125 Am. St. Rep. 275; Davis v. Swedish-American Nat. Bank, 78 Minn. 408, 80 N. W. 953, 81 N. W. 210, 79 Am. St. Rep. 400; Olson v. Lamb, 56 Neb. 104, 76 N. W. 433, 71 Am. St. Rep. 670; Duffy v. Colonial Trust Co. 287 Pa. 348, 135 A. 204, 49 A.L.R. 406, writ of certiorari denied in 273 U. S. 765, 71 L. ed. 880, 47 S. Ct. 570; Balogh v. Jackson, 272 Pa. 482, 116 A. 377, 22 A.L.R. 1497.

Annotation: 22 L. ed. 482.

A note obtained by threats or duress as compensation for an attorney's services in a criminal case is not enforceable against the client. Bailey v. Devine, 123 Ga. 653, 51 S. E. 603, 107 Am. St. Rep. 153.

An attorney who tries fraudulently to prevent the collection of the execution violates his duty, so as to deprive him of his claim for services in procuring such judgment and execution. Brackett v. Norton, 4 Conn. 517, 10 Am. Dec. 179.

[8] Duffy v. Colonial Trust Co. 287 Pa. 348, 135 A. 204, 49 A.L.R. 406, writ of certiorari denied in 273 U. S. 765, 71 L. ed. 880, 47 S. Ct. 570

Annotation: 49 A.L.R. 410.

[9] Balogh v. Jackson, 272 Pa. 482, 116 A. 377, 22 A.L.R. 1497.

Annotation: 22 L. ed. 482.

[10] Babbitt v. Bumpus, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585.

[11] See supra, § 64.

[12] People v. Gerold, 265 Ill. 448, 107 N. E. 165, Ann. Cas. 1916A, 636; Strong v. Brennan, 183 Ill. 97, 55 N. E. 675, 47 L.R.A. 792; Hosford v. Eno, 41 S. D. 65, 168 N. W. 764, L.R.A.1918F, 831.

An attorney employed by a corporation to procure the discharge of all the receivers appointed for it, but who is also employed and paid by one of the contesting sets of receivers, will be precluded by public policy from recovering from the association, even if the board of directors has by resolution approved what he has done with full knowledge of his inconsistent employments. Strong v. International Bldg. L. & Invest. Co. (Strong v. Breman) 183 Ill. 97, 55 N. E. 675, 47 L.R.A. 792.

[13] Justice v. Lairy, 19 Ind. App. 272, 49 N. E. 459, 65 Am. St. Rep. 405; Simon v. Brashear, 9 Rob. (La.) 59, 41 Am. Dec. 321; Tenney v. Berger, 93 N. Y. 524, 45 Am. Rep. 263; Nickells v. Nickells, 5 N. D. 125, 64 N. W. 73, 33 L.R.A. 515, 57 Am. St. Rep. 540; Clendinen v. Black, 18 S. C. L. (2 Bail.) 488,

has been allowed to recover on a quantum meruit notwithstanding his abandonment of his employment.[14] If, on the other hand, the attorney has justifiable cause for withdrawing from a case before it is finished or for abandoning his employment with his client and he gives reasonable notice, he may recover compensation for services already rendered, even though his withdrawal or abandonment was without the consent of the client.[15] The attorney may also recover the reasonable value of services rendered notwithstanding his withdrawal from the case or abandonment of his services where he does so with the client's consent.[16] And the same is true where complete performance by the attorney becomes impossible without fault of either party.[17]

What amounts to a withdrawal, abandonment, or failure to perform depends upon the circumstances of each individual case.[18] There is, however, no abandonment or breach excusing the client from liability where the attorney withdraws after judgment without representing the client on appeal, unless the contract requires him to perform such service.[19]

§ 172. Discharge or Prevention of Performance by Client.—Although a client may at any time terminate the relationship between himself and his attorney,[20] an attorney who, without fault on his part, is discharged by the client, or is otherwise wrongfully prevented from performing the professional duties for which he was employed, is entitled to compensation,[1] even though it does not appear positively that he could have successfully terminated his employment,[2] or even though the agreement was for a contingent fee, provided the contingency has taken place.[3]

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23 Am. Dec. 149; Davenport v. Waggoner, 49 S. D. 592, 207 N. W. 972, 45 A.L.R. 1126.

Annotation: 45 A.L.R. 1137; 52 L.R.A. (N.S.) 381; Ann. Cas. 1913E, 540.

Upon abandonment of the services the attorney cannot recover either on the contract of employment or on notes given in place of the amount which he would otherwise have been entitled to charge for his services after they had been rendered. Clendinen v. Black, 18 S. C. L. (2 Bail.) 488, 23 Am. Dec. 149.

If an attorney engaged on a contingent fee basis fails, after a reasonable length of time, to perform the contingency, he is entitled to no compensation, either on a quantum meruit or for expenses. Fletcher v. Kellogg, 55 App. D. C. 351, 6 F. (2d) 476, 40 A.L.R. 1525, writ of certiorari denied in 269 U. S. 555, 70 L. ed. 409, 46 S. Ct. 18.

[14] Annotation: 52 L.R.A.(N.S.) 381.

[15] Powers v. Manning, 154 Mass. 370, 28 N. E. 290, 13 L.R.A. 258; Eliot v. Lawton, 7 Allen (Mass.) 274, 83 Am. Dec. 683; Genrow v. Flynn, 166 Mich. 564, 131 N. W. 1115, 35 L.R.A.(N.S.) 960, Ann. Cas. 1912D, 638; Re Dunn, 205 N. Y. 398, 98 N. E. 914, Ann. Cas. 1913E, 536; Tenney v. Berger, 93 N. Y. 524, 45 Am. Rep. 263.

Annotation: 45 A.L.R. 1142; 35 L.R.A. (N.S.) 960; 83 Am. St. Rep. 159; Ann. Cas. 1912D, 640; Ann. Cas. 1913E, 540.

An attorney who withdraws on account of the employment of other counsel with whom he cannot cordially co-operate may recover for services already rendered. Tenney v. Berger, 93 N. Y. 524, 45 Am. Rep. 263.

[16] Justice v. Lairy, 19 Ind. App. 272, 49 N. E. 459, 65 Am. St. Rep. 405.

Annotation: 45 A.L.R. 1149.

[17] Annotation: 45 A.L.R. 1150.

[18] See annotation: 45 A.L.R. 1153, for illustrations.

Where legal business has been intrusted to two attorneys associated for the practice of law, it may be attended to by either, and this will constitute a performance of the contract, and it will be no defense to an action by them for their fees that one of them never took part in the trial of the case. Simon v. Brashear, 9 Rob. (La.) 59, 41 Am. Dec. 321.

[19] Annotation: 45 A.L.R. 1151.

[20] See supra, § 34.

[1] McGowan v. Parish, 237 U. S. 285, 59 L. ed. 955, 35 S. Ct. 543; Brodie v. Watkins, 33 Ark. 545, 34 Am. Rep. 49; Bartlett v. Odd Fellows' Sav. Bank, 79 Cal. 218, 21 P. 743, 12 Am. St. Rep. 139; Louque v. Dejan, 129 La. 519, 56 So. 427, 38 L.R.A.(N.S.) 389; Price v. Western Loan & Sav. Co. 35 Utah, 379, 100 P. 677, 19 Ann. Cas. 589.

Annotation: 53 L.R.A. 79; 83 Am. St. Rep. 166; 19 Ann. Cas. 592.

If a client, without due cause, takes out of his attorney's hands an account placed with him for collection under an agreement, by the terms of which the attorney is to receive as a compensation for his services a certain percentage of the amount collected, before the attorney has done anything towards the collection of the claim, the attorney is entitled to receive the value of his services as fixed by the contract. Scheinesohn v. Lemonek, 84 Ohio St. 424, 95 N. E. 913, Ann. Cas. 1912C, 737. Annotation: Ann. Cas. 1912C, 741.

[2] Hunt v. Test, 8 Ala. 713, 42 Am. Dec. 659. Annotation: 6 L.R.A.(N.S.) 93.

[3] White v. American Law Book Co. 106 Okla. 166, 233 P. 426, citing R. C. L.; Dolph

§ 173. —Settlement, Compromise, or Dismissal of Suit.—The client cannot, by settling, compromising, or dismissing his suit or action during the pendency thereof, without the consent or over the objection of his attorney,[4] deprive the attorney of his compensation [5] for the agreed amount of which the client is still liable.[6] This rule applies even in the case of reconciliation in a divorce suit.[7] The contract between the attorney and client may fix the compensation of the attorney in the event of a settlement of the action. What amounts to a settlement within such a provision depends upon all the surrounding circumstances of the case; [8] a dismissal by stipulation of an action without consideration and without prejudice is within the operation of the provision entitling the attorney to a fee upon the date such action is settled.[9]

§ 174. Combined Act of Attorney and Client.—An attorney is entitled to compensation for past services in case of termination of the employment by the acts of both himself and his client,[10] as where both are at fault and equally responsible for a condition of affairs making it necessary for the client, in the interest of his business, to employ another attorney.[11] The client cannot treat a default by the attorney caused by himself as discharging him from liability.[12]

§ 175. Death, Incapacity, or Disbarment of Attorney.—If the attorney is afflicted with physical or mental incapacity before the termination of the litigation and unable to continue his services, he may recover the reasonable value of the services theretofore rendered; [13] and if he dies after part performance, but before final adjudication or settlement, of a case in which he has been employed, his estate is entitled to recover reasonable compensation for services rendered.[14] In the case of the death of a member of a firm of attorneys, where the client does not exercise his right to abrogate the employment,[15] the firm is entitled to compensation for services rendered during the continuance of the engagement.[16]

In the case of the disability or death of an attorney employed on a contingent basis before a final adjudication or settlement has been obtained, he or his estate, as the case may be, will be allowed to recover the reasonable value of the services rendered by him upon the subsequent successful termination of the litigation in the client's favor.[17] So, also, where the relation

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v. Speckart, 94 Or. 550, 179 P. 657, 186 P. 32, citing R. C. L.

[4] See supra, §§ 116–118.

[5] Desaman v. Butler Bros. 118 Minn. 198, 136 N. W. 747, Ann. Cas. 1913E, 642; Snow v. Beard, 82 Or. 518, 162 P. 258, citing R. C. L.

Annotation: 18 Ann. Cas. 1115.

[6] Western States Oil & Land Co. v. Helms, 143 Okla. 206, 288 P. 964, 72 A.L.R. 357.

Am. Law Inst. Restatement, Agency, § 449, p. 1058.

[7] Yoder v. Yoder, 105 Wash. 491, 178 P. 474, 3 A.L.R. 1104.

Annotation: 3 A.L.R. 1109.

See generally DIVORCE AND SEPARATION [Also ALIMONY, 1 R. C. L. p. 915, § 64].

[8] Setzer v. Moore, 202 Cal. 333, 260 P. 550, 55 A.L.R. 423.

Annotation: 55 A.L.R. 428.

[9] Setzer v. Moore, 202 Cal. 333, 260 P. 550, 55 A.L.R. 423.

[10] Justice v. Lairy, 19 Ind. App. 272, 49 N. E. 459, 65 Am. St. Rep. 405.

[11] Price v. Western Loan & Sav. Co. 35 Utah, 379, 100 P. 677, 19 Ann. Cas. 589.

[12] Ramsey v. Brooke County Bldg. & L. Asso. 102 W. Va. 119, 135 S. E. 249, 49 A.L.R. 668.

[13] Annotation: 45 A.L.R. 1162.

[14] Coe v. Smith, 4 Ind. 79, 58 Am. Dec. 618; Senneff v. Healy, 155 Iowa, 82, 135 N. W. 27, 39 L.R.A.(N.S.) 219; Clifton v. Clark, 83 Miss. 446, 36 So. 251, 66 L.R.A. 821, 102 Am. St. Rep. 458, 1 Ann. Cas. 396; Morton v. Forsee, 249 Mo. 409, 155 S. W. 765, Ann. Cas. 1914D, 197; Sargent v. McLeod, 209 N. Y. 360, 103 N. E. 164, 52 L.R.A. (N.S.) 380; Clendinen v. Black, 18 S. C. L. (2 Bail.) 488, 23 Am. Dec. 149.

Annotation: 45 A.L.R. 1158; Ann. Cas. 1914D, 210.

[15] As to effect as terminating employment, see supra, § 38.

[16] Clifton v. Clark, 83 Miss. 446, 36 So. 251, 66 L.R.A. 821, 102 Am. St. Rep. 458, 1 Ann. Cas. 396.

[17] Morton v. Forsee, 249 Mo. 409, 155 S.

of attorney and client is terminated by operation of law, as where he accepts the office of judge of a court, he may recover for services previously rendered by him.[18] But if an attorney is disbarred before the completion of the litigation, he is not entitled to recover compensation [19] for the value of his services, at least not where the litigation was undertaken for a fee contingent upon success, if there has been only partial, and not substantial, performance.[20]

§ 176. Illegality of Contract of Employment.—While incidental acts of illegality with respect to an otherwise lawful contract will not prevent a recovery of compensation by the attorney,[1] when the contract for legal services is void because illegal or contrary to public policy,[2] there can be no recovery by the attorney of his stipulated compensation, notwithstanding nothing illegal was done under the condemned contract.[3] Thus, if the contract between the attorney and his client violates the laws prohibiting champerty or maintenance,[4] calls for the performance of illegal lobbying services,[5] or services which prevent or obstruct the proper administration of justice,[6] even though legitimate services may have been rendered under the contract, no recovery may be had. Nor can recovery be had for legal services performed on Sunday in violation of the Sunday laws, although such fact will not prevent recovery for services performed under a divisible contract on secular days.[7] While an attorney may not enforce a promise founded upon his engagement to procure a pardon by obtaining signatures,[8] he may recover for services rendered in seeking a pardon through lawful means.[9]

Whether an attorney can recover compensation from a private employer for assisting in the prosecution of a criminal case depends upon whether or not the contract of employment is against public policy.[10]

§ 177. —Contracts Procured through Solicitation.—It is generally held that no recovery can be had by the attorney for services rendered under a contract of employment procured by solicitation by one employed by him to solicit claims.[11] Some courts, however, take the position that mere solicitation on the part of the attorney himself, unaccompanied by fraud, misrepresentation,

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W. 765, Ann. Cas. 1914D, 197; Sargent v. McLeod, 209 N. Y. 360, 103 N. E. 164, 52 L.R.A.(N.S.) 380.
Annotation: 52 L.R.A.(N.S.) 381.

[18] Justice v. Lairy, 19 Ind. App. 272, 49 N. E. 459, 65 Am. St. Rep. 405.
Annotation: 45 A.L.R. 1163.

[19] Annotation: 45 A.L.R. 1156; 52 L.R.A. (N.S.) 381.

[20] Davenport v. Waggoner, 49 S. D. 592, 207 N. W. 972, 45 A.L.R. 1126, wherein it is said that an attorney who is disbarred is held to occupy the same position as one who voluntarily and wrongfully abandons a litigation.

[1] Old Dominion Transp. Co. v. Hamilton, 146 Va. 594, 131 S. E. 850, 46 A.L.R. 186.

[2] See supra, §§ 54 et seq.

[3] Flack v. Warner, 278 Ill. 368, 116 N. E. 202, L.R.A.1917F, 464; Chreste v. Louisville R. Co. 167 Ky. 75, 180 S. W. 49, L.R.A. 1917B, 1123, Ann. Cas. 1917C, 867; Spaulding v. Maillet, 57 Mont. 318, 188 P. 377, citing R. C. L.; Ormerod v. Dearman, 100 Pa. 561, 45 Am. Rep. 391; Weber v. Shay, 56 Ohio St. 116, 46 N. E. 377, 37 L.R.A. 230, 60 Am. St. Rep. 743; Arlington Hotel Co. v. Ewing, 124 Tenn. 536, 138 S. W. 954, 38 L.R.A.(N.S.) 842, Ann. Cas. 1913A, 121.
Annotation: 20 A.L.R. 1477, s. 26 A.L.R. 98.

[4] Johnson v. Great Northern R. Co. 128 Minn. 365, 151 N. W. 125, L.R.A.1917B, 1140.

[5] Earle v. Myers, 207 U. S. 244, 52 L. ed. 191, 28 S. Ct. 86; Nutt v. Knut, 200 U. S. 12, 50 L. ed. 348, 26 S. Ct. 216.

[6] Arlington Hotel Co. v. Ewing, 124 Tenn. 536, 138 S. W. 954, 38 L.R.A.(N.S.) 842, Ann. Cas. 1913A, 121.
Annotation: 13 Am. St. Rep. 297.

[7] Jones v. Brantley, 121 Miss. 721, 83 So. 802, 8 A.L.R. 1353.
Annotation: 8 A.L.R. 1356.

[8] Hatzfield v. Gulden, 7 Watts (Pa.) 152, 32 Am. Dec. 750.

[9] Annotation: 13 Am. St. Rep. 298.

[10] Rock v. Ekern, 162 Wis. 291, 156 N. W. 197, L.R.A.1916D, 459.

[11] Ingersoll v. Coal Creek Coal Co. 117 Tenn. 263, 98 S. W. 178, 9 L.R.A.(N.S.) 282, 119 Am. St. Rep. 1003, 10 Ann. Cas. 829.
Annotation: 86 A.L.R. 517; L.R.A.1917B, 1129; Ann. Cas. 1917C, 872.

undue influence, imposition of some kind, or other circumstances sufficient to invalidate a contract, does not render the contract of employment void as contrary to public policy so as to preclude the attorney from collecting his compensation.[12] Others take the position that the conduct of an attorney in soliciting persons having rights of action, particularly those for personal injuries or death, to intrust him with the prosecution of their actions is so contrary to the character of the profession and so opposed to sound public policy and to a proper and decorous administration of the law as to bar his right to collect fees.[13] In some jurisdictions such contracts are expressly made void by statute, whether solicited directly or indirectly, individually or by agent.[14] Such statutes are designed to discourage the practice commonly known as "ambulance chasing" and are to be construed in the light of the evil which they are designed to cure.[15] In some cases the right to compensation has been sustained where the solicitation was by a person not employed by the attorney.[16]

§ 178. —**Right to Compensation on a Quantum Meruit.**—If the contract between an attorney and client does not violate public policy and is not in any way tainted with immorality or illegality, as where the services which form the subject-matter are not themselves illegal, either intrinsically or by reason of the circumstances under which they are rendered, but the contract is void because of some want of power in one or both of the parties to make it, because of some irregularity in its execution,[17] or is for some other reason illegal,[18] the attorney may recover upon a quantum meruit for the reasonable value of such services, notwithstanding the illegality of the contract. When, however, the illegality, either in whole or in part, is in the thing which the party seeking to recover was to do, there can be no recovery upon a quantum meruit.[19] In such cases every objection to permitting a recovery upon an express contract applies with equal force to a recovery upon a quantum meruit. And this is true in some cases when the services are not intrinsically illegal, but are improper and contrary to public policy because of the circumstances under which they are rendered.[1]

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[12] Chreste v. Louisville R. Co. 167 Ky. 75, 180 S. W. 49, L.R.A.1917B, 1123, Ann. Cas. 1917C, 867; Johnson v. Great Northern R. Co. 128 Minn. 365, 151 N. W. 125, L.R.A. 1917B, 1140.

Annotation: 86 A.L.R. 519; L.R.A.1917B, 1129; Ann. Cas. 1917C, 872.

[13] Ingersoll v. Coal Creek Coal Co. 117 Tenn. 263, 98 S. W. 178, 9 L.R.A.(N.S.) 282, 119 Am. St. Rep. 1003, 10 Ann. Cas. 829.

Annotation: 9 L.R.A.(N.S.) 282, s. L.R.A. 1917B, 1128; 10 Ann. Cas. 842.

[14] Hightower v. Detroit Edison Co. 262 Mich. 1, 247 N. W. 97, 86 A.L.R. 509.

[15] Hightower v. Detroit Edison Co. 262 Mich. 1, 247 N. W. 97, 86 A.L.R. 509.

An attorney employed by a middleman cannot close his eyes to the implications of the transaction, claim ignorance of its real character, and demand that his actual knowledge of irregularities be proved. Nor can his character as agent of a middleman be changed to that of independent attorney to his client by the mere sound of words used by the middleman in engaging him, by a colorable consultation with the client, or by going through the ritual of establishing a legitimate connection. Ibid.

[16] Annotation: 86 A.L.R. 519; L.R.A.1917B, 1129.

[17] Bowman v. Phillips, 41 Kan. 364, 21 P. 230, 3 L.R.A. 631, 13 Am. St. Rep. 292; Dorr v. Camden, 55 W. Va. 226, 46 S. E. 1014, 65 L.R.A. 348.

Annotation: 3 L.R.A. 631; 13 Am. St. Rep. 297.

[18] Davis v. Webber, 66 Ark. 190, 49 S. W. 822, 45 L.R.A. 196, 74 Am. St. Rep. 81; Rochester v. Campbell, 184 Ind. 421, 111 N. E. 420, citing R. C. L.; Rust v. Larue, 4 Litt. (Ky.) 412, 14 Am. Dec. 172; Oxborough v. St. Martin, 151 Minn. 514, 187 N. W. 707, 21 A.L.R. 350; Harwood v. Carter, 47 Nev. 334, 222 P. 280, citing R. C. L.; Lynde v. Lynde, 64 N. J. Eq. 736, 52 A. 694, 58 L.R.A. 471, 97 Am. St. Rep. 692; Baca v. Padilla, 26 N. M. 223, 190 P. 730, 11 A.L.R. 1188; Re Snyder, 190 N. Y. 66, 82 N. E. 742, 14 L.R.A.(N.S.) 1101, 123 Am. St. Rep. 533, 13 Ann. Cas. 441; Stern v. Hyman Bros. 182 N. C. 422, 109 S. E. 79, 19 A.L.R. 844; Dorr v. Camden, 55 W. Va. 226, 46 S. E. 1014, 65 L.R.A. 348; Polsley v. Anderson, 7 W. Va. 202, 23 Am. Rep. 613.

Annotation: 2 L.R.A.(N.S.) 261, 83 Am. St. Rep. 173.

[19] Baca v. Padilla, 26 N. M. 223, 190 P. 730, 11 A.L.R. 1188.

With regard to services rendered under a contract held to be void for champerty, the authorities differ. Some maintain that recovery may be had on a quantum meruit for services rendered under such a contract.[2] Other authorities, however, deny any recovery on a champertous contract.[3]

It is generally held that an attorney undertaking to procure a divorce under an illegal contract, basing his right to recovery upon the contingency of obtaining the divorce, may recover the value of his services upon a quantum meruit,[4] although no recovery can be had on a quantum meruit for an attorney's services under a contract to obtain evidence and secure a divorce.[5]

§ 179. Statute of Limitations; Accrual of Action. — An attorney's right against his client for compensation may, of course, be barred by the statute of limitations, like any other civil right. The question as to when the attorney's right of action accrues and consequently, when the statute of limitations begins to run against his right, which depends in a great measure upon the agreement between the attorney and his client and the nature and scope of the attorney's employment, is discussed under another title in this work.[6]

D. Remedies to Obtain Payment

§ 180. Retention of Fees from Funds in Hand.—An attorney is often enabled to collect his fees through an agreement or writing by the client authorizing him to retain for his compensation a portion of the money collected or recovered by him.[7] An attorney also has a right, by virtue of his general lien, to retain for his fees money of his client obtained by him in the course of his professional employment.[8] Where a custom or usage exists by virtue of which all attorneys on a successful defense are allowed to retain the costs taxed in favor of their clients, less the witness fees and money advanced as part of their fees, such custom or usage may be held to be a part of the agreement between an attorney and his client and binding upon them, if it is so generally known and acted upon that the parties from that and other circumstances proved must be presumed to have had reference to it for the compensation to be paid.[9]

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[1] Annotation: 67 L. ed. 803; 2 L.R.A.(N.S.) 261; 38 L.R.A.(N.S.) 1202.

[2] Watkins v. Sedberry, 261 U. S. 571, 67 L. ed. 802, 43 S. Ct. 411; Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134; Davis v. Webber, 66 Ark. 190, 49 S. W. 822, 45 L.R.A. 196, 74 Am. St. Rep. 81; Brush v. Carbondale, 229 Ill. 144, 82 N. E. 252, 11 Ann. Cas. 121; Barngrover v. Pettigrew, 128 Iowa, 533, 104 N. W. 904, 2 L.R.A.(N.S.) 260, 111 Am. St. Rep. 206; Rust v. Larue, 4 Litt. (Ky.) 412, 14 Am. Dec. 172; Lynde v. Lynde, 64 N. J. Eq. 736, 52 A. 694, 58 L.R.A. 471, 97 Am. St. Rep. 692; Baca v. Padilla, 26 N. M. 223, 190 P. 730, 11 A.L.R. 1188; Re Snyder, 190 N. Y. 66, 82 N. E. 742, 14 L.R.A.(N.S.) 1101, 123 Am. St. Rep. 533, 13 Ann. Cas. 441; Reese v. Kyle, 49 Ohio St. 475, 31 N. E. 747, 16 L.R.A. 723; Re Evans, 22 Utah, 366, 62 P. 913, 53 L.R.A. 952, 83 Am. St. Rep. 794.

Annotation: 85 A.L.R. 1365; 67 L. ed. 802; 2 L.R.A.(N.S.) 261; 12 L.R.A.(N.S.) 606; 35 L.R.A.(N.S.) 518; 38 L.R.A.(N.S.) 1203; 83 Am. St. Rep. 173; Ann. Cas. 1913B, 1091; 6 Eng. Rul. Cas. 391.

In Ball v. Halsell, 161 U. S. 72, 40 L. ed. 622, 16 S. Ct. 554, recovery was denied because the contract was in violation of express contract.

[3] Sapp v. Davids, 176 Ga. 265, 168 S. E. 62, 85 A.L.R. 1361; Bowman v. Phillips, 41 Kan. 364, 21 P. 230, 3 L.R.A. 631, 13 Am. St. Rep. 292; Hightower v. Detroit Edison Co. 262 Mich. 1, 247 N. W. 97, 86 A.L.R. 509; Butler v. Legro, 62 N. H. 350, 13 Am. St. Rep. 573; Roller v. Murray, 112 Va. 780, 72 S. E. 665, 38 L.R.A.(N.S.) 1202, Ann. Cas. 1913B, 1088.

Annotation: 85 A.L.R. 1368; 67 L. ed. 804; 35 L.R.A.(N.S.) 518; 38 L.R.A.(N.S.) 1203; Ann. Cas. 1913B, 1091.

[4] McConnell v. McConnell, 98 Ark. 193, 136 S. W. 931, 33 L.R.A.(N.S.) 1074; Re Sylvester, 195 Iowa, 1329, 192 N. W. 442, 30 A.L.R. 180; Lynde v. Lynde, 64 N. J. Eq. 736, 52 A. 694, 58 L.R.A. 471, 97 Am. St. Rep. 692.

Annotation: 30 A.L.R. 191.

[5] Barngrover v. Pettigrew, 128 Iowa, 533, 104 N. W. 904, 2 L.R.A.(N.S.) 260, 111 Am. St. Rep. 206.

[6] See Limitation of Actions [Also 17 R. C. L. p. 767, § 133].

[7] Bent v. Lipscomb, 45 W. Va. 183, 31 S. E. 907, 72 Am. St. Rep. 815.

[8] See infra, §§ 209 et seq.

§ 181. Remedy by Suit.—The charges of counsel, like charges for services in other departments of business, are capable of enforcement in the legal tribunals;[10] such fees constitute a legal demand for which an action will lie.[11] Accordingly, while, under the English practice, it is held that a barrister cannot maintain an action for his compensation,[12] in the various states of this country the right of an attorney to recover by suit the compensation to which he is entitled for his services, either under express contract or on a quantum meruit, is well established.[13] This remedy is available to an attorney seeking to recover a retaining fee in a suit for services rendered under a general employment.[14]

While the attorney's action is generally based upon the contract of employment, where such contract is invalid, his recovery, if permissible at all, must, as has already appeared, be based upon a quantum meruit.[15] Furthermore, an attorney's recovery should be on a quantum meruit, and not on the contract, whether oral or in writing, where it appears that the parties did not mutually understand its effect[16] or where there was no agreement as to fees. But where an attorney makes a charge for services and the same is accepted by the client, it beomes an account stated between them and may be sued upon as such by the attorney,[17] although this is not possible when there is a dispute as to the amount of compensation.[18]

If a contract for a contingent fee calls for the transfer to the attorney of a certain tract of land which constituted a part of the property involved in the litigation, the attorney may maintain a suit for specific performance.[19] But generally, in proceedings by attorneys to enforce the payment of compensation for professional services, the usual rule applies that a resort to equity is not permitted where there is an adequate remedy at law.[1] Generally, the remedy of the attorney in such a case would be an action for breach of contract.[2] So, it has been held that one of two lawyers, not general partners in the practice of law, who have undertaken to conduct litigation for a client, has a plain, adequate, and complete remedy at law in an action for money had and received to his use which will preclude a resort

[9] Bodfish v. Fox, 23 Me. 90, 39 Am. Dec. 611.

[10] Wright v. Ellison, 1 Wall. (U. S.) 16, 17 L. ed. 555; Warfield v. Campbell, 38 Ala. 527, 82 Am. Dec. 724.

An attorney will not be permitted to have the merits or amount of his claim against a county adjudicated in a mandamus proceeding. State ex rel. Sayre v. Moore, 40 Neb. 854, 59 N. W. 755, 25 L.R.A. 774.

[11] Re Paschal (Texas v. White) 10 Wall. (U. S.) 483, 19 L. ed. 992; Gosserand v. Monteleone, 159 La. 316, 105 So. 356, 42 A.L.R. 310; Kagey v. Fox West Coast Theatres Corp. 139 Kan. 301, 31 P. (2d) 67, 92 A.L.R. 286.

[12] Kennedy v. Broun, 13 C. B. N. S. 677, 143 Eng. Reprint, 268, 1 Eng. Rul. Cas. 789.
Annotation: 1 Eng. Rul. Cas. 801.

[13] Warfield v. Campbell, 38 Ala. 527, 82 Am. Dec. 724; Fillmore v. Wells, 10 Colo. 228, 15 P. 343, 3 Am. St. Rep. 567; Purser & Magruder v. Baientolila, 152 La. 716, 94 So. 366, 25 A.L.R. 348; Schomp v. Schenck, 40 N. J. L. 195, 29 Am. Rep. 219; Holie v. Forbes, 64 N. D. 696, 256 N. W. 157, citing R. C. L.; Scheinesohn v. Lemonek, 84 Ohio St. 424, 95 N. E. 913, Ann. Cas. 1912C, 737; Thomas v. Scougale, 90 Wash. 162, 155 P. 847, Ann. Cas. 1918C, 452.
Annotation: 1 Eng. Rul. Cas. 801.

[14] Mellon v. Fulton, 22 Okla. 636, 98 P. 911, 19 L.R.A.(N.S.) 960.

[15] See supra, § 178.

[16] Cooper v. Bell, 127 Tenn. 142, 153 S. W. 844, Ann. Cas. 1914B, 980.

[17] Lane & B. Co. v. Taylor, 80 Ark. 469, 97 S. W. 441, 7 L.R.A.(N.S.) 924.
Annotation: 49 A.L.R. 1485.

[18] Chinn v. Lewin, 57 App. D. C. 16, 16 F. (2d) 512, 49 A.L.R. 1480.

[19] Jones v. Jones, 333 Mo. 478, 63 S. W. (2d) 146, 90 A.L.R. 219.

[1] See EQUITY [Also 10 R. C. L. p. 273, § 17].

[2] Trist v. Child (Burke v. Child) 21 Wall. (U. S.) 441, 22 L. ed. 623; Miller v. Newell, 20 S. C. 123, 47 Am. Rep. 833.

to equity in case the other receives and retains an undue proportion of the compensation paid for the services.[3]

§ 182. —**For Wrongful Discharge.**—It is well settled that if an attorney employed for a specified purpose is discharged before the purpose is accomplished, he is entitled to recover on a quantum meruit for services which have been rendered by him;[4] although he may, according to the majority view, maintain an action for damages for the breach of the contract.[5] Other courts, however, hold that, since in every contract between attorney and client there is an implied condition that the client may discharge the attorney at any time, there is no breach of contract when the attorney is discharged, and that therefore, the attorney cannot recover damages, but is limited to a recovery for the value of services rendered,[6] unless he has changed his position or incurred expense.[7] Some courts recognize the right of the attorney to wait until the end of the term of employment and sue for the agreed compensation.[8]

There seems to be no question that where an attorney is employed under a general retainer for a fixed period, the client cannot discharge him without cause without committing a breach of the contract for which the attorney can recover damages.[9]

§ 183. **Recovery in Client's Action.**—Some statutes authorize the court to decree the payment of compensation to counsel out of the amount recovered for his client,[10] but apart from such a statute, contracts between attorneys and clients, relative to professional services, should be settled and decided upon in like manner as all other contracts.[11] Thus, in the absence of statutory authority or consent of the attorney's client, the court cannot adjudge and decree the attorney a portion of the proceeds of a judgment at law recovered by the attorney in favor of his client.[12] It has, however, been held that intervention is a proper method for attorneys employed on a contingent fee to establish their rights to compensation in the judgment,[13] and in equity cases the decree sometimes provides that a payment of fees be made to a named attorney for a party.[14] Thus, it seems that where proceedings in partition are amicable and for the benefit of all parties in interest, it is proper to allow a reasonable attorney's fee and to require the payment of the same by the parties in proportion to their interest in the property involved.[15] In some jurisdictions, however, it has been held that an attorney employed by a part of the creditors of an insolvent estate, who in his professional capacity realizes a fund for distribution among all of them, cannot charge the fund with his fees. He may recover compensation only from those who employed him.[16] Accordingly, in such jurisdictions it is held that, the right to attorneys' fees in partition suits being a matter of contract, either express or implied, the court has no power to allow a fee to the plaintiff's attorney unless the amount has been agreed upon.[17]

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[3] Willis v. Crawford, 38 Or. 522, 63 P. 985, 64 P. 866, 53 L.R.A. 904.

[4] Martin v. Camp, 219 N. Y. 170, 114 N. E. 46, L.R.A.1917F, 402; Scheinesohn v. Lemonek, 84 Ohio St. 424, 95 N. E. 913, Ann. Cas. 1912C, 737; Clayton v. Martin, 108 W. Va. 571, 151 S. E. 855, citing R. C. L.; Enos v. Keating, 39 Wyo. 217, 271 P. 6, 275 P. 131, 67 A.L.R. 430.

Annotation: L.R.A.1917F, 406.

No express offer of his services to the client is necessary to enable him to maintain the action. McGowan v. Parish, 237 U. S. 285, 59 L. ed. 955, 35 S. Ct. 543.

[5] Brodie v. Watkins, 33 Ark. 545, 34 Am. Rep. 49; High Point Casket Co. v. Wheeler, 182 N. C. 459, 109 S. E. 378, 19 A.L.R. 391; Scheinesohn v. Lemonek, 84 Ohio St. 424, 95 N. E. 913, Ann. Cas. 1912C, 737; Clayton v. Martin, 108 W. Va. 571, 151 S. E. 855, citing R. C. L.

Annotation: 6 L.R.A.(N.S.) 93; L.R.A. 1917F, 409; 12 Am. St. Rep. 142.

[6] Louque v. Dejan, 129 La. 519, 56 So. 427, 38 L.R.A.(N.S.) 389; Martin v. Camp, 219 N. Y. 170, 114 N. E. 46, L.R.A.1917F, 402; Ritz v. Carpenter, 43 S. D. 236, 178 N. W. 877, 19 A.L.R. 840.

Annotation: L.R.A.1917F, 412.

[7] Martin v. Camp, 219 N. Y. 170, 114 N. E. 46, L.R.A.1917F, 402.

[8] Annotation: L.R.A.1917F, 409.

[9] Martin v. Camp, 219 N. Y. 170, 114 N. E. 46, L.R.A.1917F, 402.

Annotation: L.R.A.1917F, 413.

[10] United States v. Blackfeather, 155 U. S. 180, 39 L. ed. 114, 15 S. Ct. 64.

[11] St. Louis, I. M. & S. R. Co. v. Blaylock, 117 Ark. 504, 175 S. W. 1170, Ann. Cas. 1917A, 563.

Annotation: 51 Am. St. Rep. 273.

[12] Wolfe v. Lewis, 19 How. (U. S.) 280, 15 L. ed. 643; Okfuskee County v. Hazelwood, 79 Okla. 185, 192 P. 217, 11 A.L.R. 709; Pingree's Estate, 82 Utah, 437, 25 P. (2d) 937, 90 A.L.R. 96.

Annotation: 11 A.L.R. 713.

After the proceeds of a sale on a mortgage foreclosure have been brought into court, it is irregular to make an order that the plaintiff's attorney have a general accounting of the balance due from the plaintiff to him for professional services, and to direct its payment out of the fund, since the attorney is not a party. Wolfe v. Lewis, 19 How. (U. S.) 280, 15 L. ed. 643.

[13] High Point Casket Co. v. Wheeler, 182 N. C. 459, 109 S. E. 378, 19 A.L.R. 391.

If an order is made, in proceedings to compel the foreclosure of a railway trust deed or mortgage given to secure certain bonds, allowing fees to the counsel who represents the trustee named in such deed or mortgage, as well as the bondholders, for less than the amount claimed, and the amount allowed is directed to be paid over to such counsel, by order of the court, which then sets apart, out of trust funds in such proceedings, and directs to be paid to a trust company, money to meet the interest on bonds held by the parties whom the counsel has represented in the proceedings named, such money is a part of the trust funds, and the order allowing fees is a bar to an action by such counsel for the same services and to impress a lien therefor on the money in the custody of the trust company, notwithstanding a provision in such order that payment of the amount allowed should not preclude a recovery, by the counsel, of further compensation from the persons represented by him. A proceeding to reach funds, in the hands of the court, as part of the trust estate, is not an action against the parties or persons so represented, and does not come within the saving provision of the order.[18]

§ 184. Right of Attorney to Continue Action Which Client Has Settled or Compromised.—After a client has, in good faith, and without any intent of depriving the attorney of his fees, compromised or settled his cause of action before judgment, his attorney will not, as a general rule, be allowed to proceed with the action for the protection of his compensation or fees.[19] Many courts extend this rule to cases in which the attorney has a lien upon the cause of action,[20] permitting him to intervene to prosecute the original action only when it appears that the settlement was fraudulent,[1] or upon a showing that the client was irresponsible or that there was no other available means of paying the attorney.[2] Other courts hold, however, that if the attorney has a lien on his client's judgment, suit, or cause of action, he may intervene to prosecute the original action to final judgment.[3] According to the weight of authority, where the client makes a fraudulent or collusive settlement intended to deprive the attorney of his compensation or cost fees, the attorney will be permitted to proceed with the suit in the client's name for the purpose of protecting his interests.[4] It has been held that the attorney cannot maintain an independent suit to prevent the fraudulent dismissal of the action.[5] In some jurisdictions, this right of the attorney to proceed with the suit, even when conferred by statute, has been confined to suits for money or property, and held not to extend to contested actions sounding in tort, where the damages claimed are unliquidated.[6] Other courts have denied the right of an attorney having no lien upon, or interest in, the subject-matter of the suit to prosecute it in order to secure his compensation or fees,[7] requiring such right to be enforced in a separate suit.[8]

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[14] Central R. & Bkg. Co. v. Pettus, 113 U. S. 116, 28 L. ed. 915, 5 S. Ct. 387; Campbell v. Provident Sav. & L. Soc. (Tenn.) 61 S. W. 1090, 54 L.R.A. 817.

Annotation: 11 A.L.R. 713.

[15] Smith v. Smith, 132 Iowa, 700, 109 N. W. 194, 119 Am. St. Rep. 581; Johnson v. Emerick, 74 Neb. 303, 104 N. W. 169, 12 Ann. Cas. 851.

Annotation: 12 Ann. Cas. 854.

[16] Herndon v. Sheats, 176 Ga. 199, 167 S. E. 506, citing R. C. L.; Rives v. Patty, 74 Miss. 381, 20 So. 862, 60 Am. St. Rep. 510.

[17] Annotation: 12 Ann. Cas. 856.

[18] Truesdale v. Farmers' Loan & T. Co. 67 Minn. 454, 70 N. W. 568, 64 Am. St. Rep. 430.

[19] Lamont v. Washington & G. R. Co. 2 Mackey (D. C.) 502, 47 Am. Rep. 268; Coughlin v. New York C. & H. R. R. Co. 71 N. Y. 443, 27 Am. Rep. 75; Kusterer v. Beaver Dam, 56 Wis. 471, 14 N. W. 617, 43 Am. Rep. 725.

Annotation: 67 A.L.R. 443; 45 L.R.A. (N.S.) 750.

If the cause of action is one that is not assignable, the client cannot give his attorney such an interest therein by agreement as will enable him to continue the suit after the settlement. Winslow Bros. Co. v. Murphy, 139 Ga. 231, 77 S. E. 25, 45 L.R.A.(N.S.) 750; Boogren v. St. Paul City R. Co. 97 Minn. 51, 106 N. W. 104, 3 L.R.A.(N.S.) 379, 114 Am. St. Rep. 691; Coughlin v. New York C. & H. R. R. Co. 71 N. Y. 443, 27 Am. Rep. 75; Kusterer v. Beaver Dam, 56 Wis. 471, 14 N. W. 617, 43 Am. Rep. 725.

Annotation: 67 A.L.R. 473; 45 L.R.A. (N.S.) 750.

[20] St. Louis, I. M. & S. R. Co. v. Blaylock, 117 Ark. 504, 175 S. W. 1170, Ann. Cas. 1917A, 563; Randall v. Van Wagenen, 115

Where the attorney proceeds in the original cause to enforce his rights under a lien created by agreement with his client, he should present to the court, by petition or otherwise, the alleged agreement and his claim thereunder.[9] He must prove the material allegations of the original declaration

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N. Y. 527, 22 N. E. 361, 12 Am. St. Rep. 828; Tompkins v. Nashville, C. & St. L. R. Co. 110 Tenn. 157, 72 S. W. 116, 61 L.R.A. 340, 100 Am. St. Rep. 795.

Annotation: 67 A.L.R. 452, 458, 461.

[1] Jackson v. Stearns, 48 Or. 25, 84 P. 798, 5 L.R.A.(N.S.) 390.

[2] Annotation: 67 A.L.R. 452, 467.

[3] Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge, 161 Mich. 181, 126 N. W. 56, 137 Am. St. Rep. 495.

Annotation: 67 A.L.R. 449, 455, 457, 461.

[4] Harris v. Tison, 63 Ga. 629, 36 Am. Rep. 126; Jones v. Morgan, 39 Ga. 310, 99 Am. Dec. 458; Hobson v. Watson, 34 Me. 20, 56 Am. Dec. 632; Randall v. Van Wagenen, 115 N. Y. 527, 22 N. E. 361, 12 Am. St. Rep. 828; Coughlin v. New York C. & H. R. R. Co. 71 N. Y. 443, 27 Am. Rep. 75; Jackson v. Stearns, 48 Or. 25, 84 P. 798, 5 L.R.A. (N.S.) 390; Jackson v. Stearns, 48 Or. 25, 84 P. 798, 5 L.R.A.(N.S.) 390; Falconio v. Larsen, 31 Or. 137, 48 P. 703, 37 L.R.A. 254.

Annotation: 67 A.L.R. 462; 5 L.R.A. (N.S.) 390; 14 L.R.A.(N.S.) 1098; 51 Am. St. Rep. 263; 93 Am. St. Rep. 174, 175; Ann. Cas. 1917D, 919.

This right to prosecute the suit in the name of the client is apparently confined to the attorney for the plaintiff, and in the case of a dismissal or settlement before judgment, the case will not be retained in court to allow the defendant's attorney an opportunity to establish a lien. Annotation: 93 Am. St. Rep. 174, 179.

When, however, it is manifest to the court, from the facts of the case, that the form and effect of the anticipated judgment will be such that by the exercise of its usual and ordinary powers over the judgment, the court cannot aid the attorney in the collection of his fee, it will not compel the further prosecution of the case against the wish of the parties. Stearns v. Wollenberg, 51 Or. 88, 92 P. 1079, 14 L.R.A.(N.S.) 1095.

[5] Randall v. Van Wagenen, 115 N. Y. 527, 22 N. E. 361, 12 Am. St. Rep. 828; Jackson v. Stearns, 48 Or. 25, 84 P. 798, 5 L.R.A. (N.S.) 390.

[6] Stearns v. Wollenberg, 51 Or. 88, 92 P. 1079, 14 L.R.A.(N.S.) 1095; Tompkins v. Nashville, C. & St. L. R. Co. 110 Tenn. 157, 72 S. W. 116, 61 L.R.A. 340, 100 Am. St. Rep. 795.

Annotation: 67 A.L.R. 466; 5 L.R.A. (N.S.) 391.

In Lamont v. Washington & G. R. Co. 2 Mackey (D. C.) 502, 47 Am. Rep. 268, the court, in reviewing one of the few cases which seem to hold that in an action for unliquidated damages the suit may be allowed to proceed for the benefit of the attorney, said: "This is to be remarked about that case, and about others that seem to countenance the proposition that the court will allow a case to proceed for the benefit of the attorneys, viz., that that has never been done except to allow the attorney to secure his legal fees and costs, never to enable him to secure the compensation which his client may have agreed to pay him as counsel."

[7] Cameron v. Boeger, 200 Ill. 84, 65 N. E. 690, 93 Am. St. Rep. 165; Boogren v. St. Paul City R. Co. 97 Minn. 51, 106 N. W. 104, 3 L.R.A.(N.S.) 379, 114 Am. St. Rep. 691.

Annotation: 67 A.L.R. 465.

[8] Enos v. Keating, 39 Wyo. 217, 271 P. 6, 275 P. 131, 67 A.L.R. 430.

[9] Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge, 161 Mich. 181, 126 N. W. 56, 137 Am. St. Rep. 495.

and establish a liability on the part of the defendant to his client, with the same certainty as though the injured party were still prosecuting.[10]

§ 185. —Divorce or Other Marital Action. — There is some conflict of authority as to whether an attorney may continue to prosecute or defend a divorce or separation suit which has been abandoned by the parties, for the purpose of fixing attorneys' fees. The rule supported by the majority of the decisions is to the effect that where the parties have abandoned the suit, condoned their offenses, and resumed their marital relations, such action operates to end the litigation, and it cannot be continued by counsel for the complaining spouse, at least where no counter cause of action is set up in a cross complaint or counterclaim.[11] This is true even though an attorney is, by statute, given a lien on suits for money and the parties are denied the right to satisfy their suits until the lien is satisfied.[12] The reason for this rule is that to permit an attorney to continue such an action after the parties thereto have become reconciled and resumed cohabitation would be in violation of public policy, as continuing litigation after the parties have put an end to it, thereby having a tendency to break up the reconciliation.[13] The same rule applies in other actions involving marital relations.[14] So, since an action for breach of promise of marriage abates by the marriage of the parties,[15] the counsel for the plaintiff cannot prosecute it under a statute giving him a lien for fees.[16] It is the rule in some jurisdictions that while the action for a decree of divorce, after condonation by the injured spouse, may not be resumed, it may be continued for the purpose of requiring the husband to pay such sum as will enable the wife to pay her attorneys for services rendered and expenses incurred, although the parties may have become reconciled and asked for a dismissal of the action.[17]

§ 186. Recourse against Adverse Party Where Suit Is Compromised or Settled.—If the defendant is instrumental in bringing about the settlement of the plaintiff's action, the attorney may, where he was not notified, sue not only the client, but the adverse party, for his compensation.[18] This rule,

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[10] Annotation: 93 Am. St. Rep. 178, 179.

[11] Johnson v. Gerald, 216 Ala. 581, 113 So. 447, 59 A.L.R. 348; Bell v. Bell, 214 Ala. 573, 108 So. 375, 45 A.L.R. 935; Keefer v. Keefer, 140 Ga. 18, 78 S. E. 462, 46 L.R.A.(N.S.) 527; Gordon v. Brackey, 143 Iowa, 102, 120 N. W. 83, 136 Am. St. Rep. 751; Petersen v. Petersen, 76 Neb. 282, 107 N. W. 391, 124 Am. St. Rep. 812; Hillman v. Hillman, 42 Wash. 595, 85 P. 61, 114 Am. St. Rep. 135.

Annotation: 45 A.L.R. 941, s. 59 A.L.R. 355.

[12] Bell v. Bell, 214 Ala. 573, 108 So. 375, 45 A.L.R. 935; Keefer v. Keefer, 140 Ga. 18, 78 S. E. 462, 46 L.R.A.(N.S.) 527.

[13] Annotation: 45 A.L.R. 941, s. 59 A.L.R. 355.

[14] Annotation: 67 A.L.R. 471.

[15] See ABATEMENT, SURVIVAL, AND REVIVAL, Vol. 1, p. 23, § 7.

[16] Harris v. Tison, 63 Ga. 629, 36 Am. Rep. 126.

[17] Annotation: 45 A.L.R. 944, s. 59 A.L.R. 355.

In Yoder v. Yoder, 105 Wash. 491, 178 P. 475, 3 A.L.R. 1104, the attorneys representing the wife in a divorce action were held entitled to resist a motion by the husband to vacate, set aside, and annul an order of the trial court, allowing the wife suit money and attorneys' fees, made after the reconciliation of the parties to the suit for divorce and resumption by them of cohabitation. To somewhat the same effect was Kiddle v. Kiddle, 90 Neb. 248, 133 N. W. 181, 36 L.R.A.(N.S.) 1001, Ann. Cas. 1913A, 796, holding that the court could, after the reconciliation, and as a part of the final order of dismissal, make an allowance of attorneys' fees for services theretofore rendered in the case.

[18] Western States Oil & Land Co. v. Helms, 143 Okla. 206, 288 P. 964, 72 A.L.R. 357.

A judgment debtor who settles with the judgment creditor, in the absence of the creditor's attorney, does so at his peril and cannot thereby deprive the attorney of any portion of the fee to which he is entitled under and by virtue of his contract of employment. Chreste v. Louisville R. Co. 167 Ky. 75, 180 S. W. 49, L.R.A.1917B, 1123, Ann. Cas. 1917C, 867.

An attorney whose contract provided that he was to compromise the claim or enforce it by suit, and was to have 50 per cent of all moneys received, is not entitled, by reason of a compromise settlement of the however, has been held not to apply as against the government which compromises an unliquidated demand against it.[19]

A defendant who settles an action before judgment is liable, not for the amount of a prescribed contingent fee, but for the reasonable value of the attorney's services;[20] after verdict or judgment, however, he is answerable to the attorney for the prescribed percentage of the recovery rather than of the amount paid under the compromise.[1]

In most jurisdictions the defendant in an action, who has been instrumental in effecting a compromise, may, when sued by the plaintiff's attorney for compensation, question the legality of the contract between the plaintiff and his attorney,[2] although a contrary view is taken by some courts.[3]

§ 187. Pleading.—The general principles of pleading applicable in civil actions based upon express or implied contracts[4] apply in an action by an attorney for compensation. A declaration or complaint will be sufficient which alleges that the defendant is under obligation to pay the plaintiff a certain sum of money and interest, that he has refused to comply with such obligation, and that therefore a certain sum of money and interest is due, for which judgment is prayed. By alleging facts to exist which, if proved, would entitle him to recover the amount he demands from the defendant, the plaintiff has shown, so far as the recitals of the declaration or complaint can show, that he has sustained damages.[5] Where fraud or collusion for the purpose of depriving the attorney of his fee is alleged, it is incumbent on the plaintiff to state facts sufficient to support the charge.[6] In a suit on account for services rendered, where there is more or less uncertainty as to the grounds of recovery, there may be properly joined in the petition a count upon express contract and a count upon quantum meruit; the question of granting or overruling a motion to require the plaintiff to elect upon which he will stand is addressed to the sound legal discretion of the court.[7]

An attorney may join a claim against his client for attorneys' fees with an action against the adverse party with whom the client compromised without the attorney's knowledge.[8]

§ 188. Burden of Proof.—The usual rules that the burden of proof rests upon the plaintiff to establish his case by a fair preponderance of the evi-

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claim which the client effected, to recover any compensation from the defendant, upon whom he had served notice of his contract in accordance with a lien statute provision, and against whom he had started suit. Wabash R. Co. v. Elliott, 261 U. S. 457, 67 L. ed. 743, 43 S. Ct. 406.

Parties defendant who are not primarily liable on the claim sued upon are liable jointly with the primary debtor for the fees of which the plaintiffs' attorneys are thereby deprived. Ingersoll v. Coal Creek Coal Co. 117 Tenn. 263, 98 S. W. 178, 9 L.R.A (N.S.) 282, 119 Am. St. Rep. 1003, 10 Ann. Cas. 829.

[19] Kendall v. United States, 7 Wall. (U. S.) 113, 19 L. ed. 85.

[20] Sargent v. McLeod, 209 N. Y. 360, 103 N. E. 164, 52 L.R.A.(N.S.) 380.

[1] Chreste v. Louisville R. Co. 167 Ky. 75, 180 S. W. 49, L.R.A.1917B, 1123, Ann. Cas. 1917C, 867; Desaman v. Butler Bros. 118 Minn. 198, 136 N. W. 747, Ann. Cas. 1913E. 642.

[2] Davy v. Fidelity & C. Ins. Co. 78 Ohio St. 256, 85 N. E. 504, 17 L.R.A.(N.S.) 443, 125 Am. St. Rep. 694; Ingersoll v. Coal Creek Coal Co. 117 Tenn. 263, 98 S. W. 178, 9 L.R.A.(N.S.) 282, 119 Am. St. Rep. 1003, 10 Ann. Cas. 829.

Annotation: 35 L.R.A.(N.S.) 518.

[3] Annotation: 35 L.R.A.(N.S.) 518.

[4] See PLEADING [Also 21 R. C. L. p. 431].

[5] Bartlett v. Odd-Fellows' Sav. Bank, 79 Cal. 218, 21 P. 743, 12 Am. St. Rep. 139.

[6] Hanna v. Island Coal Co. 5 Ind. App. 163, 31 N. E. 846, 51 Am. St. Rep. 246.

[7] Mellon v. Fulton, 22 Okla. 636, 98 P. 911, 19 L.R.A.(N.S.) 960.

Each separate item of an account upon which a suit is brought by an attorney for services rendered may be composed of several elements, if, taken together, they constitute but a single item of charge upon the same subject-matter. Powers v. Manning, 154 Mass. 370, 28 N. E. 290, 13 L.R.A. 258.

[8] Western States Oil & Land Co. v. Helms, 143 Okla. 206, 288 P. 964, 72 A.L.R. 357.

dence, but that matters relied upon by the defendant by way of defense must be established by him,[9] apply in actions by attorneys against clients to recover compensation. The attorney has the burden of proving his right to fees for the services rendered by him.[10] He must show that a contract, express or implied, was entered into;[11] performance thereof on his part,[12] or sufficient reason for nonperformance, as, for instance, prevention of performance by the client;[13] and that he has not been paid.[14] The burden of proving that the attorney abandoned the prosecution or withdrew from the case, when set up as a defense, is on the client,[15] who also has the burden of sustaining a plea that the plaintiff negligently and carelessly managed the business intrusted to him.[16]

§ 189. **—As to Fairness of Contract; Presumptions.**—With respect to a contract for compensation, entered into in the establishment of the relation of attorney and client, the attorney, as a condition of enforcing it, is not bound to show that it was just, fair, and reasonable,[17] although a presumption of unfairness or invalidity attaches to a contract for compensation executed by an attorney and his client after the establishment of the fiduciary relation.[18] Hence, according to the majority rule, the burden of proof is on the attorney to show the fairness of such a transaction, that the compensation provided for does not exceed a fair and reasonable remuneration for the services which have been rendered or which it is his duty to render, and that the contract is free from all fraud, undue influence,[19] and exorbitancy of demand,[20] and was entered into by the client freely and with a full understanding as to his rights and as to the effect of the instrument.[1] The presumption of invalidity can be overcome only by the clearest and most satisfactory evidence.[2] In some states, however, by virtue of a statutory provision allowing the making of such agreements, the burden of establishing the defense of unfairness, fraud, undue influence, unreasonableness, or mistake in the contract is upon the party invoking it.[3] The rule casting on the attorney the burden of showing that a contract between himself and his client was a fair and reasonable one applies only in the enforcement of such contracts, and not in their interpretation.[4]

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[9] See EVIDENCE [Also 10 R. C. L. p. 900, § 50].

[10] Hightower v. Detroit Edison Co. 262 Mich. 1, 247 N. W. 97, 86 A.L.R. 509.

The burden is upon one suing for compensation as a law clerk to segregate the services which he could legally perform from those that he could not because he was not a licensed member of the bar. Ferris v. Snively, 172 Wash. 167, 19 P. (2d) 942, 90 A.L.R. 278.

[11] Ferris v. Snively, 172 Wash. 167, 19 P. (2d) 942, 90 A.L.R. 278.

[12] Ibid.

[13] See supra, § 172.

[14] Ferris v. Snively, 172 Wash. 167, 19 P. (2d) 942, 90 A.L.R. 278.

[15] Annotation: 45 A.L.R. 1155.

[16] Priest v. Dodsworth, 235 Ill. 613, 85 N. E. 940, 14 Ann. Cas. 340.

Annotation: 14 Ann. Cas. 342.

[17] Chreste v. Louisville R. Co. 167 Ky. 75, 180 S. W. 49, L.R.A.1917B, 1123, Ann. Cas. 1917C, 867.

Annotation: 83 Am. St. Rep. 159.

[18] Kidd v. Williams, 132 Ala. 140, 31 So. 458, 56 L.R.A. 879; Elmore v. Johnson, 143 Ill. 513, 32 N. E. 413, 21 L.R.A. 366, 36 Am. St. Rep. 401; Shirk v. Neible, 156 Ind. 66, 59 N. E. 281, 83 Am. St. Rep. 150; Burnham v. Heselton, 82 Me. 495, 20 A. 80, 9 A.L.R. 90; Moore v. Rochester Weaver Min. Co. 42 Nev. 164, 174 P. 1017, 19 A.L.R. 830; Egan v. Burnight, 34 S. D. 473, 149 N. W. 176, Ann. Cas. 1917A, 539; Dorr v. Camden, 55 W. Va. 226, 46 S. E. 1014, 65 L.R.A. 348.

Annotation: 19 A.L.R. 855; Ann. Cas. 1917A, 535.

[19] Kidd v. Williams, 132 Ala. 140, 31 So. 458, 56 L.R.A. 879; Dickinson v. Bradford, 59 Ala. 581, 31 Am. Rep. 23; Lecatt v. Sallee, 3 Port. (Ala.) 115, 29 Am. Dec. 249; Halstead v. Florence Citrus Growers' Asso. 104 Fla. 21, 139 So. 132, citing R. C. L.; Elmore v. Johnson, 143 Ill. 513, 32 N. E. 413, 21 L.R.A. 366, 36 Am. St. Rep. 401; Shirk v. Neible, 156 Ind. 66, 59 N. E. 281, 83 Am. St. Rep. 150; Donaldson v. Eaton, 136 Iowa, 650, 114 N. W. 19, 14 L.R.A.(N.S.) 1168, 125 Am. St. Rep. 275; Burnham v. Heselton, 82 Me. 495, 20 A. 80, 9 L.R.A. 90; Merryman v. Euler, 59 Md. 588, 43 Am. Rep. 564; Boyle v. Waters, 206 Mich. 515, 173 N. W. 519, citing R. C. L.; Morton v. Forsee, 249 Mo. 409, 155 S. W. 765, Ann. Cas. 1914D, 197; Re Howell, 215 N. Y. 466, 109 N. E. 572, Ann. Cas. 1917A, 527; Stern v. Hyman, 182 N. C. 422, 109 S. E. 79, 19 A.L.R. 844; Roseboom v. Baughman, 169 Okla. 442, 37 P. (2d) 616, citing R. C. L.; Egan v. Burnight, 34 S. D. 473, 149 N. W. 176, Ann. Cas. 1917A, 539; Laybourne v. Bray & Shifflett (Tex. Civ. App.) 190 S. W. 1159, citing R. C. L.

Annotation: 19 A.L.R. 855; 83 Am. St. Rep. 161; Ann. Cas. 1917A, 536.

The rule is founded in public policy and operates independently of any element of actual fraud, being intended as a protection to the client against the strong influence to which the confidential relation naturally gives rise. Moore v. Rochester Weaver Min. Co. 42 Nev. 164, 174 P. 1017, 19 A.L.R. 830.

[20] Annotation: 83 Am. St. Rep. 161.

Where the parties enter into a new contract for increased compensation for additional legal services, the attorney must show that the client fully understood its meaning and effect, particularly where it rests in parol.[5]

§ 190. Proof of Value of Services.—In the case of an action by an attorney for compensation under an express valid contract of employment specifying the amount of the compensation to be received by the attorney for his services, as in cases of contracts generally, the contract, when established, is admissible as evidence of the amount to which the attorney is entitled, and its terms cannot be varied by parol evidence.[6] In cases, however, where it is sought to recover the reasonable value of the services renderd under an implied contract, or where, by reason of the invalidity of the original contract, the recovery must be on a quantum meruit, evidence may be introduced of the prices usually charged for similar services,[7] by other attorneys in the same neighborhood, practicing in the same court.[8] But it has been held that testimony showing that less was charged by opposing attorneys in the cases in which the plaintiff rendered the services for which he sues, and that the services rendered by them were as important as, and of as much or even greater value than, those of the plaintiff, is properly excluded.[9] The services of an attorney, when rendered in litigation before the same court which is passing upon the value of such services, may, of themselves, constitute evidence from which the court alone, unaided by opinion of others as to value, or even in defiance of opinion evidence, may reach a conclusion.[10] Moreover, the attorney suing for compensation may testify as to the value of his services, and may show, by his own testimony, his experience and knowledge, and give his judgment as to such value; he may also testify as to his knowledge of the charges of other attorneys for like services in similar cases.[11]

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[1] Egan v. Burnight, 34 S. D. 473, 149 N. W. 176, Ann. Cas. 1917A, 539.

[2] Moore v. Rochester Weaver Min. Co. 42 Nev. 164, 174 P. 1017, 19 A.L.R. 830; Egan v. Burnight, 34 S. D. 473, 149 N. W. 176, Ann. Cas. 1917A, 539.

[3] Morton v. Forsee, 249 Mo. 409, 155 S. W. 765, Ann. Cas. 1914D, 197.

[4] Annotation: 83 Am. St. Rep. 162.

[5] Cooper v. Bell, 127 Tenn. 142, 153 S. W. 844, Ann. Cas. 1914B, 980.

[6] See Evidence [Also 10 R. C. L. p. 1138, § 345, p. 1021, § 214].

[7] Stanton v. Embrey, 93 U. S. 548, 23 L. ed. 983; Louisville, N. A. & C. R. Co. v. Wallace, 136 Ill. 87, 26 N. E. 493, 11 L.R.A. 787; Bodfish v. Fox, 23 Me. 90, 39 Am. Dec. 611; Compton v. Barnes, 4 Gill (Md.) 55, 45 Am. Dec. 115; Clendinen v. Black, 18 S. C. L. (2 Bail.) 488, 23 Am. Dec. 149.

[8] Stafford v. Bishop, 98 W. Va. 625, 127 S. E. 501, citing R. C. L.

Annotation: 16 Am. St. Rep. 593.

In an action by an attorney for fees in defending a title under a lease, evidence is admissible of the amount which third persons received out of a sale of the lease under the client's title, as bearing upon what the client received for his interest therein. Cornelius v. Smith, 73 Okla. 217, 175 P. 754, 9 A.L.R. 233.

[9] Babbitt v. Bumpus, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585.

[10] Larsheid v. Kittell, 142 Wis. 172, 125 N. W. 442, 20 Ann. Cas. 576.

Upon the question of the character of services rendered, in an action by an attorney for fees, evidence is admissible that he prepared and presented a petition for revivor upon the death of a party to the action, although he did not represent such person. Cornelius v. Smith, 73 Okla. 217, 175 P. 754, 9 A.L.R. 233.

§ 191. —Admissibility of Expert Testimony.—It seems to be well established that the testimony of duly qualified witnesses, given as expert opinion evidence, is admissible on the issue of the value of the services of an attorney.[12] It is not, however, generally necessary that the evidence of expert witnesses should be given,[13] although in many cases a fair and reasonable compensation for the professional services of a lawyer can only be ascertained by the opinion of members of the bar, who have become familiar by experience and practice with the character of such services. Practicing lawyers have been held to occupy the position of experts as to questions of this nature.[14] The attorney, as a witness, may give his opinion of the value of the services rendered, either from his own knowledge or from the nature and extent of the services as testified to by other witnesses or by the plaintiff himself,[15] but in order to render a hypothetical question competent as to the value of an attorney's services, it is necessary that the services performed and the circumstances attending such performance be shown,[16] and that the matters appearing in the evidence be restated in the question.[17]

§ 192. —Conclusiveness of Expert Evidence.—The opinion evidence of expert witnesses, as to the value of an attorney's services, is not conclusive or binding either on the court or on the jury.[18] Such evidence is to be taken into consideration, with all the other evidence in the case, in arriving at a conclusion as to the just value of the services performed. It is the province of the jury, or the court, in cases tried without a jury, to weigh the testimony of attorneys as to the value of the services, by reference to their nature, the time occupied in their performance, and other attending circumstances, and by applying to it their own experience and knowledge of the character of such services.[19] A finding as to what would be reasonable compensation for the services rendered will not be disturbed when founded on the decided weight of expert testimony,[20] even though the proof is entirely opinion evidence.[1]

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[11] Babbitt v. Bumpus, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585.

[12] Stanton v. Embrey, 93 U. S. 548, 23 L. ed. 983; Spencer v. Collins, 156 Cal. 298, 104 P. 320, 20 Ann. Cas. 49; Louisville, N. A. & C. R. Co. v. Wallace, 136 Ill. 87, 26 N. E. 493, 11 L.R.A. 787; Maynard v. Maynard, 251 Ky. 246, 64 S. W. (2d) 567, 91 A.L.R. 697. And see New Orleans, J. & G. N. R. Co. v. Allbritton, 38 Miss. 242, 75 Am. Dec. 98.

Annotation: 16 Am. St. Rep. 593; 20 Ann. Cas. 53; Ann. Cas. 1914D, 369.

[13] Annotation: 20 Ann. Cas. 55; Ann. Cas. 1914D, 370.

[14] Louisville, N. A. & C. R. Co. v. Wallace, 136 Ill. 87, 26 N. E. 493, 11 L.R.A. 787; Maynard v. Maynard, 251 Ky. 246, 64 S. W. (2d) 567, 91 A.L.R. 697; Bodfish v. Fox, 23 Me. 90, 39 Am. Dec. 611.

To qualify as an expert, the witness must be in a position to state what is a reasonable fee, and should, therefore, have knowledge of the value of such legal services in the place where they were rendered. Annotation: Ann. Cas. 1914D, 370.

[15] Annotation: 11 L.R.A. 787.

[16] Annotation: 20 Ann. Cas. 56.

[17] Annotation: Ann. Cas. 1914D, 370.

[18] Head v. Hargrave, 105 U. S. 45, 26 L. ed. 1028; St. Paul F. & M. Ins. Co. v. Green, 181 Ark. 1096, 29 S. W. (2d) 304, citing R. C. L.; Zimmer v. Kilborn, 165 Cal. 523, 132 P. 1026, Ann. Cas. 1914D, 368; Spencer v. Collins, 156 Cal. 298, 104 P. 320, 20 Ann. Cas. 56; Burns v. McCain, 107 Cal. App. 291, 290 P. 623, citing R. C. L.; Shouse v. Consolidated Flour Mills Co. 128 Kan. 174, 277 P. 54, 64 A.L.R. 606; Maynard v. Maynard, 251 Ky. 246, 64 S. W. (2d) 567, 91 A.L.R. 697; McCreary v. Stevens, 156 Miss. 330, 126 So. 4, citing R. C. L.; Humphreys County v. Cashin, 128 Miss. 236, 90 So. 888, citing R. C. L.; Crutcher v. Sims, 184 Mo. App. 488, 170 S. W. 430, citing R. C. L.; Re Rhea, 126 Neb. 571, 253 N. W. 876, citing R. C. L.; Jamison v. Shelton, 35 N. M. 34, 289 P. 593, citing R. C. L.; Officer v. Cummings, 127 Or. 320, 272 P. 273, citing R. C. L.; Maupin v. Maupin, 158 Va. 663, 164 S. E. 557, citing R. C. L.

Annotation: 42 L.R.A. 768, s. 45 L.R.A. (N.S.) 181; 16 Am. St. Rep. 593; 20 Ann. Cas. 56; Ann. Cas. 1914D, 371.

Allowance of attorneys' fees will not be reversible error for lack of evidence to support it, merely because the only evidence thereon was an opinion fixing a larger sum. Tillamook County v. Johnson, 96 Or. 623, 190 P. 159, 10 A.L.R. 448.

If the court is present at the time of the rendition of the services, he is presumed to know their character, extent, and value, and while he may not arbitrarily disregard the opinion of the testifying lawyers, yet he may determine for himself what, in the light of all the evidence, is a reasonable fee. Maynard v. Maynard, 251 Ky. 246, 64 S. W. (2d) 567, 91 A.L.R. 697.

§ 193. **Variance.**—In actions by attorneys to recover compensation, the usual rule as to correspondence of allegata and probata applies.[2] Thus, where the petition is a statement of a demand for services rendered, testimony tending to support a declaration for a breach of contract by which the plaintiff was prevented from rendering service is a manifest variance from the petition and clearly incompetent.[3]

§ 194. **Trial; Questions for Court and Jury.**—An action by an attorney to recover his fee is an action at law triable to a jury.[4] In such cases the fundamental principle that it is the province of the court to determine questions of law and of the jury to determine questions of fact[5] applies. The question of what constitutes an abandonment of the attorney's contract is one of law for the court,[6] but whether the attorney performed according to its terms is a question for the jury.[7] However, the courts are not in harmony on the matter of whether the determination of the justification of the attorney's withdrawal is a question of law for the court or one of fact for the jury.[8] If there is any competent evidence on the question, it is a matter for the jury whether or not there was a settlement or compromise of the cause of action without the attorney's knowledge.[9]

E. Measure of Compensation or Recovery

§ 195. **Under Express Contract.**—Where the employment of an attorney is under an express valid contract stipulating for the compensation which the attorney is to receive for his services, such contract is, generally speaking, conclusive as to the amount of such compensation.[10] This is true whether the contract specifies a definite amount, or provides that the attorney shall receive a certain proportion of the amount recovered in the suit for which he is employed.[11] Moreover, a client cannot avoid a contract with his attorney for fees for the reason simply that in the end it did not bring to him the results which he had anticipated thereunder.[12] Such contract is also binding on the attorney, even though the amount stipulated is inadequate,[13] unless the agreement is made under a mistake of fact which the law recognizes.[14] However, an attorney may be estopped from claiming his stipulated fee by bringing the action in a jurisdiction where the statutes provide for the awarding of attorneys' fees by arbitration, and seeking and accepting the benefit of such provision.[15]

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[19] Spencer v. Collins, 156 Cal. 298, 104 P. 320, 20 Ann. Cas. 49.
Annotation: 16 Am. St. Rep. 593.

[20] Fillmore v. Wells, 10 Colo. 228, 15 P. 343, 3 Am. St. Rep. 567.

[1] Tillamook County v. Johnson, 96 Or. 623, 190 P. 159, 10 A.L.R. 448.

[2] See generally Pleading [Also 21 R. C. L. p. 608, § 152].

[3] Scheinesohn v. Lemonek, 84 Ohio St. 424, 95 N. E. 913, Ann. Cas. 1912C, 737.

[4] Western States Oil & Land Co. v. Helms, 143 Okla. 206, 288 P. 964, 72 A.L.R. 357.

[5] See Trial.

[6] Annotation: 45 A.L.R. 1155.

[7] Annotation: 45 A.L.R. 1155.

[8] Annotation: 45 A.L.R. 1156.

[9] Western States Oil & Land Co. v. Helms, 143 Okla. 206, 288 P. 964, 72 A.L.R. 357.

[10] Davis v. Webber, 66 Ark. 190, 49 S. W. 822, 45 L.R.A. 196, 74 Am. St. Rep. 81; Bodfish v. Fox, 23 Me. 90, 39 Am. Dec. 611; Nichols v. Melton, 141 Okla. 210, 284 P. 642, citing R. C. L.; Dolph v. Speckart, 94 Or. 550, 179 P. 657, 186 P. 32, citing R. C. L.; White v. Burch (Tex. Civ. App.) 33 S. W. (2d) 512, citing R. C. L.
Annotation: 83 Am. St. Rep. 166.

[11] Davis v. Webber, 66 Ark. 190, 49 S. W. 822, 45 L.R.A. 196, 74 Am. St. Rep. 81; Graham v. Dubuque Specialty Mach. Works, 138 Iowa, 456, 114 N. W. 619, 15 L.R.A.(N.S.) 729; Stevens v. Sheriff, 76 Kan. 124, 90 P. 799, 11 L.R.A.(N.S.) 1153.
Annotation: 15 L.R.A.(N.S.) 729.
A contract to pay an attorney a percentage of any sum obtained by execution, settlement, compromise, or agreement in an action for breach of promise of marriage does not entitle him to any share in property secured by the plaintiff through marriage with the defendant, or to any part of the value of the marriage. Crow v. Mitchell, 269 Mo. 697, 192 S. W. 417, L.R.A.1917D, 912.

[12] Davis v. Webber, 66 Ark. 190, 49 S. W. 122, 45 L.R.A. 196, 74 Am. St. Rep. 81.

§ 196. **—When Contract Is Invalid.**—Where the contract is illegal because of some consideration not affecting the validity of the employment itself, the attorney is limited, in his right to recover compensation, to an action on a quantum meruit.[16] In such cases the contract cannot be taken as the criterion of value for such services,[17] although it may be looked to for the purpose of ascertaining what the parties themselves thought the services were reasonably worth, and, in connection with the other evidence, to determine what was the reasonable value of the service actually rendered.[18]

§ 197. **—For Additional Services.**—The fact that there is a contract between an attorney and client as to the performance of certain services does not necessarily repel the presumption that the client has promised to pay the attorney for other services rendered at the client's request, though an express promise to pay therefor does not exist,[19] although it has been said that an attorney ought not to do work he considers beyond the contract, with the intent of charging the client therefor, without consulting the client and enlarging the contract.[20] Generally the compensation fixed for conducting or defending the interests of the client in certain litigation, in the absence of express stipulations to the contrary, covers all the necessary steps in advancing the suit or the defense,[1] including motions for new trials,[2] and even general services rendered in collateral suits necessary to effectuate the purposes of the original litigation.[3] However, the ordinary contract to conduct or defend a suit does not contemplate services rendered after judgment or settlement,[4] either on appeal, unless such services are expressly covered by the terms of the contract or by necessary implication,[5] or in other suits.[6] Moreover, the attorney may be employed to perform only a particular limited legal service, and thus may be entitled to compensation for additional services not contemplated as probable or necessary at the time of making the agreement.[7]

§ 198. **Under Implied Contract.**—In the absence of an express contract of employment between an attorney and his client fixing the amount of the attorney's compensation, it is generally held that the attorney is entitled to what his services are reasonably worth, or what has usually been paid to others for similar services.[8] The determination of this depends largely upon the circumstances of the particular case.[9] Among other things to be considered are the importance and results of the case,[10] the difficulties thereof, the degree of professional skill and ability required and exercised,[11] the skill, experience, and professional standing of the attorney,[12] and the prominence or character of the parties, where it affects the importance of the litigation,[13] as well as the amount or values involved or recovered.[14] The value of the services of an attorney is necessarily to be determined by many considerations besides the mere time visibly employed in the conduct of a suit,[15] although in the absence of other evidence, the court must be guided in estimating the value of attorney's services by the time or amount of labor performed as indicated by the record.[16]

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[13] Annotation: 83 Am. St. Rep. 166.

[14] Thurston v. Travelers' Ins. Co. 128 Neb. 141, 258 N. W. 66, citing R. C. L.

[15] Plummer v. Great Northern R. Co. 60 Wash. 214, 110 P. 989, 31 L.R.A.(N.S.) 1215.

[16] See supra, § 178.

[17] Davis v. Webber, 66 Ark. 190, 49 S. W. 822, 45 L.R.A. 196, 74 Am. St. Rep. 81; Dorr v. Camden, 55 W. Va. 226, 46 S. E. 1014, 65 L.R.A. 348.

[18] McGowan v. Parish, 237 U. S. 285, 59 L. ed. 955, 35 S. Ct. 543; Davis v. Webber, 66 Ark. 190, 49 S. W. 822, 45 L.R.A. 196, 74 Am. St. Rep. 81; Bryant v. Browning (Tex. Civ. App.) 48 S. W. (2d) 798, citing R. C. L.; Re Evans, 22 Utah, 366, 62 P. 913, 53 L.R.A. 952, 83 Am. St. Rep. 794.

[19] Annotation: 83 Am. St. Rep. 167.

[20] Annotation: 2 A.L.R. 845.

[1] Falloon v. Miles, 102 Neb. 843, 170 N. W. 191, 2 A.L.R. 840.
Annotation: 2 A.L.R. 847.

[2] Falloon v. Miles, 102 Neb. 843, 170 N. W. 191, 2 A.L.R. 840.

[3] Annotation: 2 A.L.R. 848.

[4] Annotation: 2 A.L.R. 848.

[5] Annotation: 2 A.L.R. 849.
Where the contract in express terms covers all the work in all the courts, the attorney is not entitled to further compensation for litigating the matter in the Supreme Court. Annotation: 83 Am. St. Rep. 167.

[6] Annotation: 2 A.L.R. 851.

[7] Duniway v. Hadley, 91 Or. 343, 178 P. 942, citing R. C. L.
Annotation: 2 A.L.R. 852–854.

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[8] Stanton v. Embrey, 93 U. S. 548, 23 L. ed. 983; Kline v. Blackwell (C. C. A. 5th) 63 F. (2d) 897 (writ of certiorari denied in 290 U. S. 636, 78 L. ed. 553, 54 S. Ct. 54) citing R. C. L.; Lecatt v. Sallee, 3 Port. (Ala.) 115, 29 Am. Dec. 249; Ætna L. Ins. Co. v. Heiden, 184 Ark. 291, 42 S. W. (2d) 392, citing R. C. L.; Shackleford v. Arkansas Baptist College, 181 Ark. 363, 26 S. W. (2d) 124, citing R. C. L.; Ætna L. Ins. Co. v. Taylor, 128 Ark. 155, 193 S. W. 540, Ann. Cas. 1918B, 1122; Elmore v. Johnson, 143 Ill. 513, 32 N. E. 413, 21 L.R.A. 366, 36 Am. St. Rep. 401; Pons's Succession, 142 La. 721, 77 So. 515, Ann. Cas. 1918D, 939; Babbitt v. Bumpus, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585; Mellon v. Fulton, 22 Okla. 636, 98 P. 911, 19 L.R.A.(N.S.) 960; Watson v. Johnson, 174 Wash. 12, 24 P. (2d) 592, 89 A.L.R. 1527; Whitham v. Hilton, 78 Wash. 446, 139 P. 209, Ann. Cas. 1916B, 260; Ramsey v. Brooke County Bldg. & L. Asso. 102 W. Va. 119, 135 S. E. 249, 49 A.L.R. 668; Dorr v. Camden, 55 W. Va. 226, 46 S. E. 1014, 65 L.R.A. 348.

Annotation: 19 L.R.A.(N.S.) 960; 16 Am. St. Rep. 585; 20 Ann. Cas. 55; Ann. Cas. 1918D, 945.

A contract between a wife and an attorney for the institution of proceedings for a divorce is based upon the reasonable value of the services and her ability to respond in a court of law therefor. Johnson v. Gerald, 216 Ala. 581, 113 So. 447, 59 A.L.R. 348.

[9] Franklin Lumber Co. v. Harold Anderson, 105 N. J. Eq. 542, 148 A. 792, citing R. C. L.

Annotation: 9 A.L.R. 237; Ann. Cas. 1916B, 263.

The circumstances to be taken into consideration do not essentially differ from those which pertain to and regulate contracts of other professional services, and in fact any kind of service in which the amount of the compensation necessarily depends largely upon the circumstances under which the service is rendered, its nature, and the charges that are usual and customary for like services. McLellan v. Hayford, 72 Me. 410, 39 Am. Rep. 343.

[10] Federal Oil Marketing Corp. v. Cravens (C. C. A. 8th) 46 F. (2d) 938, citing R. C. L.; Bayou Meto Drainage Dist. v. Chapline, 143 Ark. 446, 220 S. W. 807, citing R. C. L.; Davis v. Webber, 66 Ark. 190, 49 S. W. 822, 45 L.R.A. 196, 74 Am. St. Rep. 81; F. L. Stitt & Co. v. Powell, 94 Fla. 550, 114 So. 375, citing R. C. L.; Graham v. Dubuque Specialty Mach. Works, 138 Iowa, 456, 114 N. W. 619, 15 L.R.A.(N.S.) 729; Pons's Succession, 142 La. 721, 77 So. 515, Ann. Cas. 1918D, 939; Babbitt v. Bumpus, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585; Selover v. Bryant, 54 Minn. 434, 56 N. W. 58, 21 L.R.A. 418, 40 Am. St. Rep. 349; Egan v. Burnight, 34 S. D. 473, 149 N. W. 176, Ann. Cas. 1917A, 539; Watson v. Johnson, 174 Wash. 12, 24 P. (2d) 592, 89 A.L.R. 1527.

Annotation: 16 Am. St. Rep. 592; 74 Am. St. Rep. 91; 20 Ann. Cas. 55.

[11] Stanton v. Embrey, 93 U. S. 548, 23 L. ed. 983; Deberry v. Cavalier, 113 Cal. App. 30, 297 P. 611, citing R. C. L.; Greyling Realty Corp. v. Lawson, 179 Ga. 188, 175 S. E. 453, citing R. C. L.

[12] Federal Oil Marketing Corp. v. Cravens (C. C. A. 8th) 46 F. (2d) 938, citing R. C. L.; Bayou Meto Drainage Dist. v. Chapline, 143 Ark. 446, 220 S. W. 807, citing R. C. L.; Davis v. Webber, 66 Ark. 190, 49 S. W. 822, 45 L.R.A. 196, 74 Am. St. Rep. 81; Graham v. Dubuque Specialty Mach. Works, 138 Iowa, 456, 114 N. W. 619, 15 L.R.A.(N.S.) 729; Pons's Succession, 142 La. 721, 77 So. 515, Ann. Cas. 1918D, 939; Stafford v. Bishop, 98 W. Va. 625, 127 S. E. 501, citing R. C. L

Annotation: 20 Ann. Cas. 56.

[13] Graham v. Dubuque Specialty Mach. Works, 138 Iowa, 456, 114 N. W. 619, 15 L.R.A.(N.S.) 729.

[14] Graham v. Dubuque Specialty Mach. Works, 138 Iowa, 456, 114 N. W. 619, 15 L.R.A.(N.S.) 729; Morton v. Forsee, 249 Mo. 409, 155 S. W. 765, Ann. Cas. 1914D, 197; Burdick v. Mann, 60 N. D. 710, 236 N. W. 340, 82 A.L.R. 1443 (verdict for $9,000 for legal services securing over $165,000 for the client).

Eight thousand dollars has been held not excessive to allow attorneys, consisting of three firms and two individuals, for securing an estate for an infant through a will contest which required three trials and two arguments on appeal, where the amount recovered for him was between $17,000 and $19,000, and their recovery depended upon the success of the litigation. Roberts v. Vaughn, 142 Tenn. 361, 219 S. W. 1034, 9 A.L.R. 1528.

The value of the services to the client, measured by his necessities, are not necessarily the measure of the value of the services in themselves which the attorney may recover. Old Dominion Transp. Co. v. Hamilton, 146 Va. 594, 131 S. E. 850, 46 A.L.R. 186.

Where the fee is to be contingent upon success, the magnitude of the result achieved or the doubtfulness of the case when instituted should be considered in estimating the value of the services rendered,[17] and not the number of pleadings filed, or their length, or the number of times counsel appeared in court, or the number of hours consumed in oral argument.[18]

§ 199. Interest on Fees.—In the absence of statutory provisions to the contrary,[19] it may be laid down as a general rule that interest on attorneys' fees is recoverable from the time they become due and payable,[20] which is usually, unless the time is determined by the provisions of the contract,[1] when demand for payment is made,[2] or the date of the termination of the employment, when the attorney is discharged by the client.[3] If, however, the demand is unliquidated, no interest should be allowed on attorneys' fees.[4]

§ 200. Statutory Limitation on Amount of Fees.—In certain instances attorneys may be limited by statute in the amounts which they may charge clients for services,[5] in which case an agreement for a larger fee than that allowed by the statute is illegal.[6] A general statute limiting the amount which a lawyer may charge for his services is doubtless unconstitutional, but statutes limiting the amount of fees chargeable by attorneys for certain services may be upheld as a valid exercise of the police power.[7] Thus, Congress has the power to regulate and limit the amount of an attorney's fee for

[15] Selover v. Bryant, 54 Minn. 434, 56 N. W. 58, 21 L.R.A. 418, 40 Am. St. Rep. 349.
Annotation: 20 Ann. Cas. 55.

[16] Federal Oil Marketing Corp. v. Cravens (C. C. A. 8th) 46 F. (2d) 938, citing R. C. L.; Bayo Meto Drainage Dist. v. Chapline, 143 Ark. 446, 220 S. W. 807, citing R. C. L.; Greyling Realty Corp. v. Lawson, 179 Ga. 188, 175 S. E. 453, citing R. C. L.; Graham v. Dubuque Specialty Mach. Works, 138 Iowa, 456, 114 N. W. 619, 15 L.R.A.(N.S.) 729; Farley v. Geisheker, 78 Iowa, 453, 43 N. W. 279, 6 L.R.A. 533; Pons's Succession, 142 La. 721, 77 So. 515, Ann. Cas. 1918D, 939; Watson v. Johnson, 174 Wash. 12, 24 P. (2d) 592, 89 A.L.R. 1527; Stafford v. Bishop, 98 W. Va. 625, 127 S. E. 501, citing R. C. L.

[17] Davis v. Webber, 66 Ark. 190, 49 S. W. 822, 45 L.R.A. 196, 74 Am. St. Rep. 81; Cornelius v. Smith, 73 Okla. 217, 175 P. 754, 9 A.L.R. 233.
Annotation: 9 A.L.R. 238.

[18] Cornelius v. Smith, 73 Okla. 217, 175 P. 754, 9 A.L.R. 233.

[19] Annotation: 52 A.L.R. 200; Ann. Cas. 1916E, 250.

[20] Myers v. Bender, 46 Mont. 497, 129 P. 330, Ann. Cas. 1916E, 245; Prager v. New Jersey Fidelity & P. G. Ins. Co. 245 N. Y. 1, 156 N. E. 76, 52 A.L.R. 193; Mygatt v. Wilcox, 45 N. Y. 306, 6 Am. Rep. 90.
Annotation: 52 A.L.R. 197; Ann. Cas. 1916E, 249.
A judgment for attorneys' fees, properly provides for interest from its date. Hoyt v. Beach, 104 Iowa, 257, 73 N. W. 492, 65 Am. St. Rep. 461.

[1] Myers v. Bender, 46 Mont. 497, 129 P. 330, Ann. Cas. 1916E, 245.
Annotation: 52 A.L.R. 198.

[2] Trimble v. Kansas City, P. & G. R. Co. 180 Mo. 574, 79 S. W. 678, 1 Ann. Cas. 363; Prager v. New Jersey Fidelity & P. G. Ins. Co. 245 N. Y. 1, 156 N. E. 76, 52 A.L.R. 193; Mygatt v. Wilcox, 45 N. Y. 306, 6 Am. Rep. 90.
Annotation: 52 A.L.R. 198; Ann. Cas. 1916E, 249.

[3] Mygatt v. Wilcox, 45 N. Y. 306, 6 Am. Rep. 90.
Annotation: 52 A.L.R. 198; Ann. Cas. 1916E, 249.

[4] Annotation: 52 A.L.R. 199; Ann. Cas. 1916E, 250.

[5] Blair v. Coleraine, 180 Minn. 388, 231 N. W. 193, 69 A.L.R. 1317, 72 A.L.R. 108.
The fees which may be paid to an attorney by an executor or administrator are sometimes limited by statute. Reed v. Taliaferro, 37 Wyo. 107, 259 P. 815, 55 A.L.R. 941.
As to limitations on fees charged workmen's compensation claimants, see Workmen's Compensation Acts.

[6] Hall v. Kimmer, 61 Mich. 269, 28 N. W. 96, 1 Am. St. Rep. 575.

[7] Yeiser v. Dysart, 267 U. S. 540, 69 L. ed. 775, 45 S. Ct. 399.
Annotation: 69 A.L.R. 1319; 69 L. ed. 776.

prosecuting a claim for a pension,[8] for prosecuting Civil War damage claims,[9] or for prosecuting a claim under the Indian Depredation Claims Act.[10]

§ 201. On Death of Attorney.—Where the contract between an attorney and his client is terminated by the death of the attorney, the extent of the recovery permitted his representative is the full reasonable value of the services rendered prior to the death, not exceeding, however, the sum or rate fixed by the contract.[11] The contract may be of value in determining the reasonable value of the services,[12] and the compensation may be apportioned in such proportion as the services actually rendered bear to those contracted for,[13] with an allowance to the client of direct and consequential damages occasioned by the stopping of performance, including additional money expended for attorneys' fees.[14]

If the client permits a surviving partner to complete the contract, he will be liable for the full amount of the compensation originally agreed upon.[15]

§ 202. On Discharge by Client.—In a suit on a quantum meruit for the recovery of compensation where the attorney employed for a specific purpose or for a definite time was discharged without cause, the measure of recovery is not the benefit received by the client, but what the services were reasonably worth.[16] If, however, the action is for damages for breach of the contract in which a definite compensation is fixed, the measure of recovery is in some cases held to be the full contract price agreed upon,[17] with interest from the time it became due,[18] provided, in the case of an employment for a fixed time, that the attorney remained ready and willing to perform, and capable of doing so, during the period of the contract.[19] In some decisions, however, a different measure of recovery is adopted.[20] Moreover, it would seem that the attorney ought not to recover more than he would have made if he had gone on with the case; in other words, his right to claim the whole compensation is subject to such abatement as would in the natural course of things have been incurred if the services had been continued.[1] It is to be noted also that some courts take the position that no action for damages lies in favor of an attorney who is discharged before he completes his contract of service.[2] If, however, the compensation agreed upon is contingent on the successful result of a suit, it has been held that the measure of damages is not the contingent fee, but the reasonable value of the services rendered,[3] plus any injury or loss sustained by reason of the breach,[4] not to exceed the amount contracted for.[5]

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[8] Ballew v. United States, 160 U. S. 187, 40 L. ed. 388, 16 S. Ct. 263; Frisbie v. United States, 157 U. S. 160, 39 L. ed. 657, 15 S. Ct. 586; Wolcott v. Frissell, 134 Mass. 1, 45 Am. Rep. 272; Hall v. Kimmer, 61 Mich. 269, 28 N. W. 96, 1 Am. St. Rep. 575.

Annotation: 69 L. ed. 780; Ann. Cas. 1918C, 863, 866.

[9] Newman v. Moyers, 253 U. S. 182, 64 L. ed. 849, 40 S. Ct. 478; Calhoun v. Massie, 253 U. S. 170, 64 L. ed. 843, 40 S. Ct. 474; Capital Trust Co. v. Calhoun, 250 U. S. 208, 63 L. ed. 942, 39 S. Ct. 486; Ralston v. Dunaway, 123 Ark. 12, 184 S. W. 425, Ann. Cas. 1918C, 870.

Annotation: 69 L. ed. 779; Ann. Cas. 1918C, 869, 872; Ann. Cas. 1918E, 538.

Such provisions do not affect contracts made prior to the enactment of the statute. Newman v. Moyers, 47 App. D. C. 102, Ann. Cas. 1918E, 528; Moyer v. Memphis, 135 Tenn. 263, 186 S. W. 105, Ann. Cas. 1918C, 854.

[10] Ball v. Halsell, 161 U. S. 72, 40 L. ed. 622, 16 S. Ct. 554.

Annotation: 69 L. ed. 779; Ann. Cas. 1918C, 869.

[11] Sargent v. McLeod, 209 N. Y. 360, 103 N. E. 164, 52 L.R.A.(N.S.) 380 (employment on contingent basis); Clendinen v. Black, 18 S. C. L. (2 Bail.) 488, 23 Am. Dec. 149.

Annotation: Ann. Cas. 1914D, 210.

[12] Morton v. Forsee, 249 Mo. 409, 155 S. W. 765, Ann. Cas. 1914D, 197.

Annotation: 52 L.R.A.(N.S.) 383.

[13] Morton v. Forsee, 249 Mo. 409, 155 S. W. 765, Ann. Cas. 1914D, 197; Clendinen v. Black, 18 S. C. L. (2 Bail.) 488, 23 Am. Dec. 149.

Annotation: Ann. Cas. 1914D, 211.

[14] Morton v. Forsee, 249 Mo. 409, 155 S. W. 765, Ann. Cas. 1914D, 197.

[15] Clifton v. Clark, 83 Miss. 446, 36 So. 251, 66 L.R.A. 821, 102 Am. St. Rep. 458, 1 Ann. Cas. 396.

Annotation: 1 Ann. Cas. 401.

[16] Martin v. Camp, 219 N. Y. 170, 114 N. E. 46, L.R.A.1917F, 402; Price v. Western Loan & Sav. Co. 35 Utah, 379, 100 P. 677, 19 Ann. Cas. 589.

Annotation: 6 L.R.A.(N.S.) 93; L.R.A. 1917F, 413; 12 Am. St. Rep. 142.

[17] McGowan v. Parish, 237 U. S. 285, 59 L. ed. 955, 35 S. Ct. 543; Bartlett v. Odd Fellows' Sav. Bank, 79 Cal. 218, 21 P. 743, 12 Am. St. Rep. 139; Scheinesohn v. Lemonek, 84 Ohio St. 424, 95 N. E. 913, Ann. Cas. 1912C, 737.

Annotation: L.R.A.1917F, 410.

[18] Brodie v. Watkins, 33 Ark. 545, 34 Am. Rep. 49; Bartlett v. Odd Fellows' Sav. Bank, 79 Cal. 218, 21 P. 743, 12 Am. St. Rep. 139; Dolph v. Speckart, 94 Or. 550, 186 P. 32, citing R. C. L.

Annotation: 6 L.R.A.(N.S.) 92; 83 Am. St. Rep. 166.

If there is no mode of ascertaining the damage sustained except by adopting the agreed price as the measure of damages, the price agreed must, from necessity, be accepted. Annotation: 53 L.R.A. 80; 6 L.R.A.(N.S.) 92; L.R.A.1917F, 410.

[19] Annotation: L.R.A.1917F, 414.

[20] Annotation: L.R.A.1917F, 410, 411.

§ 203. On Dismissal or Discontinuance of Action by Client.—As a general rule, an attorney employed on a percentage contract is entitled to recover the reasonable value of his services, where the action is voluntarily discontinued or dismissed by the client without his consent.[6] Thus, attorneys whose connection with their client is severed by the latter after the dismissal, on the client's motion, of an action which they were employed to bring by a contract providing for a contingent fee payable out of the land or money recovered may sue for the reasonable value of the services performed.[7] In some jurisdictions, however, the attorney's compensation is apparently measured by the amount which would have been recovered.[8]

§ 204. On Settlement or Compromise by Client. — With regard to the measure of compensation to which an attorney employed under a contingent fee is entitled where the action or suit is compromised by the client without the attorney's consent, the authorities are not uniform. By the weight of authority, where an attorney is employed on a contingent fee consisting of a percentage of the amount recovered, the amount for which the case is settled is the basis on which the attorney's percentage is to be computed,[9] unless there is fraud or collusion in the settlement, in which case the rule is otherwise.[10] The attorney should receive the same proportion of such amount as was called for in the contract. Thus, for instance, where the contract called for a fee of 50 per cent of any sum collected, the attorney would be entitled to one half of the sum paid in settlement.[11] The attorney is not limited to the reasonable value of his services if such value is less than the specified percentage of the amount of the settlement, or entitled to recover such reasonable value if it is greater than such specified percentage.[12] The same rule applies to property received in settlement.[13] There are, however, decisions to the effect that when an attorney contracts for a contingent fee to depend upon the result of the suit, and the client compromises such suit without the consent of the attorney, the latter will be entitled to recover the whole amount of the fee in like manner as if the contingency had transpired upon which the payment of the fee was made to depend.[14] This rule has, however, been sometimes limited to cases where the evidence fails to show what would have been the result of the litigation had the compromise not been made, it being deemed unreasonable to hold that an attorney should receive compensation on the basis of a successful termination of the suit, where the evidence affirmatively shows that such would not have been the result.[15] Where the clause in a contract between attorney and client prohibiting a settlement without the consent of the attorney is void as against public policy so that it may be repudiated by the client,[16] and is so connected with the clause prescribing the percentage of the recovery which the attorney is to receive as compensation that the latter clause falls with it, the attorney is usually held to be entitled to recover the value of the services rendered by him upon the basis of actual worth.[17] In some jurisdictions, the matter is regulated by statute.[18]

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[1] Brodie v. Watkins, 33 Ark. 545, 34 Am. Rep. 49.
Annotation: 53 L.R.A. 80; 6 L.R.A. (N.S.) 92.

[2] Martin v. Camp, 219 N. Y. 170, 114 N. E. 46, L.R.A.1917F, 402.

[3] Polsley v. Anderson, 7 W. Va. 202, 23 Am. Rep. 613.
Annotation: 6 L.R.A.(N.S.) 93.

[4] Annotation: 53 L.R.A. 80; 6 L.R.A. (N.S.) 93.

[5] Smith v. Thompson (Tex. Civ. App.) 233 S. W. 876, reversed apparently on other grounds in (Tex.) 248 S. W. 1070, citing R. C. L.
Annotation: 53 L.R.A. 80; 6 L.R.A.(N.S.) 93.

[6] Andrews v. Haas, 214 N. Y. 255, 108 N. E. 423, 3 A.L.R. 458.
Annotation: 3 A.L.R. 489, s. 40 A.L.R. 1538.

[7] Enos v. Keating, 39 Wyo. 217, 271 P. 6, 275 P. 131, 67 A.L.R. 430.

[8] Annotation: 3 A.L.R. 490, s. 40 A.L.R. 1538.

[9] Nichols v. Orr, 63 Colo. 333, 166 P. 561, 2 A.L.R. 449; Procter v. Louisville & N. R. Co. 156 Ky. 465, 161 S. W. 518, 3 A.L.R. 461; Schmitz v. South Covington & C. Street R. Co. 131 Ky. 207, 114 S. W. 1197, 22 L.R.A.(N.S.) 776, 18 Ann. Cas. 1114; Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge, 161 Mich. 181, 126 N. W. 56, 137 Am. St. Rep. 495; Southworth v. Rosendahl, 133 Minn. 447, 158 N. W. 717, 3 A.L.R. 468; Myers v. Bender, 46 Mont. 497, 129 P. 330, Ann. Cas. 1916E, 245.
Annotation: 3 A.L.R. 473, s. 40 A.L.R. 1530.

[10] Southworth v. Rosendahl, 133 Minn. 447, 156 N. W. 717, 3 A.L.R. 468; Desaman v. Butler Bros. 118 Minn. 198, 136 N. W. 747, Ann. Cas. 1913E, 642.
Annotation: 3 A.L.R. 480, s. 40 A.L.R. 1533.

[11] Schmitz v. South Covington & C.

Where the contract is not for a percentage of the recovery, but for a specified fee contingent upon success, there is a conflict of opinion as to the proper measure of recovery. One class of cases holds that the attorney is entitled to recover only the reasonable value of his services,[19] but some cases apparently take the view that the whole fee may be recovered.[20]

Where the settlement is made after judgment, the cases are not entirely harmonious, but they support the rule that if the judgment is final, the amount of the judgment, and not the amount of the settlement, controls, at least where the defendant is solvent.[1] But where the judgment has not be-

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Street R. Co. 131 Ky. 207, 114 S. W. 1197, 22 L.R.A.(N.S.) 776, 18 Ann. Cas. 1114.

Annotation: 3 A.L.R. 475, s. 40 A.L.R. 1531.

[12] Annotation: 3 A.L.R. 474, s. 40 A.L.R. 1531.

[13] Myers v. Bender, 46 Mont. 497, 129 P. 330, Ann. Cas. 1916E, 245.

Annotation: 3 A.L.R. 477, s. 40 A.L.R. 1532.

An attorney employed on a contingent fee to bring an action for breach of promise of marriage is not entitled to any share of property received by the client by operation of law as a result of her subsequent marriage to the defendant, or to any part of the value of such marriage. Crow v. Mitchell, 269 Mo. 697, 192 S. W. 417, L.R.A. 1917D, 912.

[14] Western States Oil & Land Co. v. Helms, 143 Okla. 206, 288 P. 964, 72 A.L.R. 357; Polsley v. Anderson, 7 W. Va. 202, 23 Am. Rep. 613 (stating this to be the holding of a Texas case, but disapproving thereof).

[15] Annotation: 18 Ann. Cas. 1115, 1116.

[16] See supra, § 116.

[17] Re Snyder, 190 N. Y. 66, 82 N. E. 742, 14 L.R.A.(N.S.) 1101, 123 Am. St. Rep. 533, 13 Ann. Cas. 441.

[18] Annotation: 3 A.L.R. 474, s. 40 A.L.R. 1536.

[19] Southworth v. Rosendahl, 133 Minn. 447, 158 N. W. 717, 3 A.L.R. 468; Polsley v. Anderson, 7 W. Va. 202, 23 Am. Rep. 613.

Annotation: 3 A.L.R. 491, s. 40 A.L.R. 1539.

[20] Ingersoll v. Coram, 211 U. S. 335, 53 L. ed. 208, 29 S. Ct. 92; Hunt v. Test, 8 Ala. 713, 42 Am. Dec. 659.

Annotation: 3 A.L.R. 492, s. 40 A.L.R. 1539.

[1] Chreste v. Louisville R. Co. 167 Ky. 75, 180 S. W. 49, L.R.A.1917B, 1123, Ann. Cas. 1917C, 867.

Annotation: 3 A.L.R. 484, s. 40 A.L.R. 1535.

It was held in Desaman v. Butler Bros. 118 Minn. 198, 136 N. W. 747, Ann. Cas. 1913E, 642, that where a verdict had fixed the amount of the plaintiff's cause of action, a secret and collusive compromise between the parties, the facts of which showed fraud as against the plaintiff's attorney, did not affect the amount of the attorney's lien. Accordingly, as the attorney had a contract with the plaintiff for one half of the amount that might be obtained, and after the recovery of a verdict for $3,000, the client settled for $700, it was held that the attorney could recover $1,500 from the defendant.

come final, as where an appeal or a motion for a new trial is pending, the amount of the settlement, and not the amount of the judgment, controls as a general rule.[2] This is clearly true when there has been a reversal.[3]

§ 205. When Adversary Agrees to Pay Fee.—Whether the fact that the adverse party has agreed to pay or has paid to the client the latter's attorneys' fees will affect the measure of compensation to which the attorney is entitled depends upon whether, in the particular jurisdiction, the client's recovery upon stipulations for attorneys' fees is allowed as liquidated damages or only as an indemnity. If payment of such fees is considered purely as liquidated damages, such a stipulation between the client and his debtor does not concern the former's relation with his attorney or fix the measure of such attorney's compensation.[4] If, on the other hand, the theory of indemnity applies, the amount of fees collected by the creditor and the compensation due his attorney are directly interrelated; the client can only collect from the debtor reasonable fees or those fixed by agreement with his attorney, and he is estopped to deny that the attorney's services are worth the amount collected, which is accordingly deemed the measure of the attorney's compensation, in the absence of a contract, express or implied, fixing such compensation.[5] There is authority to the contrary, however, holding that the stipulated amount in the note or other contract between the debtor and the client is inserted solely for the client's benefit, and that as between him and his attorney, the latter is not limited to that amount, and his compensation is not measured by it, but is limited to the reasonable value of his services,[6] although that sum will be presumed to be the reasonable value of his services until the contrary is shown.[7]

The authorities are also in conflict as to the measure of an attorney's compensation where he has undertaken a case for a certain percentage of the recovery, and during the pendency of the suit the client settles directly with his adversary, the latter agreeing to pay the attorney's fee stipulated for. Thus, in some jurisdictions it has been held that where a case in which the plaintiff has agreed to pay his attorney a fee equal to a specified per cent of any sum collected or recovered is compromised by the defendant's paying the plaintiff a certain sum and agreeing to pay the fee agreed upon between the plaintiff and his attorney, the attorney is not entitled to an amount which would be equal to the specified per cent of the total of the sums paid to himself and to the plaintiff, but only to the specified per cent of that amount which the plaintiff received under the settlement.[8] In brief, if the attorney was to receive 50 per cent of the recovery as his fee, he could recover from the defendant only half the amount paid the plaintiff under the settlement.[9] The view prevailing in other jurisdictions is that the agreement to pay the attorney is a part of the settlement, that the amount paid the client is not the whole of the settlement, but only the client's share thereof, and that the whole amount of the settlement on which the attorney's percentage is to be computed is an amount bearing such a proportion to the amount paid to the client as the whole bears to the fraction representing the client's share.[10] In other words, if the client had agreed to pay the attorney 50 per cent of the amount recovered, then the defendant would be obligated to pay the attorney the same amount that he had agreed to pay the plaintiff in the settlement.[11]

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[2] Nichols v. Orr, 63 Colo. 333, 166 P. 561, 2 A.L.R. 449.
Annotation: 3 A.L.R. 485, s. 40 A.L.R. 1535.

[3] Procter v. Louisville & N. R. Co. 156 Ky. 465, 161 S. W. 518, 3 A.L.R. 461.

[4] Annotation: 51 L.R.A.(N.S.) 594.

[5] Porter v. Title Guaranty & S. Co. 17 Idaho, 364, 106 P. 299, 27 L.R.A.(N.S.) 111.
Annotation: 51 L.R.A.(N.S.) 595.

[6] Rogers v. Kemp Lumber Co. 18 N. M. 300, 137 P. 586, 51 L.R.A.(N.S.) 594.

[7] Exchange Bank v. Tuttle, 5 N. M. 427, 23 P. 241, 7 L.R.A. 445.

[8] Procter v. Louisville & N. R. Co. 156 Ky. 465, 161 S. W. 518, 3 A.L.R. 461; Schmitz v. South Covington & C. Street R. Co. 131 Ky. 207, 114 S. W. 1197, 22 L.R.A. (N.S.) 776, 18 Ann. Cas. 1114.
Annotation: 3 A.L.R. 481, s. 40 A.L.R. 1533; 22 L.R.A.(N.S.) 776.

[9] Schmitz v. South Covington & C. Street R. Co. 131 Ky. 207, 114 S. W. 1197, 22 L.R.A. (N.S.) 776, 18 Ann. Cas. 1114.

§ 206. Right to Taxable Costs, Statutory Fees, and Expenses.—In many jurisdictions it is laid down as a general rule that in the absence of an agreement to the contrary, the costs and other disbursements allowed in an action belong to the party, and not to his attorney,[12] even though the attorney has a lien on the judgment for costs and disbursements and for his services.[13] In some jurisdictions, however, the rule has been altered by statute.[14] When a statute authorizes an attorney's fee to be taxed, it depends upon the provisions of the statute whether this should go to the attorney or to the client; but when an allowance on account of the attorney's fees is made because due by the terms of the contract sued on, it seems clear that the attorney is entitled to receive it.[15] Moreover, an allowance to a party for his attorney's fees and expenses is for the use and benefit of the attorney, with the party standing in the position of dry trustee without power to satisfy the judgment until the fees and expenses of the attorney have been paid.[16]

An attorney, by virtue of his employment as such, has authority to incur such reasonable expenses as the case may require;[17] and if he has advanced money for proper and necessary expenses, he may recover the amount thereof from his client,[18] although a client is not liable for costs incurred by an attorney employed by his attorney without authority to do so.[1]

§ 207. Division of Compensation between Attorneys Contributing Services.—Lawyers jointly undertaking to represent a client without a contract as to the division of the fees share equally.[2] The same rule applies where one attorney engages another attorney to assist in the prosecution of litigation for a contingent fee under an agreement to share the fee if successful.[3] But where the client's employment of several attorneys is separate and not joint, or where separate attorneys have rendered services although not all of them were employed throughout the litigation, each is entitled to what his services are reasonably worth.[4]

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[10] Johnson v. Great Northern R. Co. 128 Minn. 365, 151 N. W. 125, L.R.A.1917B, 1140.

Annotation: 3 A.L.R. 481, s. 40 A.L.R. 1534; 22 L.R.A.(N.S.) 777.

Where the statute provides that an attorney's fee shall be paid by an insurance company which fails to pay the loss, the fee is a part of the recovery, within the meaning of a contract between attorney and client entitling the attorney to a percentage of the recovery in a suit upon the policy. Vaughan v. Humphreys, 153 Ark. 140, 239 S. W. 730, 22 A.L.R. 1201.

[11] Annotation: 22 L.R.A.(N.S.) 776.

Under an agreement in a personal injury case by which the defendant settled with the plaintiff, agreeing to pay him $4,500 and to reimburse him for any sum he should be compelled to pay his attorneys, the defendant is liable for $2,250 to the attorneys, where their contract with the injured person provided for the payment to them of one third of any amount received in settlement. Johnson v. Great Northern R. Co. 128 Minn. 365, 151 N. W. 125, L.R.A. 1917B, 1140.

[12] Vaughan v. Humphreys, 153 Ark. 140, 239 S. W. 730, 22 A.L.R. 1201; Dwyer v. Ellis, 208 Mass. 195, 94 N. E. 286, 21 Ann. Cas. 1042; Davis v. Swedish-American Nat. Bank, 78 Minn. 408, 80 N. W. 953, 81 N. W. 210, 79 Am. St. Rep. 400; Re Howell, 215 N. Y. 466, 109 N. E. 572, Ann. Cas. 1917A, 527.

Annotation: 22 A.L.R. 1203.

[13] See infra, §§ 219 et seq.

[14] The Baltimore, 8 Wall. (U. S.) 377, 19 L. ed. 463; Com. v. McCoy, 8 Watts (Pa.) 153, 34 Am. Dec. 445.

Annotation: 22 A.L.R. 1208.

[15] Schmidt v. Oregon Gold Min. Co. 28 Or. 9, 40 P. 406, 1014, 52 Am. St. Rep. 759.

Annotation: 21 Ann. Cas. 1042.

[16] Yoder v. Yoder, 105 Wash. 491, 178 P. 474, 3 A.L.R. 1104.

[17] See supra, § 95.

[18] Forbes v. Chicago, R. I. & P. R. Co. 150 Iowa, 177, 129 N. W. 810, Ann. Cas. 1912D, 311.

Annotation: Ann. Cas. 1912D, 313.

[1] Antrobus v. Sherman, 65 Iowa, 230, 21 N. W. 579, 54 Am. Rep. 7.

[2] Underwood v. Overstreet, 188 Ky. 562, 223 S. W. 152, 10 A.L.R. 1352.

Annotation: 10 A.L.R. 1357.

[3] Langdon v. Kennedy, 118 Neb. 290, 224 N. W. 292, 63 A.L.R. 896; Davenport v. Waggoner, 49 S. D. 592, 207 N. W. 972, 45 A.L.R. 1126.

Annotation: 63 A.L.R. 919.

Upon the dissolution of a law firm, there must be an accounting made of fees earned by the combined services of the partners in suits or other unfinished business pending at the time of dissolution;[5] and if a member of a law firm becomes a judge of a court, he may, under a contract of employment in pending business, recover for services of which the client has already had the benefit, but he has no interest in any fees for services rendered by the remaining member of the firm in concluding that particular business.[6] Commissions received by one member of a law firm while acting as an executor or administrator for the estate of a third person without objection or with the assent of the other members of the partnership are not firm profits or earnings for which he must account to the partnership on a dissolution thereof.[7]

A member of the firm who withdraws from the case and refuses to perform any services under the contract is not entitled to share in the compensation received by the other partners who prosecute the case to a conclusion, although mere neglect of duty alone probably would not extinguish his right.[8] Nor should a deduction be made because one partner has not been as active as the other.[9]

X. ATTORNEYS' LIENS

A. In General

§ 208. Generally.—Attorneys' liens are divided, according to their nature, into two classes: (1) General, possessory, or retaining liens; and (2) charging or special liens.[10] The general or retaining lien attaches to all property, papers, books, documents, securities, and moneys of the client coming into the hands of the attorney in the course of his professional employment[11] and gives him the right to retain possession thereof as security for costs, disbursements, and charges not only in the particular cause in which they come into his possession, but for all costs, disbursements, and charges due him for other professional employment and business.[12] This lien is, however, generally speaking, a passive one, and cannot ordinarily be actively enforced either at law or in equity.[13] The special or charging lien is one given to the attorney for his services rendered in procuring a judgment, decree, or award for his client.[14] At common law such lien attaches to the judgment, and not to the cause of action, although in a number of states statutory provisions have extended the charging lien to the client's cause of action. This lien may be actively enforced in appropriate proceedings therefor.[15] Thus, it will be seen that there is a clear distinction between a retaining lien and a charging lien, and the failure to distinguish between them has in many cases led to conflict and confusion in the decisions on the subject.[16]

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[4] Annotation: 10 A.L.R. 1358.

[5] Osment v. McElrath, 68 Cal. 466, 9 P. 731, 58 Am. Rep. 17.
Annotation: 80 A.L.R. 34.

[6] Justice v. Lairy, 19 Ind. App. 272, 49 N. E. 459, 65 Am. St. Rep. 405.

[7] Metcalfe v. Bradshaw, 145 Ill. 124, 33 N. E. 1116, 36 Am. St. Rep. 478.

[8] Denver v. Roane, 99 U. S. 355, 25 L. ed. 476.
Annotation: L.R.A.1918B, 679.
As to right of estate of deceased partner in profits from unfinished business, see Partnership.

[9] Consaul v. Cummings, 222 U. S. 262, 56 L. ed. 192, 32 S. Ct. 83.

[10] Hale v. Tyson, 202 Ala. 107, 79 So. 499, citing R. C. L.; Manning v. Leighton, 65 Vt. 84, 26 A. 258, 24 L.R.A. 684; Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 570, 48 Am. Rep. 821.
Annotation: 51 Am. St. Rep. 251.

[11] See infra, §§ 210 et seq.

[12] See infra, § 213.

[13] See infra, § 218.

[14] See infra, §§ 219 et seq.

[15] See infra, §§ 242 et seq.

B. General or Retaining Lien

§ 209. Generally.—The general or retaining lien of an attorney is the lien which attaches to papers, documents, moneys, etc., of his client, connected with the litigation, coming into the attorney's hands in the course of his employment,[17] and gives the attorney the right to retain such papers, property, or money until all his costs and charges against his client are paid.[18] This lien is said to have had its origin partly in custom and partly to prevent circuity of action.[19] It is a common-law lien founded and depending upon possession;[20] no such lien can be asserted on funds in the hands of the defendant [1] or, except as to costs, on the damages recovered in a cause before they come to his hands, even if he has a demand against his client equal to the amount of the recovery.[2] In some states there is an express statutory provision for a general or retaining lien which supersedes the common-law one.[3]

§ 210. Property to Which Lien Attaches.—The general, possessory, or retaining lien of an attorney attaches to all property, papers, books, documents, or securities of the client that come to the attorney professionally or in the course of his professional employment,[4] such as a bond,[5] a municipal warrant,[6] a promissory note or other negotiable paper,[7] an account,[8] a voucher,[9] a bank book,[10] a letter or writing,[11] a contract, insurance policy, or lease,[12] a deed,[13] or a mortgage.[14] The lien extends to an execution or copy of the judgment in the attorney's hands[15] and to articles delivered to the attorney to be exhibited to witnesses, and has been enforced in the case of copies of expensive books used in evidence. While the lien must arise from professional employment, yet if the attorney receives papers in his professional capacity, it does not, it seems, matter that he also sustains some other business relation to his client.[16]

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[16] Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 570, 48 Am. Rep. 821.

[17] See infra, § 210.

[18] See infra, § 213.

When the attorney has possession of such papers, moneys, etc., he has the right to retain them against his client as assignments or attachments until the general balance due him for legal services is paid. The client cannot discharge him and withdraw such papers or money from his hands without first paying the general balance due him for legal services, whether growing out of the special matters then in his hands, or other legal matters. Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 570, 48 Am. Rep. 821.

[19] Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 570, 48 Am. Rep. 821.

The Federal courts, it seems, recognize no lien at common law in behalf of an attorney beyond that given by the local law. Annotation: 51 Am. St. Rep. 256.

[20] Reynolds v. Warner, 128 Neb. 304, 258 N. W. 462, 97 A.L.R. 1128; Prichard v. Fulmer, 22 N. M. 134, 159 P. 39, 2 A.L.R. 474; Robinson v. Rogers, 237 N. Y. 467, 143 N. E. 647, 33 A.L.R. 1291; Re Heinsheimer, 214 N. Y. 361, 108 N. E. 636, Ann. Cas. 1916E, 384; American Nat. Bank v. Funk, 68 Okla. 169, 172 P. 1078, L.R.A. 1918F, 1137; Manning v. Leighton, 65 Vt. 84, 26 A. 258, 24 L.R.A. 684.

Annotation: 51 Am. St. Rep. 251, 252.

[1] Annotation: 51 Am. St. Rep. 252.

[2] Stewart v. Flowers, 44 Miss. 513, 7 Am. Rep. 707.

Annotation: 51 Am. St. Rep. 252.

[3] Enos v. Keating, 39 Wyo. 217, 271 P. 6, 275 P. 131, 67 A.L.R. 430, holding that no legal lien is fastened upon either a cause of action for the cancelation of a deed and for reconveyance and possession of the land it covers, or the subject-matter thereof, by service of notice of the lien by counsel upon the defendants prior to the dismissal of the action thereon instituted by them, under a statute giving an attorney a lien for a general balance, there being no money judgment claimed or any fund in the hands of counsel which he could retain.

[4] McPherson v. Cox, 96 U. S. 404, 24 L. ed. 746; Re Paschal (Texas v. White) 10 Wall. (U. S.) 483, 19 L. ed. 992; Gray v. Hopkins-Carter Hardware Co. (C. C. A. 5th) 32 F. (2d) 876, citing R. C. L.; Warfield v. Campbell, 38 Ala. 527, 82 Am. Dec. 724; Andrews v. Morse, 12 Conn. 444, 31 Am. Dec. 752; Lamont v. Washington & G. R. Co. 2 Mackey (D. C.) 502, 47 Am. Rep. 268; Curtis v. Richards, 4 Idaho, 434, 40 P. 57, 95 Am. St. Rep. 134; McCracken v. Joliet, 271 Ill. 270, 111 N. E. 131, Ann. Cas. 1917D, 144; Forsythe v. Beveridge, 52 Ill. 268, 4 Am. Rep. 612; Hobson v. Watson, 34 Me. 20, 56 Am. Dec. 632; Northrop v. Hayward, 102 Minn. 307, 113 N. W. 701, 12 Ann. Cas. 341; Stewart v. Flowers, 44 Miss. 513, 7 Am. Rep. 707; Reynolds v. Warner, 128 Neb. 304, 258 N. W. 462, 97 A.L.R. 1128; Van Etten v. State, 24 Neb. 734, 40 N. W. 289, 1 L.R.A. 669; Prichard v. Fulmer, 22 N. M. 134, 159 P. 39, 2 A.L.R. 474; Robinson v. Rogers, 237 N. Y. 467, 143 N. E. 647, 33 A.L.R. 1291; Re Heinsheimer, 214 N. Y. 361, 108 N. E. 636, Ann. Cas. 1916E, 384; Re Dunn, 205 N. Y. 398, 98 N. E. 914, Ann. Cas. 1913E, 536; State ex rel. Mothersead v. Dyer, 126 Okla. 260, 259 P. 212, citing R. C. L.; American Nat. Bank v. Funk, 68 Okla. 169, 172 P. 1078, L.R.A. 1918F, 1137; Dubois's Appeal, 38 Pa. 231, 80 Am. Dec. 478; Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 570, 48 Am. Rep. 821; Manning v. Leighton, 65 Vt. 84, 26 A. 258, 24 L.R.A. 684; Hooper v. Welch, 43 Vt. 169, 5 Am. Rep. 267; Hazeltine v. Keenan, 54 W. Va. 600, 46 S. E. 609, 102 Am. St. Rep. 953.

§ 211. —Money Collected by Attorney.—The general or retaining lien of an attorney is usually held to extend to moneys collected by him for his client in the course of his employment, whether or not upon a judgment or award.[17] If the client sues to recover the money, the attorney may retain the whole amount if the value of his services is equal to or exceeds the sum collected; he will not, however, be allowed to hold the entire amount collected merely because a small part is due to him as fees. With regard to the basis of the attorney's claim upon moneys collected for his client for the payment of such client's indebtedness to him, the authorities are not uniform, some holding that the right rests upon the law of lien,[18] others that it is a right to defalcate, rather than a right of lien,[19] and still others that it results from the right to set off.[20]

§ 212. —Property Not Affected.—Papers may come into the possession of an attorney under such circumstances as are inconsistent with the enforcement of a lien for services.[1] For example, a general or retaining lien does

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Re Morris [1908] 1 K. B. (Eng.) 473, 2 B. R. C. 46; Stevenson v. Blakelock, 1 Maule & S. 535, 105 Eng. Reprint, 200, 24 Eng. Rul. Cas. 694.

Annotation: 19 L. ed. 992; 51 Am. St. Rep. 251; 95 Am. St. Rep. 137; Ann. Cas. 1913E, 540; Ann. Cas. 1917D, 147; 16 Eng. Rul. Cas. 125, 126; 24 Eng. Rul. Cas. 703.

An original attorney is not bound to consent to a substitution or to deliver papers upon which he has a lien until the amount of his just demands is ascertained by a court or referee and paid or secured. Curtis v. Richards, 4 Idaho, 434, 40 P. 57, 95 Am. St. Rep. 134.

Where the court reporter refused to surrender the certificate of evidence in an action until payment of his fees, but loaned it to the plaintiff's attorneys for preparation of their abstracts and briefs for appeal, they are entitled to a lien on the certificate for their compensation. McCracken v. Joliet, 271 Ill. 270, 111 N. E. 131, Ann. Cas. 1917D, 144.

[5] McPherson v. Cox, 96 U. S. 404, 24 L. ed. 746.

Annotation: 51 Am. St. Rep. 251; Ann. Cas. 1917D, 149.

[6] Kusterer v. Beaver Dam, 56 Wis. 471, 14 N. W. 617, 43 Am. Rep. 725.

[7] Stewart v. Flowers, 44 Miss. 513, 7 Am. Rep. 707; Hazeltine v. Keenan, 54 W. Va. 600, 46 S. E. 609, 102 Am. St. Rep. 953.

Annotation: Ann. Cas. 1917D, 149.

[8] Annotation: Ann. Cas. 1917D, 149.

[9] Annotation: Ann. Cas. 1917D, 150.

[10] Annotation: Ann. Cas. 1917D, 149.

[11] Stewart v. Flowers, 44 Miss. 513, 7 Am. Rep. 707.

Annotation: Ann. Cas. 1917D, 149.

[12] Annotation: Ann. Cas. 1917D, 149.

[13] Stewart v. Flowers, 44 Miss. 513, 7 Am. Rep. 707.

Annotation: Ann. Cas. 1917D, 149, 150.

[14] Annotation: 51 Am. St. Rep. 251; Ann. Cas. 1917D, 149, 150.

[15] Stewart v. Flowers, 44 Miss. 513, 7 Am. Rep. 707.

Annotation: 51 Am. St. Rep. 252; Ann. Cas. 1917D, 149.

[16] Annotation: 51 Am. St. Rep. 252.

[17] Re Paschal (Texas v. White) 10 Wall. 483, 19 L. ed. 992; Stewart v. Flowers, 44 Miss. 513, 7 Am. Rep. 707; Van Etten v. State, 24 Neb. 734, 40 N. W. 289, 1 L.R.A. 669; Burleigh v. Palmer, 74 Neb. 122, 103 N. W. 1068, 12 Ann. Cas. 777; Prichard v. Fulmer, 22 N. M. 134, 159 P. 39, 2 A.L.R. 474; Robinson v. Rogers, 237 N. Y. 467, 143 N. E. 647, 33 A.L.R. 1291; Re Heinsheimer, 214 N. Y. 361, 108 N. E. 636, Ann. Cas. 1916E, 384; Dubois's Appeal, 38 Pa. 231, 80 Am. Dec. 478; Horton v. Champlin, 12 R. I. 550, 34 Am. Rep. 722.

Annotation: 51 Am. St. Rep. 253; 12 Ann. Cas. 778.

[18] Annotation: 51 Am. St. Rep. 253, 254, 255.

[19] Stewart v. Flowers, 44 Miss. 513, 7 Am. Rep. 707; Dubois's Appeal, 38 Pa. 231, 80 Am. Dec. 478.

Annotation: 51 Am. St. Rep. 253.

[20] Annotation: 51 Am. St. Rep. 255.

[1] Re Niagara, L. & O. Power Co. 203 N. Y. 493, 97 N. E. 33, 38 L.R.A.(N.S.) 207, Ann. Cas. 1913B, 234.

not attach to papers and documents which have come into the hands of an attorney otherwise than in the course of his employment as such[2]—as, for instance, where papers are received by him as prochein ami of an infant,[3] as mortgagee, or as trustee.[4] No such lien attaches to money or property which a client has left with his attorney for a special purpose,[5] unless the property is allowed to remain in the attorney's hands after the specific purpose is fulfilled.[6] Nor will an attorney be permitted to hold under a retaining lien papers which are essential to the preservation of the client's rights in future litigation.[7] The retaining lien of an attorney does not attach to funds in court or property in dispute, except, perhaps, in bankruptcy or lunacy cases, when, it seems, a general lien for the management of the property may attach on the fund or body of the estate.[8] Such a lien cannot be successfully asserted against money appropriated to such client by an act of the legislature while such money is in the custody or under the control of the State Treasurer.[9]

§ 213. Services and Compensation Covered by Lien.—The general or retaining lien of the attorney exists not only for all costs, charges, and disbursements due him in the particular cause in which they come into his possession, but also for the costs and the amount due him for other professional business and employment in other causes.[10] In other words, the lien extends to the general balance due for professional services rendered to the client.[11] It has been held that an attorney will also be protected in making payment, out of the funds collected by him, of reasonable fees to associate counsel in the cause employed by the client.[12]

§ 214. Notice of Lien.—No notice is required to be given before an attorney's common-law retaining lien upon papers in his possession becomes operative.[13] Thus, it is usually held that notice is not required to protect such lien against assignment by the client or attachment by trustee process by his creditors.[14] In some decisions, however, statutes giving attorneys the lien for a general balance of compensation from the time of giving notice of the lien have been held applicable to liens claimed against money or property in the possession of the attorney against which, in the absence of the statute, the attorney would have had a general common-law retaining lien.[15] However, the real intent of these statutes seems to be to require notice only in the case of money or property in the hands of the adverse party.[16]

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[2] Thomson v. Findlater Hardware Co. 109 Tex. 235, 205 S. W. 831, 2 A.L.R. 1486; Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 570, 48 Am. Rep. 821.

Stevenson v. Blakelock, 1 Maule & S. 535, 105 Eng. Reprint, 200, 24 Eng. Rul. Cas. 694.

Annotation: 2 A.L.R. 1488; 19 L. ed. 993; 51 Am. St. Rep. 252; Ann. Cas. 1917D, 150.

[3] Annotation: 31 Am. Dec. 759.

[4] Annotation: 51 Am. St. Rep. 252.

[5] Lindsley v. Caldwell, 234 Mo. 498, 137 S. W. 983, 37 L.R.A.(N.S.) 161; Anderson v. Bosworth, 15 R. I. 443, 8 A. 339, 2 Am. St. Rep. 910.

Annotation: Ann. Cas. 1917D, 151, 152.

Money specially deposited with an attorney to be used as cash bail for a client, to be returned as soon as that purpose shall have been accomplished is not subject to such a lien. Annotation: 51 Am. St. Rep. 255.

[6] Annotation: 31 Am. Dec. 759.

[7] Annotation: Ann. Cas. 1917D, 152.

[8] Stewart v. Flowers, 44 Miss. 513, 7 Am. Rep. 707.

An attorney cannot maintain a claim on a fund in court against a mortgagee or judgment creditor, even though such mortgagee or creditor is his own client. Dubois's Appeal, 38 Pa. 231, 80 Am. Dec. 478.

[9] State v. Moore, 40 Neb. 854, 59 N. W. 755, 25 L.R.A. 774.

[10] Hooper v. Welch, 43 Vt. 169, 5 Am. Rep. 267.

Stevenson v. Blakelock, 1 Maule & S. 535, 105 Eng. Reprint, 200, 24 Eng. Rul. Cas. 694.

Annotation: 51 Am. St. Rep. 251; 24 Eng. Rul. Cas. 701.

[11] Prichard v. Fulmer, 22 N. M. 134, 159 P. 39, 2 A.L.R. 474; Re Heinsheimer, 214 N. Y. 361, 108 N. E. 636, Ann. Cas. 1916E, 384; Newcomb v. Krueger, 36 Ohio App. 469, 173 N. E. 246, citing R. C. L.; American Nat. Bank v. Funk, 68 Okla. 169, 172 P. 1078, L.R.A.1918F, 1137; Hudson v. Brown, 179 Wash. 32, 35 P. (2d) 756, citing R. C. L.

Annotation: 19 L. ed. 993.

Am. Law Inst. Restatement, Agency, § 464, p. 1090.

As to right to lien against funds of a decedent's estate, see EXECUTORS AND ADMINISTRATORS.

[12] Annotation: 51 Am. St. Rep. 254.

[13] McCarty v. Goodsman, 39 N. D. 389, 167 N. W. 503, L.R.A.1918F, 160.

[14] Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 570, 48 Am. Rep. 821.

§ 215. Priorities.—The attorney's lien on his client's papers for costs and disbursements will not be protected against the pre-existing rights of third persons; it does, however, prevail against one to whom the client has assigned the cause of action before judgment, for a pre-existing debt, in a jurisdiction where such consideration is not regarded as a valuable consideration, and against the client's assignment for the benefit of his creditors.[17]

§ 216. Waiver or Loss of Lien.—An attorney's general or retaining lien is liable to be defeated or lost in a number of different ways.[18] It may be lost by an assignment of the funds against which the lien is asserted or by the fact of the attorney's voluntary withdrawal from,[19] or unjustifiable refusal to proceed with, the prosecution of the case.[20] But such lien is not affected by the client's assignment in bankruptcy or insolvency or for the benefit of creditors.[1] Nor is it extinguished by a transfer subject to the lien.[2]

It has also been held that the lien is superseded by taking security for the debt which is the subject of the lien,[3] or that at least it has been suspended,[4] although it has been held that whether such security is due or not, where securities are given to secure the payment of particular costs, the general lien is unaffected.[5] The solution of this question whether the taking of security constitutes a waiver is generally held to depend upon the intention of the parties to the transaction.[6]

§ 217. —Loss of Possession.—Being founded on possession, the attorney's retaining lien may be lost by the act of the attorney in voluntarily parting with the possession of the papers, etc., to which it may have attached,[7] even though by mistake.[8] The fact, however, that the property is placed in the control of the attorney's agent does not affect the lien.[9] Nor is it lost by reason of the fact that the papers are improperly taken from the attorney.[10]

Where the retention by an attorney of his client's papers serves to embarrass the client, the attorney may be required to deliver them up, upon receiving proper security for his compensation.[11] An attorney from whom papers, which he has a right to hold to secure payment for his services, have been taken by an order and decree of court, thereby swelling the funds for the payment of creditors of the client, is entitled to be paid, out of the funds realized from the sale of the client's property, the debts for which the papers were held.[12]

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[15] Annotation: 51 Am. St. Rep. 277.

[16] See infra, § 225.

[17] Annotation: 51 Am. St. Rep. 253, 254.

[18] Annotation: 31 Am. Dec. 759.

[19] Annotation: 51 Am. St. Rep. 252, 256.

[20] Re Dunn, 205 N. Y. 398, 98 N. E. 914, Ann. Cas. 1913E, 536.
Annotation: Ann. Cas. 1913E, 540.

[1] Annotation: 51 Am. St. Rep. 252.

[2] Annotation: 51 Am. St. Rep. 252.

[3] Annotation: 31 Am. Dec. 759; 2 B. R. C. 58.

[4] Annotation: 19 L. ed. 994.

[5] Re Morris, [1908] 1 K. B. (Eng.) 473, 2 B. R. C. 46—C. A.
Annotation: 2 B. R. C. 58.

[6] Annotation: 51 Am. St. Rep. 252; 2 B. R. C. 58.

[7] Lamont v. Washington & Georgetown R. Co. 2 Mackey (D. C.) 502, 47 Am. Rep. 268; Northrup v. Hayward, 102 Minn. 307, 113 N. W. 701, 12 Ann. Cas. 341; American Nat. Bank v. Funk, 68 Okla. 169, 172 P. 1078, L.R.A.1918F, 1137; Dubois's Appeal, 38 Pa. 231, 80 Am. Dec. 478; Manning v. Leighton, 65 Vt. 84, 26 A. 258, 24 L.R.A. 684; Hazeltine v. Keenan, 54 W. Va. 600, 46 S. E. 609, 102 Am. St. Rep. 953.
Annotation: 19 L. ed. 994; 51 Am. St. Rep. 251, 256.
Where the attorney files papers in his possession in court for the purpose of procuring a judgment, he surrenders his right to a possessory lien. Reynolds v. Warner, 128 Neb. 304, 258 N. W. 462, 97 A.L.R. 1128.

[8] Hazeltine v. Keenan, 54 W. Va. 600, 46 S. E. 609, 102 Am. St. Rep. 953.
Annotation: 51 Am. St. Rep. 256.

[9] American Nat. Bank v. Funk, 68 Okla. 169, 172 P. 1078, L.R.A.1918F, 1137.
Annotation: 51 Am. St. Rep. 252.

[10] Annotation: 31 Am. Dec. 759.

[11] Robinson v. Rogers, 237 N. Y. 467, 143 N. E. 647, 33 A.L.R. 1291.
Annotation: 33 A.L.R. 1296.

§ 218. **Enforcement of Lien.**—The general lien of an attorney upon his client's papers is a passive one, and cannot ordinarily be actively enforced, either at law or in equity. It amounts to a mere right to retain the papers as against the client until the attorney is fully paid.[13] Clearly, in the case of a promissory note in the attorney's hands for collection, the lien does not give him any right to a judgment against the client for the amount of his fees after the defendant has paid the note to the attorney's client.[14] If the lien is questioned, it must be determined by the court or a referee on a proper investigation. Such lien may, however, be indirectly enforced, under some circumstances, by order and execution; and it is sometimes proper for the court to determine the existence and amount of the lien and to establish the condition upon which the attorney shall deliver up the property.[15] Even when enforceable under an attorney's lien law, such a retaining lien cannot be foreclosed by advertisement and sale under a statute providing for the foreclosure of liens on personal property.[16]

C. Special or Charging Lien

§ 219. **Generally.**—In addition to the retaining lien, an attorney has what is generally known as a particular, special, or charging lien for his services rendered in procuring a judgment, decree, or award for his client,[17] which attaches to the fruits of his skill and labor.[18] This lien is not dependent [19] or does not rest upon possession, as in the case of general or retaining liens, but upon the equity of an attorney to be paid his fees and disbursements out of the judgment which he has obtained.[1] Such lien, as recognized by the common law, is the right of an attorney or solicitor to recover his taxable costs, or his fees and money expended on behalf of his client, from a fund recovered by his aid, and the right to have the court interfere to prevent payment by the judgment debtor to the creditor in fraud of his right to the same and to prevent or set aside assignments or settlements made in fraud of his right.[2] It entitles the attorney to apply to the court for a disbursement of the proceeds realized by the enforcement of the judgment.[3] It is necessary, however, to the existence of the lien that there be a valid contract for fees, either express or implied, entered into between the attorney and his client.[4]

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[12] Annotation: 51 Am. St. Rep. 256.

[13] Modern Woodmen v. Cummins, 216 Mo. App. 404, 268 S. W. 383, citing R. C. L.

[14] Reynolds v. Warner, 128 Neb. 304, 258 N. W. 462, 97 A.L.R. 1128.

[15] Annotation: 51 Am. St. Rep. 254, 255.

[16] McCarty v. Goodsman, 39 N. D. 389, 167 N. W. 503, L.R.A.1918F, 160.

[17] Hale v. Tyson, 202 Ala. 107, 79 So. 499, citing R. C. L.; Warfield v. Campbell, 38 Ala. 527, 82 Am. Dec. 724; Fillmore v. Wells, 10 Colo. 228, 15 P. 343, 3 Am. St. Rep. 567; Andrews v. Morse, 12 Conn. 444, 31 Am. Dec. 752; Lamont v. Washington & G. R. Co. 2 Mackey (D. C.) 502, 47 Am. Rep. 268; State v. National Surety Co. 29 Idaho, 670, 161 P. 1026, 2 A.L.R. 251; Hanna v. Island Coal Co. 5 Ind. App. 163, 31 N. E. 846, 51 Am. St. Rep. 246; Hubbard v. Ellithorpe, 135 Iowa, 259, 112 N. W. 796, 124 Am. St. Rep. 271; Harlan & Co. v. Bennett, 127 Ky. 572, 106 S. W. 287, 128 Am. St. Rep. 360; Potter v. Mayo, 3 Me. 34, 14 Am. Dec. 211; Northrup v. Hayward, 102 Minn. 307, 113 N. W. 701, 12 Ann. Cas. 341; Stewart v. Flowers, 44 Miss. 513, 7 Am. Rep. 707; Reynolds v. Warner, 128 Neb. 304, 258 N. W. 462, 97 A.L.R. 1128; Citizens' Nat. Bank v. Culver, 54 N. H. 327, 20 Am. Rep. 134; Prichard v. Fulmer, 22 N. M. 134, 159 P. 39, 2 A.L.R. 474; Re Heinsheimer, 214 N. Y. 361, 108 N. E. 636, Ann. Cas. 1916E, 384; Coughlin v. New York C. & H. R. R. Co. 71 N. Y. 443, 27 Am. Rep. 75; Marshall v. Meech, 51 N. Y. 140, 10 Am. Rep. 572; Horton v. Champlin, 12 R. I. 550, 34 Am. Rep. 722; Loofbourow v. Hicks, 24 Utah, 49, 66 P. 602, 55 L.R.A. 874; Victor Gold & Silver Min. Co. v. National Bank, 18 Utah, 87, 55 P. 72, 72 Am. St. Rep. 767; Manning v. Leighton, 65 Vt. 84, 26 A. 258, 24 L.R.A. 684; Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 570, 48 Am. Rep. 821; Hazeltine v. Keenan, 54 W. Va. 600, 46 S. E. 609, 102 Am. St. Rep. 953; Bent v. Lipscomb, 45 W. Va. 183, 31 S. E. 907, 72 Am. St. Rep. 815.

Annotation: 19 L. ed. 992; 51 Am. St. Rep. 251, 254.

[18] Wylie v. Coxe, 15 How. (U. S.) 415, 14 L. ed. 753.

Annotation: 19 L. ed. 992.

Courts have and will exercise authority to allow an attorney a lien for his fees upon a fund which his labors have created or assisted to bring into existence, unless some consideration of public policy or other special reasons stand in the way. Costigan v. Stewart, 76 Kan. 353, 91 P. 83, 11 L.R.A. (N.S.) 630.

[19] Re Heinsheimer, 214 N. Y. 361, 108 N. E. 636, Ann. Cas. 1916E, 384.

[1] Collins v. Thuringer, 92 Colo. 433, 21 P. (2d) 709, citing R. C. L.; Forsythe v. Beveridge, 52 Ill. 268, 4 Am. Rep. 612; Cohen v. Goldberger, 109 Ohio St. 22, 141 N. E. 656, citing R. C. L.; Tyler v. Superior Court, 30 R. I. 107, 73 A. 467, 23 L.R.A.(N.S.) 1045;

§ 220. Purpose and Basis of Lien.—The charging lien of an attorney was recognized by early English decisions.[5] It generally exists in this country and is based, in some states, upon the common law,[6] though in many states, entirely on statutes[7] the constitutionality of which have been upheld.[8] Even where the attorney's lien as enforced at common law is recognized, it is frequently the subject of express statutory regulation, which must, of course, be complied with. The scope of such lien has been greatly enlarged by statute in many states.[9] Wherever the legislature has enlarged and defined a common-law lien, its definition supersedes that of the courts.[10] In a few states it seems that in the absence of an express contract, out of which an equitable assignment arises, an attorney at law has no such lien.[11] Such charging lien was created to protect the rights of an attorney unable to get possession

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Horton v. Champlin, 12 R. I. 550, 34 Am. Rep. 722; Loofbourow v. Hicks, 24 Utah, 49, 66 P. 602, 55 L.R.A. 874; Victor Gold & S. Min. Co. v. National Bank, 18 Utah, 87, 55 P. 72, 72 Am. St. Rep. 767.

Annotation: 51 Am. St. Rep. 257; 24 Eng. Rul. Cas. 717.

[2] Hale v. Tyson, 202 Ala. 107, 79 So. 499, citing R. C. L.; Fillmore v. Wells, 10 Colo. 228, 15 P. 343, 3 Am. St. Rep. 567; Costigan v. Stewart, 76 Kan. 353, 91 P. 83, 11 L.R.A. (N.S.) 630; Prichard v. Fulmer, 22 N. M. 134, 159 P. 39, 2 A.L.R. 474; Randall v. Van Wagenen, 115 N. Y. 527, 22 N. E. 361, 12 Am. St. Rep. 828; Stearns v. Wollenberg, 51 Or. 88, 92 P. 1079, 14 L.R.A.(N.S.) 1096; Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 570, 48 Am. Rep. 821.

[3] Nutt v. Knut, 200 U. S. 12, 50 L. ed. 348, 26 S. Ct. 216; Webster v. Sweat (C. C. A. 5th) 65 F. (2d) 109, citing R. C. L.; Jax Ice & Cold Storage Co. v. South Florida Farms Co. 91 Fla. 593, 109 So. 212, 48 A.L.R. 957; Tulka v. Chicago City R. Co. 259 Ill. App. 234, citing R. C. L.; Griggs v. Chicago, R. I. & P. R. Co. 104 Neb. 301, 177 N. W. 185, citing R. C. L.

The lien creates a right to have the judgment enforced for the attorney's benefit, but not a right to transfer the judgment. Am. Law Inst. Restatement, Agency, § 464, p. 1087.

The cause of action does not, however, become in part the property of the attorney. Re Snyder, 190 N. Y. 66, 82 N. E. 742, 14 L.R.A.(N.S.) 1101, 123 Am. St. Rep. 533, 13 Ann. Cas. 441.

[4] Wright v. Ellison, 1 Wall. (U. S.) 16, 17 L. ed. 555; Midland Valley R. Co. v. Johnson, 140 Ark. 174, 215 S. W. 665, 7 A.L.R. 1007; State v. National Surety Co. 29 Idaho, 670, 161 P. 1026, 2 A.L.R. 251; People ex rel. Stephens v. Holten, 304 Ill. 394, 136 N. E. 738, 24 A.L.R. 929.

An associate or assistant counsel engaged by an attorney cannot, without authority to do so, assert a lien, unless the client ratifies the employment. Annotation: 90 A.L.R. 278.

If compensation is claimed under an illegal contract, there is no right to a lien on the judgment. Hightower v. Detroit Edison Co. 262 Mich. 1, 247 N. W. 97, 86 A.L.R. 509.

[5] Annotation: 31 Am. Dec. 755, 756; 24 Eng. Rul. Cas. 716.

[6] Royal Ins. Co. v. Simon, 20 Del. Ch. 297, 174 A. 444, citing R. C. L.; Horton v. Champlin, 12 R. I. 550, 34 Am. Rep. 722; Tyler v. Superior Ct. 30 R. I. 107, 73 A. 467, 23 L.R.A.(N.S.) 1045.

[7] Rowe v. Fogle, 88 Ky. 105, 10 S. W. 426, 2 L.R.A. 708; Potter v. Mayo, 3 Me. 34, 14 Am. Dec. 211; Elliott v. Orton, 69 Okla. 233, 171 P. 1110, L.R.A.1918E, 103; Horton v. Champlin, 12 R. I. 550, 34 Am. Rep. 722; Humptulips Driving Co. v. Cross, 65 Wash. 636, 118 P. 827, 37 L.R.A.(N.S.) 226.

Federal courts recognize no common-law lien, but give effect to the laws of the state in which they are held. Annotation: 93 A.L.R. 687.

[8] Standidge v. Chicago R. Co. 254 Ill. 524, 98 N. E. 963, 40 L.R.A.(N.S.) 529, Ann. Cas. 1913C, 65; O'Connor v. St. Louis Transit Co. 198 Mo. 622, 97 S. W. 150, 115 Am. St. Rep. 495, 8 Ann. Cas. 703.

Annotation: 40 L.R.A.(N.S.) 529.

[9] Fillmore v. Wells, 10 Colo. 228, 15 P. 343, 3 Am. St. Rep. 567.

[10] Robinson v. Rogers, 237 N. Y. 467, 143 N. E. 647, 33 A.L.R. 1291.

[11] Cameron v. Boeger, 200 Ill. 84, 65 N. E. 690, 93 Am. St. Rep. 165; Forsythe v. Beveridge, 52 Ill. 268, 4 Am. Rep. 612; Humphrey v. Browning, 46 Ill. 476, 95 Am. Dec. 446.

Annotation: 51 Am. St. Rep. 266.

against a client who seeks to avoid payment for services.[12] It is upheld on the theory that his service and skill produced the judgment,[13] in accordance with the principle which gives a mechanic a lien upon a valuable thing which, by his skill and labor, he has produced.[14] Such a lien cannot be asserted by an attorney who is himself guilty of collusion against his client.[15]

§ 221. **Agreement Creating Lien.**—A lien may be created by an express agreement on the part of the client that the attorney shall have a lien for his compensation on the amount recovered.[16] Moreover, it has been held in some jurisdictions that where the parties have contracted that the attorney shall receive a specified amount of the recovery, such agreement will create an equitable lien in favor of the attorney to the extent of the amount stipulated.[17] A writing from a client authorizing an attorney to retain as compensation a part of any recovery of money had by judgment amounts to an assignment and does not destroy, but confirms, the attorney's common-law lien upon the judgment for his compensation.[18] Other courts, however, have taken a contrary view.[19] In some decisions a distinction is sought to be made to the effect that if the agreement is for a certain fee or percentage to be paid out of the fund recovered, a lien is created, while if it is merely for a sum equal to a certain percentage of the fund recovered or for a certain amount in case of recovery, the contract is merely personal between the attorney and client and no lien on the fund recovered is created.[20] That is, it is indispensable to the lien that there should be a distinct appropriation of the fund by the client and an agreement that the attorney should be paid out of it.[1] When, however, the cause of action is by its nature not assignable, some courts hold that the client cannot by any agreement give his attorney any interest or lien therein;[2] others take the position that an agreement to divide the recovery in a nonassignable cause of action may attach itself to the judgment when recovered and give the attorney an equitable interest therein.[3]

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[12] Prichard v. Fulmer, 22 N. M. 134, 159 P. 39, 2 A.L.R. 474; Robinson v. Rogers, 237 N. Y. 467, 143 N. E. 647, 33 A.L.R. 1291.

[13] Coughlin v. New York C. & H. R. R. Co. 71 N. Y. 443, 27 Am. Rep. 75.

Annotation: 51 Am. St. Rep. 257.

[14] Coughlin v. New York C. & H. R. R. Co. 71 N. Y. 443, 27 Am. Rep. 75; Cohen v. Goldberger, 109 Ohio St. 22, 141 N. E. 656, citing R. C. L.; Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 570, 48 Am. Rep. 821.

[15] Am. Law Inst. Restatement, Agency, § 464, p. 1088.

[16] Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge, 161 Mich. 181, 126 N. W. 56, 137 Am. St. Rep. 495.

[17] Ingersoll v. Coram, 211 U. S. 335, 53 L. ed. 208, 29 S. Ct. 92; Peugh v. Porter, 112 U. S. 737, 28 L. ed. 859, 5 S. Ct. 361; Forsythe v. Beveridge, 52 Ill. 268, 4 Am. Rep. 612; Costigan v. Stewart, 76 Kan. 353, 91 P. 83, 11 L.R.A.(N.S.) 630; Svea Assur. Co. v. Packham, 92 Md. 464, 48 A. 359, 52 L.R.A. 95; Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge, 161 Mich. 181, 126 N. W. 56, 137 Am. St. Rep. 495; Re Heinsheimer, 214 N. Y. 361, 108 N. E. 636, Ann. Cas. 1916E, 384; Coughlin v. New York C. & H. R. R. Co. 71 N. Y. 443, 27 Am. Rep. 75; Stansell v. Roach, 147 Tenn. 183, 246 S. W. 520, 29 A.L.R. 143; Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 570, 48 Am. Rep. 821; Bent v. Lipscomb, 45 W. Va. 183, 31 S. E. 907, 72 Am. St. Rep. 815.

Annotation: 27 L.R.A.(N.S.) 634; 51 Am. St. Rep. 265; Ann. Cas. 1916E, 387, 390.

An agreement by a lawyer who was prosecuting a case for a contingent fee to give certain other lawyers one third of such fee, if and when he should receive it, if they would do certain work for him creates a lien upon the fund as soon as it is received by him in favor of such attorneys where they have performed the agreed services. Barnes v. Alexander, 232 U. S. 117, 58 L. ed. 530, 34 S. Ct. 276.

[18] Bent v. Lipscomb, 45 W. Va. 183, 31 S. E. 907, 72 Am. St. Rep. 815.

[19] Nutt v. Knut, 200 U. S. 12, 50 L. ed. 348, 26 S. Ct. 216; Cameron v. Boeger, 200 Ill. 84, 65 N. E. 690, 93 Am. St. Rep. 165; Enos v. Keating, 39 Wyo. 217, 271 P. 6, 275 P. 131, 67 A.L.R. 430.

[20] Trist v. Child (Burke v. Child) 21 Wall. (U. S.) 441, 22 L. ed. 623; De Winter v. Thomas, 34 App. D. C. 80, 27 L.R.A.(N.S.) 634, writ of certiorari denied in 215 U. S. 609, 54 L. ed. 347, 30 S. Ct. 411.

Annotation: 27 L.R.A.(N.S.) 634.

[1] Porter v. White, 127 U. S. 235, 32 L. ed. 112, 8 S. Ct. 1217; Wright v. Ellison, 1 Wall. (U. S.) 16, 17 L. ed. 555.

[2] Nutt v. Knut, 200 U. S. 12, 50 L. ed. 348, 26 S. Ct. 216; Hanna v. Island Coal Co. 5 Ind. App. 163, 31 N. E. 846, 51 Am. St. Rep. 246; Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge, 161 Mich. 181, 126 N. W. 56, 137 Am. St. Rep. 495; Boogren v. St. Paul City R. Co. 97 Minn. 51, 106 N. W. 104, 3 L.R.A.(N.S.) 379, 114 Am. St. Rep. 691; Tyler v. Superior Ct. 30 R. I. 107, 73 A. 467, 23 L.R.A.(N.S.) 1045.

§ 222. Extent of Lien; Taxable Costs.—The decisions are not uniform as to the extent of an attorney's charging lien. Clearly it includes all the fees and expenses of the attorney embraced in the assessed costs,[4] and as a general rule, it has been extended so as to cover not merely disbursements made on behalf of the client included in the taxable costs, but also compensation for the services of the attorney.[5] If the amount of compensation was agreed upon, the attorney has a lien to the extent of that amount.[6] If there was no specific agreement for compensation, he has a lien to the extent to which he is entitled to recover of the client on a quantum meruit a reasonable compensation for the services rendered.[7]

In England and in Canada the particular or charging lien of the attorney is confined to his taxable costs and disbursements in the suit,[8] and some of the United States courts take this view.[9]

§ 223. Limitation of Lien to Services in Suit Wherein Judgment Is Had.—In the absence of statute, the particular or charging lien does not extend beyond the charges and fees in the suit in which the judgment was recovered; it does not cover any general balance which may be due the attorney from the client for professional services rendered in other causes or transactions,[10] or any claim for unpaid salary under a general retainer.[11] Even the statutory lien of an attorney on the fruits of the suit has been held to be limited to the services rendered therein, and not to extend to prospective services in the hearing of an appeal.[12] Generally, however, the charging lien has been held to extend to charges for fees or disbursements of suits incident to, or growing out of, the principal object of the employment.[13] Moreover, under some statutes the lien is held not to be limited to compensation for services rendered by the attorney in procuring the judgment upon which he relies, but to cover a balance due him for any and all professional services theretofore rendered his client,[14] and it may be sustained for services rendered in other matters, where there is a special contract with regard thereto.[15]

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[3] Coughlin v. New York C. & H. R. R. Co. 71 N. Y. 443, 27 Am. Rep. 75; Miller v. Newell, 20 S. C. 123, 47 Am. Rep. 833; Kusterer v. Beaver Dam, 56 Wis. 471, 14 N. W. 617, 43 Am. Rep. 725.

Annotation: 51 Am. St. Rep. 265.

[4] Loofbourow v. Hicks, 24 Utah, 49, 66 P. 602, 55 L.R.A. 874; Victor Gold & S. Min. Co. v. National Bank, 18 Utah, 87, 55 P. 72, 72 Am. St. Rep. 767; McClure v. Little, 15 Utah, 379, 49 P. 298, 62 Am. St. Rep. 938.

If the expenses of an attorney are a part of the fee for which he contracts, they are within the purview of a statute giving a lien for his fees. Midland Valley R. Co. v. Johnson, 140 Ark. 174, 215 S. W. 665, 7 A.L.R. 1007.

[5] Central R. & Bkg. Co. v. Pettus, 113 U. S. 116, 28 L. ed. 915, 5 S. Ct. 387; Internal Improv. Fund v. Greenough, 105 U. S. 527, 26 L. ed. 1157; Re Paschal (Texas v. White) 10 Wall. (U. S.) 483, 19 L. ed. 992; Warfield v. Campbell, 38 Ala. 527, 82 Am. Dec. 724; Fillmore v. Wells, 10 Colo. 228, 15 P. 343, 3 Am. St. Rep. 567; Andrews v. Morse, 12 Conn. 444, 31 Am. Dec. 752; Baker v. Baker, 258 Ill. 418, 101 N. E. 587 (based upon statute and overruling by implication a prior decision to the contrary under the common law in Forsythe v. Beveridge, 52 Ill. 268, 4 Am. Rep. 612); Harlan & Co. v. Bennett, 127 Ky. 572, 106 S. W. 287, 128 Am. St. Rep. 360; Northrup v. Hayward, 102 Minn. 307, 113 N. W. 701, 12 Ann. Cas. 341; Stewart v. Flowers, 44 Miss. 513, 7 Am. Rep. 707; Burleigh v. Palmer, 74 Neb. 122, 103 N. W. 1068, 12 Ann. Cas. 777; Citizens Nat. Bank v. Culver, 54 N. H. 327, 20 Am. Rep. 134 (decided under a Vermont statute; the New Hampshire rule is to the contrary; see annotation: Ann. Cas. 1916E, 391); Coughlin v. New York C. & H. R. R. Co. 71 N. Y. 443, 27 Am. Rep. 75; Marshall v. Meech, 51 N. Y. 140, 10 Am. Rep. 572; Victor Gold & S. Min. Co. v. National Bank, 18 Utah, 87, 55 P. 72, 72 Am. St. Rep. 767; Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 570, 48 Am. Rep. 821; Hooper v. Welch, 43 Vt. 169, 5 Am. Rep. 267.

Annotation: 19 L. ed. 993; 51 Am. St. Rep. 260, 275; Ann. Cas. 1916E, 387; 24 Eng. Rul. Cas. 716.

[6] Annotation: 51 Am. St. Rep. 260; Ann. Cas. 1916E, 387.

[7] Harlan & Co. v. Bennett, 127 Ky. 572, 106 S. W. 287, 128 Am. St. Rep. 360.

Annotation: Ann. Cas. 1916E, 387; 51 Am. St. Rep. 260.

[8] Annotation: 51 Am. St. Rep. 258; Ann. Cas. 1916E, 390.

[9] Newbert v. Cunningham, 50 Me. 231, 79 Am. Dec. 612; Hobson v. Watson, 34 Me. 20, 56 Am. Dec. 632; Tyler v. Superior Ct. 30 R. I. 107, 73 A. 467, 23 L.R.A.(N.S.) 1045; Horton v. Champlin, 12 R. I. 550, 34 Am. Rep. 722; Miller v. Newell, 20 S. C. 123, 47 Am. Rep. 833.

Annotation: 19 L. ed. 993; 51 Am. St. Rep. 259; Ann. Cas. 1916E, 391; 24 Eng. Rul. Cas. 716.

Under a statute giving an attorney a lien for so much of the execution as is due him for fees and disbursements, his lien has been held to extend only to such fees and disbursements as are taxed and included in the execution. Newbert v. Cunningham, 50 Me. 231, 79 Am. Dec. 612.

Where the attorney by statute is given a lien for his unpaid fees and disbursements on any execution lawfully within his hands, the lien is limited to taxable costs only, and does not extend to counsel fees. Annotation: 51 Am. St. Rep. 275.

[10] Central R. & Bkg. Co. v. Pettus, 113 U. S. 116, 28 L. ed. 915, 5 S. Ct. 387; Internal Improv. Fund v. Greenough, 105 U. S. 527, 26 L. ed. 1157; Davis v. Webber, 66 Ark. 190, 49 S. W. 822, 45 L.R.A. 196, 74 Am. St. Rep. 81; Stewart v. Flowers, 44 Miss. 513 7 Am. Rep. 707; Reynolds v. Warner, 128 Neb. 304, 258 N. W. 462, 97 A.L.R. 1128;

§ 224. **Lien for Successful Defense of Suit or Right.**—The attorney for the plaintiff is not necessarily the only attorney entitled to a lien; there may be instances where the attorney for the defendant also has such right.[16] If, for example, the defense attorney succeeds in obtaining an affirmative judgment in favor of his client, as, for instance, in the case of a demand for a set-off or counterclaim, he may claim a lien for such services.[17] However, in a majority of jurisdictions in which an attorney has a lien on specific property recovered, he has no lien on property for his services in successfully defending or protecting the title thereto.[18] In some jurisdictions, however, an attorney is given a statutory lien on land for services in successfully defending the title thereto in an action brought against his client to recover it.[19] Moreover, the agree-

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Re Heinsheimer, 214 N. Y. 361, 108 N. E. 636, Ann. Cas. 1916E, 384; Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 570, 48 Am. Rep. 821; Hazeltine v. Keenan, 54 W. Va. 600, 46 S. E. 609, 102 Am. St. Rep. 953.

Annotation: 93 A.L.R. 680; 97 A.L.R. 1134; Ann. Cas. 1916E, 392.

Am. Law Inst. Restatement, Agency, § 464, p. 1093.

The value of services rendered in one suit cannot be included in a judgment establishing the lien of an attorney for his fees on property received by his client in compromise of a judgment in a different suit. Davis v. Webber, 66 Ark. 190, 49 S. W. 822, 45 L.R.A. 196, 74 Am. St. Rep. 81.

[11] Re Heinsheimer, 214 N. Y. 361, 108 N. E. 636, Ann. Cas. 1916E, 384.

[12] Annotation: 51 Am. St. Rep. 275.

[13] Re Paschal (Texas v. White) 10 Wall. (U. S.) 483, 19 L. ed. 992.

Annotation: 97 A.L.R. 1135, 1137; Ann. Cas. 1916E, 393.

When a judgment has been obtained, an execution issued, and the attorney's lien has attached thereto, it has been held to extend to suits arising from and incidental to the enforcement of the judgment. Newbert v. Cunningham, 50 Me. 231, 79 Am. Dec. 612.

[14] Fillmore v. Wells, 10 Colo. 228, 15 P. 343, 3 Am. St. Rep. 567; Hubbard v. Ellithorpe, 135 Iowa, 259, 112 N. W. 796, 124 Am. St. Rep. 271.

[15] Annotation: 97 A.L.R. 1139.

[16] Harlan & Co. v. Bennett, 127 Ky. 572, 106 S. W. 287, 128 Am. St. Rep. 360.

[17] Harlan & Co. v. Bennett, 127 Ky. 572, 106 S. W. 287, 128 Am. St. Rep. 360; O'Connor v. St. Louis Transit Co. 198 Mo. 622, 97 S. W. 150, 115 Am. St. Rep. 495, 8 Ann. Cas. 703; Elliott v. Orton, 69 Okla. 233, 171 P. 1110, L.R.A.1918E, 103.

When, in a suit by partners to settle the partnership and enforce their liens upon the assets, the defendant partner obtains an affirmative judgment for a definite sum then under the control of the court, the title to which, up to the time of the judgment, was in the firm and not in himself alone, this is a recovery of property which entitles his attorney to a lien for his fee. Harlan & Co. v. Bennett, 127 Ky. 572, 106 S. W. 287, 128 Am. St. Rep. 360.

[18] Gray v. Hopkins-Carter Hardware Co. (C. C. A. 5th) 32 F. (2d) 876, citing R. C. L.; Owens v. Gunther, 75 Ark. 37, 86 S. W. 851, 5 Ann. Cas. 130; Harlan & Co. v. Bennett, 127 Ky. 572, 106 S. W. 287, 128 Am. St. Rep. 360; Forrester v. Howard, 124 Ky. 215, 98 S. W. 984, 124 Am. St. Rep. 394; Elliott v. Orton, 69 Okla. 233, 171 P. 1110, L.R.A. 1918E, 103; Stearns v. Wollenberg, 51 Or. 88, 92 P. 1079, 14 L.R.A.(N.S.) 1095; Stansell v. Roach, 147 Tenn. 183, 246 S. W. 520, 29 A.L.R. 143.

Annotation: 93 A.L.R. 689; 9 Ann. Cas. 626.

In Mackall v. Willoughby, 167 U. S. 681, 42 L. ed. 323, 17 S. Ct. 954, such a lien was allowed where an agreement provided for a lien on any judgment or property recovered in the pending suits, one of which successfully defended a possession obtained in one of the other two suits.

In jurisdictions in which an attorney is entitled to a lien on specific property recovered for his client, a lien clearly does not arise where property does not become vested in his client as a result of his services. Annotation: 93 A.L.R. 687.

[19] Strohecker v. Irvine, 76 Ga. 639, 2 Am. St. Rep. 62.

Annotation: 93 A.L.R. 693; 9 Ann. Cas. 627.

ment between the attorney and client may be such as to give the attorney a lien upon property, the title to which he successfully defends against the claim of third persons.[20]

§ 225. Notice of Lien.—As between attorney and client, the filing and recording of a notice of lien is not essential to the validity of the lien,[1] nor is notice necessary to protect the attorney against an execution creditor of the client who levies on the judgment,[2] or against an assignee of the judgment.[3] However, notice has been held necessary to render an attorney's lien on property recovered binding on a bona fide purchaser of the property not otherwise chargeable with notice.[4] Some courts have held that it is not necessary that notice of the lien be given to the opposite party or his attorney,[5] although ordinarily, even after final judgment has been rendered, notice to the judgment debtor of the attorney's lien is necessary in order to protect it against a bona fide settlement and payment of the debt by the debtor, made in ignorance of the existence of such lien;[6] such notice is expressly required by statute in some states,[7] especially where it is sought to have the lien extend to the amount of compensation fixed by special agreement.[8] In other jurisdictions the attorney is not required to give notice of his intention to rely on his lien where the judgment is for costs alone.[9] Some statutes provide that an attorney shall have a lien in a case of a special agreement, to the extent of the compensation definitely agreed on, from the giving of a prescribed notice thereof to the party against whom the judgment or decree is given. In such a case the right to the lien depends upon giving the notice as required by the statute.[10]

§ 226. —Sufficiency of Notice.—Where notice of an attorney's lien is necessary, no special form of notice is as a rule required. Actual notice of the claim, whether verbal or in writing, answers every purpose of the requirement and is sufficient to protect the rights of the attorney.[11] It has been held that where the judgment debtor has actual notice of the lien or claim of the attorney, and, in some states, where he has notice of facts such as to put a prudent person upon inquiry, it is sufficient to protect the rights of the attorney.[12] A service of a written notice of an attorney's lien upon the attorney of record for the adverse party has been held sufficient to satisfy the statutory requirement.[13] Where the attorney is, by statute, given a lien on the cause of action, the pendency of the action is, in some jurisdictions, deemed sufficient notice of such lien.[14] In other jurisdictions, statutes giving an attorney a lien upon money in the hands of the adverse party provide that notice of a claim to such money shall be given by the memorandum note on the judgment or combination docket, and that the filing of this notice is sufficient to protect the attorney against payment of the judgment by the pary against whom it is rendered.[15]

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[20] In Mackall v. Willoughby, 167 U. S. 681, 42 L. ed. 323, 17 S. Ct. 954, where the attorney was to represent the client in several pending cases and it was agreed that he should have a lien for his compensation on any judgment and property recovered, the attorney was held entitled to a lien on property involved in the suits where the client was left in undisturbed possession because of a recovery in one of them.

[1] Annotation: 93 A.L.R. 695.

[2] Barnes v. Verry, 154 Minn. 252, 191 N. W. 589, 31 A.L.R. 707.

[3] Bent v. Lipscomb, 45 W. Va. 183, 31 S. E. 907, 72 Am. St. Rep. 815.

[4] Annotation: 93 A.L.R. 695.

[5] Barnes v. Verry, 154 Minn. 252, 191 N. W. 589, 31 A.L.R. 707.

[6] Andrews v. Morse, 12 Conn. 444, 31 Am. Dec. 752; Dodd v. Brott, 1 Minn. 270, 66 Am. Dec. 541; People v. New York Common Pleas, 13 Wend. (N. Y.) 649, 28 Am. Dec. 495; Manning v. Leighton, 65 Vt. 84, 26 A. 258, 24 L.R.A. 684; Hooper v. Welch, 43 Vt. 169, 5 Am. Rep. 267; Bent v. Lipscomb, 45 W. Va. 183, 31 S. E. 907, 72 Am. St. Rep. 815.

Annotation: 72 Am. St. Rep. 817.

In Am. Law Inst. Restatement, Agency, § 464, p. 1093, it is stated that notice must be given either to the judgment debtor or to the court.

[7] Haj v. American Bottle Co. 261 Ill. 362, 103 N. E. 1000, Ann. Cas. 1915A, 220; Townsend v. Chamberlain, 81 Or. 163, 158 P. 664, Ann. Cas. 1918C, 330; Stearns v. Wollenberg, 51 Or. 88, 92 P. 1079, 14 L.R.A.(N.S.) 1095.

[8] Northrup v. Hayward, 102 Minn. 307, 113 N. W. 701, 12 Ann. Cas. 341; Stearns v. Wollenberg, 51 Or. 88, 92 P. 1079, 14 L.R.A.(N.S.) 1095.

[9] Newbert v. Cunningham, 50 Me. 231, 79 Am. Dec. 612; Hobson v. Watson, 34 Me. 20, 56 Am. Dec. 632. And see Northrup v. Hayward, 102 Minn. 307, 113 N. W. 701, 12 Ann. Cas. 341; Victor Gold & S. Min. Co. v. National Bank, 18 Utah, 87, 55 P. 72, 72 Am. St. Rep. 767.

Annotation: 93 A.L.R. 694.

[10] Stearns v. Wollenberg, 51 Or. 88, 92 P. 1079, 14 L.R.A.(N.S.) 1095.

[11] Northrup v. Hayward, 102 Minn. 307, 113 N. W. 701, 12 Ann. Cas. 341.

Annotation: 12 Ann. Cas. 343.

The manner of service of notice is not important, the chief consideration being the fact of service and the bringing home of notice to the party adjudged to pay. Alexander v. Clarkson, 100 Kan. 294, 164 P. 294, L.R.A.1917F, 1006.

A service by mail has been held, however, to be ineffective where the statute was silent as to the manner thereof. Haj v.

Where the right to the lien is, by statute, made to depend upon notice given in a prescribed manner, all the conditions imposed by the statute must be complied with.[16] The notice need not, however, state the amount of the attorney's claim[17] or the terms of his agreement with his client.[18]

§ 227. Priorities.—The lien of an attorney for services rendered in an action relates back to, and takes effect from, the time of the commencement of the services;[1] when it attaches to a judgment, it is superior to the claim of a creditor in whose favor execution has been levied,[2] or to a subsequent attachment, garnishment, or trustee process,[3] or other liens on the money or property involved, subsequent in point of time.[4] Such a lien may be asserted against a subsequent receiver or trustee in insolvency,[5] and where an assignee in bankruptcy assumes control of the action, the court will protect the right of the original attorney to compensation out of the fund. One who purchases a fund in court during the pendency of the suit purchases with notice of the attorney's lien upon the fund for his fee for services rendered with respect to it.[6] Such lien is, however, subject to any rights in the property which are valid against the client at the time the lien attaches.[7]

American Bottle Co. 261 Ill. 362, 103 N. E. 1000, Ann. Cas. 1915A, 220.

[12] Northrup v. Hayward, 102 Minn. 307, 113 N. W. 701, 12 Ann. Cas. 341; Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 570, 48 Am. Rep. 821; Hooper v. Welch, 43 Vt. 169, 5 Am. Rep. 267.

[13] Alexander v. Clarkson, 100 Kan. 294, 164 P. 294, L.R.A.1917F, 1006.

[14] Annotation: 12 Ann. Cas. 343.

Under the North Dakota statute, the entering of the lien in the judgment docket, opposite the entry of the judgment, makes the lien effective as against the judgment debtor, and as to him constitutes sufficient notice. Jacobsen v. Miller, 50 N. D. 828, 198 N. W. 349, 34 A.L.R. 317.

[15] Hubbard v. Ellithorpe, 135 Iowa, 259, 112 N. W. 796, 124 Am. St. Rep. 271.

[16] Alexander v. Clarkson, 100 Kan. 294, 164 P. 294, L.R.A.1917F, 1006; Stearns v. Wollenberg, 51 Or. 88, 92 P. 1079, 14 L.R.A. (N.S.) 1095.

Annotation: 12 Ann. Cas. 343.

[17] Annotation: Ann. Cas. 1917D, 919.

[18] Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge, 161 Mich. 181, 126 N. W. 56, 137 Am. St. Rep. 495.

[1] Harlan & Co. v. Bennett, 127 Ky. 572, 106 S. W. 287, 128 Am. St. Rep. 360.

[2] Barnes v. Verry, 154 Minn. 252, 191 N. W. 589, 31 A.L.R. 707.

Annotation: 51 Am. St. Rep. 269.

[3] Harlan & Co. v. Bennett, 127 Ky. 572, 106 S. W. 287, 128 Am. St. Rep. 360; Barnes v. Verry, 154 Minn. 252, 191 N. W. 589, 31 A.L.R. 707; Chattanooga Sewer Pipe Works v. Dumler, 153 Miss. 276, 120 So. 450, 62 A.L.R. 999; Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 570, 48 Am. Rep. 821.

[4] Annotation: 93 A.L.R. 686; 41 L.R.A. (N.S.) 700, 710.

[5] Annotation: 2 L.R.A.(N.S.) 1037, 1051; 51 Am. St. Rep. 269, 270.

An attorney's lien on the proceeds of a judgment in foreclosure on behalf of a bank, obtained before the insolvency of such bank, is prior to the lien of depositors or other creditors of the bank. Fralick v. Coeur D'Alene Bank & T. Co. 35 Idaho, 749, 208 P. 835, 27 A.L.R. 110.

As to priority of claim for attorney's services in the bankruptcy proceedings, see Bankruptcy [Also 3 R. C. L. p. 256, § 84]; as to priority of attorneys' fees in receivership proceedings, see Receivers [Also 23 R. C. L. p. 109, § 119].

[6] Annotation: 51 Am. St. Rep. 269, 270.

[7] Annotation: 93 A.L.R. 685.

Where, upon securing for a client an

§ 228. —As between Lien and Set-off.—Upon the question of whether an attorney's charging lien upon a judgment which has resulted from his services is superior to the right of the adverse party to assert a set-off against his client, there is much conflict of opinion.[8] This conflict existed under the English common law until the adoption of the Hilary Term Rule, under which priority was given to the attorney's lien as against the set-off of another judgment or claim against the judgment procured by the attorney for his client, but not as against cross judgments in the same suit. This distinction has been followed in practice under the English Judicature Act and in the Canadian decisions.[9]

The American decisions have likewise been in conflict on this question, some denying the priority of the lien, whether a common-law [10] or statutory one,[11] and others upholding its superiority, both apart from,[12] and under, lien statutes.[13] Often the matter of priority has been regarded as one within the court's discretion.[14]

A distinction is sometimes made between set-offs acquired prior to, and those acquired after, the rendition of the judgment on which the attorney claims a lien. Thus, the attorney's lien is deemed superior to a set-off acquired after the rendition of the judgment,[15] especially if the cause of action out of which the judgment sought to be set off resulted arose out of a separate and distinct transaction from that out of which arose the cause of action resulting in the judgment to which the attorney's lien is affixed,[16] but inferior to a set-off acquired prior to such judgment [17] or prior to receipt of notice of the attorney's lien,[18] or to one that was properly pleaded and proved in the action.[19] According to some authorities, the attorney is regarded as an assignee of the judgment, at least at the date of its rendition, to the extent of his fees, and, accordingly, has an older equity than that acquired by a set-off of later acquisition, so that the maxim, "qui prior est tempore, potior est jure," applies in his favor.[20]

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equity of redemption in property, it becomes necessary to borrow money to satisfy the prior lien, the court may compel the attorney to execute an agreement, upon proper terms that will protect his lien upon the equity of redemption, to subordinate his lien to the rights of the one advancing the money. Robinson v. Rogers, 237 N. Y. 467, 143 N. E. 647, 33 A.L.R. 1291.

[8] Annotation: 34 A.L.R. 323, s. 51 A.L.R. 1268; 51 Am. St. Rep. 268.

[9] Annotation: 34 A.L.R. 324, s. 51 A.L.R. 1268.

[10] Andrews v. Morse, 12 Conn. 444, 31 Am. Dec. 752.

Annotation: 34 A.L.R. 331, s. 51 A.L.R. 1268.

[11] Alexander v. Clarkson, 100 Kan. 294, 164 P. 294, L.R.A.1917F, 1006; Bruegge v. State Bank, — Mo. —, 74 S. W. (2d) 835, citing R. C. L.

Annotation: 34 A.L.R. 332, s. 51 A.L.R. 1268.

[12] Collins v. Campbell, 97 Me. 23, 53 A. 837, 94 Am. St. Rep. 458; Simmons v. Reid, 31 S. C. 389, 9 S. E. 1058, 17 Am. St. Rep. 36; Roberts v. Mitchell, 94 Tenn. 277, 29 S. W. 5, 29 L.R.A. 705; Victor Gold & S. Min. Co. v. National Bank, 18 Utah, 87, 55 P. 72, 72 Am. St. Rep. 767.

Annotation: 34 A.L.R. 333, s. 51 A.L.R. 1268; L.R.A.1917F, 1012.

The view now upheld in New York is to sustain the attorney's lien as paramount to the set-off. Annotation: 34 A.L.R. 329, s. 51 A.L.R. 1268.

[13] Puett v. Beard, 86 Ind. 172, 44 Am. Rep. 280; Johnson v. Johnston, 123 Okla. 203, 254 P. 494, 51 A.L.R. 1265.

Annotation: 34 A.L.R. 335, s. 51 A.L.R. 1268; L.R.A.1917F, 1012.

[14] Annotation: 34 A.L.R. 333, s. 51 A.L.R. 1268.

[15] Warfield v. Campbell, 38 Ala. 527, 82 Am. Dec. 724; Puett v. Beard, 86 Ind. 172, 44 Am. Rep. 280; Victor Gold & S. Min. Co. v. National Bank, 18 Utah, 87, 55 P. 72, 72 Am. St. Rep. 767.

[16] Johnson v. Johnston, 123 Okla. 203, 254 P. 494, 51 A.L.R. 1265.

[17] Alexander v. Clarkson, 100 Kan. 294, 164 P. 294, L.R.A.1917F, 1006.

Annotation: 34 A.L.R. 331, s. 51 A.L.R. 1268.

[18] Annotation: 34 A.L.R. 333, s. 51 A.L.R. 1268.

[19] Johnson v. Johnston, 123 Okla. 203, 254 P. 494, 51 A.L.R. 1265.

[20] Warfield v. Campbell, 38 Ala. 527, 82 Am. Dec. 724; Collins v. Campbell, 97 Me. 23, 53 A. 837, 94 Am. St. Rep. 458; Jacobsen v. Miller, 50 N. D. 828, 198 N. W. 349, 34 A.L.R. 317; Roberts v. Mitchell, 94 Tenn. 277, 29 S. W. 5, 29 L.R.A. 705.

§ 229. —When Judgment or Verdict Is Assigned to Attorney.—Where the judgment has been expressly assigned to the attorney to secure payment for his services, his right has generally been sustained as superior to the adverse party's right to set off another judgment, wherever it has been possible to do so without violating a clear equity or express statutory right to a set-off.[1] His right is, however, held inferior where he had notice of the prior judgment against his client, or where such judgment was rendered in the same action.[2] Some courts hold a prior judgment against the client superior to the attorney's right in any event,[3] even though the attorney took the assignment without knowledge that the prior judgment, of which he had knowledge, was unpaid.[4]

§ 230. Waiver or Loss of Lien.—An attorney may waive or be estopped to assert his right to a charging lien on the judgment recovered for his client. A waiver may be implied from various acts of the attorney, or from his failure to enforce his lien.[5] Such a lien is deemed to be waived if the attorney neglects to proceed to the enforcement of it until the debtor has in good faith discharged the liability under the judgment or a third person has, in good faith, for a valuable consideration, purchased the fruits thereof;[6] if he agrees that the proceeds of judgment shall be remitted as collected, and that he shall receive payments of salary at stated intervals;[7] when he agrees to hold the property involved as trustee; where he allows the client to convey the property or permits it to be taken on execution by the client's creditors; where he consents to a delivery or conveyance to his client or to a trustee for him;[8] or where he takes or agrees to take other security, as, for instance, where he contracts to take a conveyance of land for his fee, and gives no notice of intention to claim a lien under the statute.[9] But where the legislature provides a lien for compensation of an attorney upon the proceeds of the cause of action, the court cannot substitute a bond or other form of protection for the lien.[10]

§ 231. —Death or Withdrawal from Case.—An attorney's lien is not entirely extinguished by his death before the termination of the litigation, but may be asserted to the extent of the reasonable value of the services rendered by him, even though his employment was on a contingent fee.[11] The effect of an attorney's withdrawal from a case upon his right to assert a lien depends upon whether his withdrawal was with or without cause; if such withdrawal was without just cause, he can have no lien on the judgment obtained in the suit,[12] but if he was justified in withdrawing, he may assert a lien for services theretofore performed.[13]

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[1] Adair v. First Nat. Bank, 139 S. C. 1, 137 S. E. 192, 51 A.L.R. 1269; Simmons v. Reid, 31 S. C. 389, 9 S. E. 1058, 17 Am. St. Rep. 36.
Annotation: 51 A.L.R. 1279, 1282; 23 L.R.A. 339; L.R.A.1917F, 1012.

[2] Annotation: 51 A.L.R. 1281, 1285; 23 L.R.A. 337.

[3] Utica Ins. Co. v. Power, 3 Paige (N. Y.) 365.
Annotation: 51 A.L.R. 1285; 23 L.R.A. 335; L.R.A.1917F, 1013.

[4] Benson v. Haywood, 86 Iowa, 107, 53 N. W. 85, 23 L.R.A. 335.

[5] When the attorney, without objection, permits his client to purchase the property ordered sold by the court in satisfaction of his lien, permits the court to confirm the sale, and approves the deed of the property to the client, he waives his lien. Prichard v. Fulmer, 22 N. M. 134, 159 P. 39, 2 A.L.R. 474.

[6] Fillmore v. Wells, 10 Colo. 228, 15 P. 343, 3 Am. St. Rep. 567; Charles v. Whitt, 187 Ky. 77, 218 S. W. 994, citing R. C. L.
Annotation: 93 A.L.R. 700.

[7] Re Heinsheimer, 214 N. Y. 361, 108 N. E. 636, Ann. Cas. 1916E, 384.

[8] Annotation: 93 A.L.R. 700.

[9] Stearns v. Wollenberg, 51 Or. 88, 92 P. 1079, 14 L.R.A.(N.S.) 1095.
Annotation: 2 B. R. C. 58.

[10] Robinson v. Rogers, 237 N. Y. 467, 143 N. E. 647, 33 A.L.R. 1291.
Annotation: 33 A.L.R. 1296.

[11] Sargent v. McLeod, 209 N. Y. 360, 103 N. E. 164, 52 L.R.A.(N.S.) 380.

§ 232. —Compromise or Settlement by Client.—The client, in the exercise of his conceded right to dismiss, compromise, or settle his cause of action [14] may defeat his attorney's right to a lien which he would otherwise have had,[15] even though the client agreed to pay the attorney a percentage of the proceeds of the judgment,[16] and notwithstanding an express agreement on the part of the client not to dismiss, settle, or compromise without the consent of the attorney.[17] If, however, the attorney's lien has already attached either by the recovery of a judgment or by a compliance with the provisions of the statute providing for such a lien, the act of his client in settling, compromising, or dismissing the suit without his consent will not defeat or prejudice the lien.[18] Thus, where judgment has been obtained for his client, and notice of the attorney's lien thereon has been given, where required, such lien cannot be affected by a payment or settlement of such judgment as between the parties.[19] Nor will a secret or collusive settlement between the parties litigant, made after verdict, affect the lien of the attorney for the successful party.[20] The usual method of protecting the attorney is to allow him to proceed with the suit to recover the amount of his fee.[1]

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[12] Annotation: Ann. Cas. 1913E, 540.

[13] Re Dunn, 205 N. Y. 398, 98 N. E. 914, Ann. Cas. 1913E, 536.
Annotation: Ann. Cas. 1913E, 540.

[14] See supra, § 116.

[15] Midland Valley R. Co. v. Johnson, 140 Ark. 174, 215 S. W. 665, 7 A.L.R. 1007 (by minor after reaching maturity); Jackson v. Stearns, 48 Or. 25, 84 P. 798, 5 L.R.A.(N.S.) 390.
Annotation: 1 Ann. Cas. 247.

[16] Lamont v. Washington & G. R. Co. 2 Mackey (D. C.) 502, 47 Am. Rep. 268; Coughlin v. New York C. & H. R. R. Co. 71 N. Y. 443, 27 Am. Rep. 75; Miller v. Newell, 20 S. C. 123, 47 Am. Rep. 833; Kusterer v, Beaver Dam, 56 Wis. 471, 14 N. W. 617, 43 Am. Rep. 725.
Annotation: 51 Am. St. Rep. 262.

[17] Annotation: 51 Am. St. Rep. 262.

[18] Midland Valley R. Co. v. Johnson, 140 Ark. 174, 215 S. W. 665, 7 A.L.R. 1007 (by minor after reaching maturity); St. Louis, I. M. & S. R. Co. v. Blaylock, 117 Ark. 504, 175 S. W. 1170, Ann. Cas. 1917A, 563; Standidge v. Chicago R. Co. 254 Ill. 524, 98 N. E. 963, 40 L.R.A.(N.S.) 529, Ann. Cas. 1913C, 65; Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge, 161 Mich. 181, 126 N. W. 56, 137 Am. St. Rep. 495; Desaman v. Butler, 118 Minn. 198, 136 N. W. 747, Ann. Cas. 1913E, 642; Noell v. Missouri P. R. Co. 335 Mo. 687, 74 S. W. (2d) 7, 94 A.L.R. 684; O'Connor v. St. Louis Transit Co. 198 Mo. 622, 97 S. W. 150, 115 Am. St. Rep. 495, 8 Ann. Cas. 703; Griggs v. Chicago, R. I. & P. R. Co. 104 Neb. 301, 177 N. W. 185, citing R. C. L.; Sargent v. McLeod, 209 N. Y. 360, 103 N. E. 164, 52 L.R.A.(N.S.) 380; Re Snyder, 190 N. Y. 66, 82 N. E. 742, 13 Ann. Cas. 441, 14 L.R.A.(N.S.) 1101, 123 Am. St. Rep. 533; Greenleaf v. Minneapolis, St. P. & S. Ste. M. R. Co. 30 N. D. 112, 151 N. W. 879, Ann. Cas. 1917D, 908; Tompkins v. Nashville, C. & St. L. R. Co. 110 Tenn. 157, 72 S. W. 116, 61 L.R.A. 340, 100 Am. St. Rep. 795. And see Ingersoll v. Coal Creek Coal Co. 117 Tenn. 263, 98 S. W. 178, 9 L.R.A.(N.S.) 282, 119 Am. St. Rep. 1003, 10 Ann. Cas. 829.
Annotation: 93 Am. St. Rep. 175; 1 Ann. Cas. 248; Ann. Cas. 1917A, 572.

[19] Andrews v. Morse, 12 Conn. 444, 31 Am. Dec. 752; Newbert v. Cunningham, 50 Me. 231, 79 Am. Dec. 612; Desaman v. Butler, 118 Minn. 198, 136 N. W. 747, Ann. Cas. 1913E, 642; Northrup v. Hayward, 102 Minn. 307, 113 N. W. 701, 12 Ann. Cas. 341; Hooper v. Welch, 43 Vt. 169, 5 Am. Rep. 268.
Annotation: Ann. Cas. 1913E, 646.

The payment by the judgment debtor to the judgment creditor of a judgment upon which the attorney has such a lien, with actual notice of the attorney's claim, is void as to the attorney to the extent of his lien. Northrup v. Hayward, 102 Minn. 307, 113 N. W. 701, 12 Ann. Cas. 341.

An application for alimony is not, however, a suit for money or an amount due a client within the meaning of a statute protecting an attorney's lien against satisfaction of the suit or judgment before the lien is satisfied. Keefer v. Keefer, 140 Ga. 18, 78 S. E. 462, 47 L.R.A.(N.S.) 527.

[20] Fillmore v. Wells, 10 Colo. 228, 15 P. 343, 3 Am. St. Rep. 567; Andrews v. Morse, 12 Conn. 444, 31 Am. Dec. 752; Desaman v. Butler Bros. 118 Minn. 198, 136 N. W. 747, Ann. Cas. 1913E, 642; Northrup v. Hayward, 102 Minn. 307, 113 N. W. 701, 12 Ann. Cas. 341; Aspinwall v. Sabin, 22 Neb. 73, 34 N. W. 72, 3 Am. St. Rep. 258; People ex rel. Manning v. New York Common Pleas, 13 Wend. (N. Y.) 649, 28 Am. Dec. 495; Alexander v. Munroe, 54 Or. 500, 101 P. 903, 135 Am. St. Rep. 840, modified on rehearing in 54 Or. 512, 103 P. 514, 135 Am. St. Rep. 849; Miller v. Newell, 20 S. C. 123, 47 Am. Rep. 833; Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 570, 48 Am. Rep. 821; Hooper v. Welch, 43 Vt. 169, 5 Am. Rep. 267.
Annotation: Ann. Cas. 1913E, 646.

[1] See supra, § 184.

§ 233. —Assignment of Cause of Action or Judgment.—An attorney's lien on the cause of action, given by statute,[2] cannot be defeated by an assignment of such cause of action. In those jurisdictions, however, where the lien does not exist until judgment, if the plaintiff assigns his interest in the judgment before it is entered, the assignee holds free from the attorney's lien,[3] but the assignment of a judgment will not defeat an attorney's lien which has once attached,[4] even though the assignee was without notice of the lien,[5] except in cases where the statute gives an attorney a lien on the judgment only from the time of filing notice thereof, and an assignment of the judgment in good faith and without collusion is made before the lien is filed.[6]

Where the attorney himself takes an assignment of the whole judgment, by so doing he merges his lien for costs or fees and waives his equities.[7]

D. To What Charging Lien Attaches

§ 234. Cause of Action.—An attorney's charging lien, in the absence of statutory provision,[8] or of a contract between the parties, operating as an equitable assignment of, or lien upon, the cause of action,[9] does not attach until after judgment. Such lien does not, at common law, attach to the client's claim or cause of action against a third person, whether the cause of action is in tort or contract,[10] apart from the tangible vouchers of the claim which may be in the attorney's possession.[11] In a number of states, however, the charging lien of the attorney is, by express statutory provision, extended to the client's cause of action,[12] or counterclaim.[13] Such statutes usually provide that such lien in the case of the plaintiff's attorney shall attach from the date of the filing of the suit,[14] the commencement of the action,[15] or the service of the summons,[16] or in the case of the attorney for the defense, from the service of an answer containing a counterclaim.[17]

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[2] See infra, § 234.

[3] Potter v. Mayo, 3 Me. 34, 14 Am. Dec. 211.

[4] Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 570, 48 Am. Rep. 821; Bent v. Lipscomb, 45 W. Va. 183, 31 S. E. 907, 72 Am. St. Rep. 815.

[5] Bent v. Lipscomb, 45 W. Va. 183, 31 S. E. 907, 72 Am. St. Rep. 815.
Annotation: 37 L.R.A.(N.S.) 227.

[6] Humptulips Driving Co. v. Cross, 65 Wash. 636, 118 P. 827, 37 L.R.A.(N.S.) 226.
Annotation: 37 L.R.A.(N.S.) 226; 24 Eng. Rul. Cas. 718.

[7] Dodd v. Brott, 1 Minn. 271, 66 Am. Dec. 541; Jernigan Bros. v. Hart, 139 Tenn. 515, 202 S. W. 68, citing R. C. L.
Annotation: 23 L.R.A. 339; 37 L.R.A. (N.S.) 228; 2 B. R. C. 60.

[8] Hanna v. Island Coal Co. 5 Ind. App. 163, 31 N. E. 846, 51 Am. St. Rep. 246; Tyler v. Superior Ct. 30 R. I. 107, 73 A. 467, 23 L.R.A.(N.S.) 1045.
Annotation: 24 Eng. Rul. Cas. 717.

[9] Stearns v. Wollenberg, 51 Or. 88, 92 P. 1079, 14 L.R.A.(N.S.) 1095.

[10] Jennings v. Canady (C. C. A. 8th) 13 F. (2d) 356 (writ of certiorari denied in 273 U. S. 728, 71 L. ed. 862, 47 S. Ct. 239) citing R. C. L.; Lamont v. Washington & G. R. Co. 2 Mackey (D. C.) 502, 47 Am. Rep. 268; North Chicago Street R. Co. v. Ackley, 171 Ill. 100, 49 N. E. 222, 44 L.R.A. 177; Hanna v. Island Coal Co. 5 Ind. App. 163, 31 N. E. 846, 51 Am. St. Rep. 246; Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge, 161 Mich. 181, 126 N. W. 56, 137 Am. St. Rep. 495; Desaman v. Butler, 118 Minn. 198, 136 N. W. 747, Ann. Cas. 1913E, 643; Boogren v. St. Paul City R. Co. 97 Minn. 51, 106 N. W. 104, 3 L.R.A.(N.S.) 379, 114 Am. St. Rep. 691; Randall v. Van Wagenen, 115 N. Y. 527, 22 N. E. 361, 12 Am. St. Rep. 838; Coughlin v. New York C. & H. R. R. Co. 71 N. Y. 443, 27 Am. Rep. 75; Elliott v. Orton, 69 Okla. 233, 171 P. 1110, L.R.A.1918E, 103; Tyler v. Superior Ct. 30 R. I. 107, 73 A. 467, 23 L.R.A.(N.S.) 1045; Kusterer v. Beaver Dam, 56 Wis. 471, 14 N. W. 617, 43 Am. Rep. 725.
Annotation: 3 L.R.A.(N.S.) 379.

[11] Lamont v. Washington & G. R. Co. 2 Mackey (D. C.) 502, 47 Am. Rep. 268.
Annotation: 24 Eng. Rul. Cas. 717.

[12] Hubbard v. Ellithorpe, 135 Iowa, 259, 112 N. W. 796, 124 Am. St. Rep. 271; Barnes v. Verry, 154 Minn. 252, 191 N. W. 589, 31 A.L.R. 707; Desaman v. Butler, 118 Minn. 198, 136 N. W. 747, Ann. Cas. 1913E, 642; Northrup v. Hayward, 102 Minn. 307, 113 N. W. 701, 12 Ann. Cas. 341; O'Connor v. St. Louis Transit Co. 198 Mo. 622, 97 S. W. 150, 115 Am. St. Rep. 495, 8 Ann. Cas. 703; Robinson v. Rogers, 237 N. Y. 467, 143 N. E. 647, 33 A.L.R. 1291; Re Heinsheimer, 214 N. Y. 361, 108 N. E. 636, Ann. Cas. 1916E, 384; Elliott v. Orton, 69 Okla. 233, 171 P. 1110, L.R.A.1918E, 103; Tompkins v. Nashville, C. & St. L. R. Co. 110 Tenn. 157, 72 S. W. 116, 61 L.R.A. 340, 100 Am. St. Rep. 795.

The fact that a cause of action arose in another state does not prevent the attachment thereto of an attorney's lien given by the statute of the state in which the action is brought, at least not as between such attorney and the parties to the action. Noell v. Missouri P. R. Co. 335 Mo. 687, 74 S. W. (2d) 7, 94 A.L.R. 684.

A nonresident attorney may assert such lien for such services as he may legally perform within the state. Barnes v. Verry, 154 Minn. 252, 191 N. W. 589, 31 A.L.R. 707.

[13] O'Connor v. St. Louis Transit Co. 198

§ 235. —Construction and Validity of Statutes Creating Lien on Cause of Action.—In most jurisdictions statutes which in general terms give attorneys a lien on the cause of action, without anything to indicate an intention to confine the lien to actions on contract, or which in general terms give the attorney a lien upon "money due his client in the hands of an adverse party," without expressly limiting it to actions upon contract, are construed to give a lien upon a cause of action in tort,[18] as well as upon a cause of action in contract; there are, however, expressions in some decisions to the effect that no such lien can be created against a cause of action in tort,[19] especially where the cause of action is not assignable, as was the rule at common law.[20] Moreover, the statute may be so drawn as to limit the lien to causes of action arising on contract.[1]

Statutes giving attorneys a lien upon the cause of action, in the absence of some legislative expression to the contrary, are construed prospectively only.[2] Their validity has been uniformly upheld as against objections that they are class or special legislation; that they deprive the opposite party to the client's action of his rights without due process of law; that they restrict or destroy the right of the parties to contract and to effect a settlement of the action; or that they tend to the commission of unprofessional acts on the part of attorneys.[3]

§ 236. Judgments, Decrees, or Awards.—The right of an attorney to a charging lien upon the judgment, decree, or award for his expenses or compensation for the services in procuring the same has been recognized from an early period and exists in almost every jurisdiction at the present time, either under the common-law rule or by virtue of statute,[4] even though the action

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Mo. 622, 97 S. W. 150, 115 Am. St. Rep. 495, 8 Ann. Cas. 703; Elliott v. Orton, 69 Okla. 233, 171 P. 1110, L.R.A.1918E, 103.

[14] Midland Valley R. Co. v. Johnson, 140 Ark. 174, 215 S. W. 665, 7 A.L.R. 1007; Tompkins v. Nashville, C. & St. L. R. Co. 110 Tenn. 157, 72 S. W. 116, 61 L.R.A. 340, 100 Am. St. Rep. 795.

[15] O'Connor v. St. Louis Transit Co. 198 Mo. 622, 97 S. W. 150, 115 Am. St. Rep. 495, 8 Ann. Cas. 703.

[16] Barnes v. Verry, 154 Minn. 252, 191 N. W. 589, 31 A.L.R. 707; Northrup v. Hayward, 102 Minn. 307, 113 N. W. 701, 12 Ann. Cas. 341.

[17] O'Connor v. St. Louis Transit Co. 198 Mo. 622, 97 S. W. 150, 115 Am. St. Rep. 495, 8 Ann. Cas. 703.

[18] Dickinson v. Stiles, 246 U. S. 631, 62 L. ed. 908, 38 S. Ct. 415, Ann. Cas. 1918E; 501 (cause of action under the Federal Employers' Liability Act for an injury received in interstate commerce); Standidge v. Chicago R. Co. 254 Ill. 524, 98 N. E. 963, 40 L.R.A.(N.S.) 529, Ann. Cas. 1913C, 65; Greenleaf v Minneapolis, St. P. & S. Ste. M. R. Co. 30 N. D. 112, 151 N. W. 879, Ann. Cas. 1917D, 908; Tompkins v. Nashville, C. & St. L. R. Co. 110 Tenn. 157, 72 S. W. 116, 61 L.R.A. 340, 100 Am. St. Rep. 795.

Annotation: 3 L.R.A.(N.S.) 379; Ann. Cas. 1917D, 918; Ann. Cas. 1918E, 502.

[19] See discussion in Boogren v. St. Paul City R. Co. 97 Minn. 51, 106 N. W. 104, 3 L.R.A.(N.S.) 379, 114 Am. St. Rep. 691.

[20] See Assignments, Vol. 4, p. 251, § 27.

[1] Annotation: 3 L.R.A.(N.S.) 380.

[2] Northrup v. Hayward, 102 Minn. 307, 113 N. W. 701, 12 Ann. Cas. 341.

[3] Standidge v. Chicago R. Co. 254 Ill. 524, 98 N. E. 963, 40 L.R.A.(N.S.) 529, Ann. Cas. 1913C, 65; O'Connor v. St. Louis Transit Co. 198 Mo. 622, 97 S. W. 150, 115 Am. St. Rep. 495, 8 Ann. Cas. 703.

Annotation: 8 Ann. Cas. 709; Ann. Cas. 1913C, 69.

[4] Central R. & Bkg. Co. v. Pettus, 113 U. S. 116, 28 L. ed. 915, 5 S. Ct. 387; Internal Improv. Fund v. Greenough, 105 U. S. 527, 26 L. ed. 1157; Re Paschal (Texas v. White) 10 Wall. (U. S.) 483, 19 L. ed. 992; United States ex rel. Payne v. Call (C. C. A. 5th) 287 F. 520, citing R. C. L.; Hale v. Tyson, 202 Ala. 107, 79 So. 499, citing R. C. L.; Warfield v. Campbell, 38 Ala. 527, 82 Am. Dec. 724; Fillmore v. Wells, 10 Colo. 228, 15 P. 343, 3 Am. St. Rep. 567; Andrews v. Morse, 12 Conn. 444, 31 Am. Dec. 752; Lamont v. Washington & G. R. Co. 2 Mackey (D. C.) 502, 47 Am. Rep. 268;

is in tort.[5] Where a lien is given on the cause of action itself, that lien attaches to the judgment.[6] As stated by the American Law Institute, an attorney of record who has sustained a judgment has an interest therein as security for his fees in the case and for proper payments made, and liabilities incurred, during the course of the proceedings.[7] Some courts have held that the lien of an attorney on his client's judgment is an interest to the same extent as if the creditor had assigned it to him as collateral security for his fees and disbursements.[8]

§ 237. —Divorce and Alimony Proceedings.—An exception to the general rule that the attorney has a charging lien upon the judgment, decree, or award obtained by him is usually held to exist in the case of an award of alimony[9] or an allowance for support and maintenance[10] in a divorce action. Such a lien will attach, however, where the decree of the court makes a final division of property, awarding to the party obtaining the divorce specific property or in lieu thereof a money judgment representing such party's interest in the property of the adverse party.[11]

§ 238. Property Recovered in Litigation.—There is a difference of opinion as to whether an attorney, in the absence of statute or of a contract providing therefor, has a charging lien on specific property recovered for clients by litigation.[12] The weight of authority is to the effect that in the absence of a

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State v. National Surety Co. 29 Idaho, 670, 161 P. 1026, 2 A.L.R. 251; Hanna v. Island Coal Co. 5 Ind. App. 163, 31 N. E. 846, 51 Am. St. Rep. 246; Hubbard v. Ellithorpe, 135 Iowa, 259, 112 N. W. 796, 124 Am. St. Rep. 271; Harlan & Co. v. Bennett, 127 Ky. 572, 106 S. W. 287, 128 Am. St. Rep. 360; Newbert v. Cunningham, 50 Me. 231, 79 Am. Dec. 612; Hobson v. Watson, 34 Me. 20, 56 Am. Dec. 632; Potter v. Mayo, 3 Me. 34, 14 Am. Dec. 211; Minor v. Fick, 225 Mich. 325, 196 N. W. 194, citing R. C. L.; Northrup v. Hayward, 102 Minn. 307, 113 N. W. 701, 12 Ann. Cas. 341; Stewart v. Flowers, 44 Miss. 513, 7 Am. Rep. 707; Reynolds v. Warner, 128 Neb. 304, 258 N. W. 462, 97 A.L.R. 1128; Burleigh v. Palmer, 74 Neb. 122, 103 N. W. 1068, 12 Ann. Cas. 777; Citizens Nat. Bank v. Culver, 54 N. H. 327, 20 Am. Rep. 134; Prichard v. Fulmer, 22 N. M. 134, 159 P. 39, 2 A.L.R. 474; Re Heinsheimer, 214 N. Y. 361, 108 N. E. 636, Ann. Cas. 1916E, 384; Coughlin v. New York C. & H. R. R. Co. 71 N. Y. 443, 27 Am. Rep. 75; Marshall v. Meech, 51 N. Y. 140, 10 Am. Rep. 572; Tyler v. Superior Ct. 30 R. I. 107, 73 A. 467, 23 L.R.A.(N.S.) 1045; Horton v. Champlin, 12 R. I. 550, 34 Am. Rep. 722; Loofbourow v. Hicks, 24 Utah, 49, 66 P. 602, 55 L.R.A. 874; Victor Gold & S. Min. Co. v. National Bank, 18 Utah, 87, 55 P. 72, 72 Am. St. Rep. 767; McClure v. Little, 15 Utah, 379, 49 P. 298, 62 Am. St. Rep. 938; Manning v. Leighton, 65 Vt. 84, 26 A. 258, 24 L.R.A. 684; Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 570, 48 Am. Rep. 821; Hooper v. Welch, 43 Vt. 169, 5 Am. Rep. 267; Hazeltine v. Keenan, 54 W. Va. 600, 46 S. E. 609, 102 Am. St. Rep. 953; Bent v. Lipscomb, 45 W. Va. 183, 31 S. E. 907, 72 Am. St. Rep. 815.

Annotation: 19 L. ed. 992; 51 Am. St. Rep. 251; Ann. Cas. 1916E, 387.

The lien of an attorney employed to bring an action in one state attaches, though based on a statute of that state, to a judgment recovered in an action brought through the agency of another attorney in another state on the same cause of action. Noell v. Missouri P. R. Co. 335 Mo. 687, 74 S. W. (2d) 7, 94 A.L.R. 684.

[5] Greenleaf v. Minneapolis, St. P. & S. Ste. M. R. Co. 30 N. D. 112, 151 N. W. 879, Ann. Cas. 1917D, 908.

[6] Noell v. Missouri P. R. Co. 335 Mo. 687, 74 S. W. (2d) 7, 94 A.L.R. 684.

[7] Restatement, Agency, § 464, p. 1086.

[8] Hale v. Tyson, 202 Ala. 107, 79 So. 499, citing R. C. L.; Newbert v. Cunningham, 50 Me. 231, 79 Am. Dec. 612; Hobson v. Watson, 34 Me. 20, 56 Am. Dec. 632.

The lien on the judgment is held to extend to a bond given by the unsuccessful opponent of his client, such, for instance, as a replevin bond given by the plaintiff (Newbert v. Cunningham, 50 Me. 231, 79 Am. Dec. 612), or a bond given under statute for the release of a judgment debtor from arrest (Hobson v. Watson, 34 Me. 20, 56 Am. Dec. 632).

[9] Hubbard v. Ellithorpe, 135 Iowa, 259, 112 N. W. 796, 124 Am. St. Rep. 271.

Annotation: 55 A.L.R. 365.

[10] Johnson v. Gerald, 216 Ala. 581, 113 So. 447, 59 A.L.R. 348.

[11] Hubbard v. Ellithorpe, 135 Iowa, 259, 112 N. W. 796, 124 Am. St. Rep. 271.

[12] Annotation: 93 A.L.R. 667.

In England the right to a charge on property "recovered or preserved" for his costs, under the 28th section of the Solicitors' Act of 1860, exists in every case in which a solicitor is employed, and authorizes a charge not on the mere interest of the plaintiff, but on all property recovered in the action whatever for the plaintiff only or for him in connection with others. Baile v. Baile, L. R. 13 Eq. 507, 24 Eng. Rul. Cas. 705. Annotation: 24 Eng. Rul. Cas. 715.

statute or a contract providing therefor, no such lien attaches to land involved in litigation which the attorney has recovered for his client or the title to which he has successfully defended against attack.[13] A like rule has been applied with reference to personal property recovered by the attorney for the client.[14] Some courts, however, have adopted the view that an attorney may assert a lien against property which he has recovered for his client;[15] and in many jurisdictions there are statutory provisions which expressly or by necessary implication extend the attorney's charging lien to such property.[16] Such statutes have a prospective operation only; they are inapplicable to services rendered under contracts of employment entered into before the statute took effect.[17]

In the absence of a statutory or common-law lien upon property recovered for the client, his attorney may be entitled to a lien thereon by virtue of his agreement with his client.[18] Some courts take the view that such a lien, at least one of an equitable nature, arises from an agreement that the attorney shall have a certain portion of the recovery for his compensation,[19] although other courts take the contrary view.[20] The authorities also conflict on the question whether a lien against property recovered for the client arises under an agreement that the attorney shall have a reasonable fee out of the property.[1] Under such an agreement, it has been held that an equitable lien attaches to land recovered.[2]

Generally, the lien of an attorney on property recovered for his client is limited to services rendered in the action in which the property was recovered[3] and to the property involved in the litigation.[4]

§ 239. Money and Funds.—In addition to the common law retaining lien on moneys in the attorney's hands belonging to his client,[5] an attorney is, by

[13] Webster v. Sweat (C. C. A. 5th) 65 F. (2d) 109, citing R. C. L.; Humphrey v. Browning, 46 Ill. 476, 95 Am. Dec. 446; Holmes v. Waymire, 73 Kan. 104, 84 P. 558, 9 Ann. Cas. 624; Stewart v. Flowers, 44 Miss. 513, 7 Am. Rep. 707.
Annotation: 93 A.L.R. 670; 9 Ann. Cas. 625.
This rule applies in cases where the attorney has successfully prosecuted a suit in equity to establish title to land, where he has recovered land in an action of ejectment, and where he has successfully defended the right and title to land against an unjust claim or an unwarranted attempt to subject it to an alleged lien or liability. Annotation: 93 A.L.R. 671; 9 Ann. Cas. 625.

[14] Cameron v. Boeger, 200 Ill. 84, 65 N. E. 690, 93 Am. St. Rep. 165.
Annotation: 93 A.L.R. 669.

[15] Scott v. Kirtley, 113 Fla. 637, 152 So. 721, 93 A.L.R. 661; Grant v. Lookout Mountain Co. 93 Tenn. 691, 28 S. W. 90, 27 L.R.A. 98.
Annotation: 93 A.L.R. 669, 673.

[16] Fillmore v. Wells, 10 Colo. 228, 15 P. 343, 3 Am. St. Rep. 567; Strohecker v. Irvine, 76 Ga. 639, 2 Am. St. Rep. 62; Harlan & Co. v. Bennett, Robbins & Thomas, 127 Ky. 572, 106 S. W. 287, 128 Am. St. Rep. 360; Rowe v. Fogle, 88 Ky. 105, 10 S. W. 426, 2 L.R.A. 708; Hobson v. Watson, 34 Me. 20, 56 Am. Dec. 632; Roberts v. Vaughn, 142 Tenn. 361, 219 S. W. 1034, 9 A.L.R. 1528; Grant v. Lookout Mountain Co. 93 Tenn. 691, 28 S. W. 90, 27 L.R.A. 98.
Annotation: 93 A.L.R. 673, 676.
There is a conflict of authority as to the effect of such statutes as giving an attorney a lien on land for his services in procuring a partition of such land. Annotation: 9 Ann. Cas. 627.

[17] Annotation: 93 A.L.R. 673.

[18] Mackall v. Willoughby, 167 U. S. 681, 42 L. ed. 323, 17 S. Ct. 954.
Annotation: 93 A.L.R. 681.

[19] Ingersoll v. Coram, 211 U. S. 335, 53 L. ed. 208, 29 S. Ct. 92; Patrick v. Morrow, 33 Colo. 509, 81 P. 242, 108 Am. St. Rep. 107; De Winter v. Thomas, 34 App. D. C. 80, 27 L.R.A.(N.S.) 634, writ of certiorari denied in 215 U. S. 609, 54 L. ed. 347, 30 S. Ct. 411; Farrell v. Records, 187 Ky. 468, 219 S. W. 792, 12 A.L.R. 541; Fairbanks v. Sargent, 104 N. Y. 108, 9 N. E. 870, 58 Am. Rep. 490; High Point Casket Co. v. Wheeler, 182 N. C. 459, 109 S. E. 378, 19 A.L.R. 391.
Annotation: 93 A.L.R. 670, 682.

[20] Cameron v. Boeger, 200 Ill. 84, 65 N. E. 690, 93 Am. St. Rep. 165.
Annotation: 93 A.L.R. 684.

[1] Annotation: 93 A.L.R. 673, 685.

[2] Scott v. Kirtley, 113 Fla. 637, 152 So. 721, 93 A.L.R. 661.

[3] Annotation: 93 A.L.R. 680.

[4] Re Cutler, 204 Iowa, 739, 212 N. W. 573, 217 N. W. 448, 54 A.L.R. 527.

[5] See supra, §§ 209 et seq.

statutory provisions in a number of states, given a lien upon money due to his client and in the hands of the adverse party from the time of giving notice of the lien to such party,[6] even before judgment is rendered;[7] but it has been held that such provision applies only to proceedings in the local courts,[8] and in the absence of a statute, there is no right to a lien on moneys owing to an attorney's client not in the hands of a third person or upon funds in court.[9]

The lien attaches to the proceeds of a judgment or settlement[10] or to any funds recovered by an attorney for his client.[11] It does not matter for what the money is due, and the lien is not limited to any particular class of liability or form of action, extending as well to tort, as to contract, actions.[12] Thus, it is held that the statutory provision applies to the proceeds of a judgment in foreclosure of a chattel mortgage,[13] to a fund recovered by an attorney employed by the mother of an illegitimate child to assist in the prosecution of bastardy proceedings, under a contract by which he is to be paid an attorney's fee out of the fund,[14] and to unliquidated claims for personal injuries.[15]

§ 240. —Public Funds.—While there is authority to the contrary,[16] it is generally held, as a rule of public policy, that in the absence of constitutional or statutory authority to bind such funds, an attorney has no charging lien on public funds.[17]

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[6] Wylie v. Coxe, 15 How. (U. S.) 415, 14 L. ed. 753; Holmes v. Waymire, 73 Kan. 104, 84 P. 558, 9 Ann. Cas. 624; Van Etten v. State, 24 Neb. 734, 40 N. W. 289, 1 L.R.A. 669; Greenleaf v. Minneapolis, St. P. & S. Ste. M. R. Co. 30 N. D. 112, 151 N. W. 879, Ann. Cas. 1917D, 908; Plummer v. Great Northern R. Co. 60 Wash. 214, 110 P. 989, 31 L.R.A.(N.S.) 1215.

Annotation: 19 L. ed. 992.

As to lien upon funds of a decedent's estate, see EXECUTORS AND ADMINISTRATORS.

[7] Greenleaf v. Minneapolis, St. P. & S. Ste. M. R. Co. 30 N. D. 112, 151 N. W. 879, Ann. Cas. 1917D, 908.

[8] Plummer v. Great Northern R. Co. 60 Wash. 214, 110 P. 989, 31 L.R.A.(N.S.) 1215.

Annotation: 31 L.R.A.(N.S.) 1215.

[9] Dubois's Appeal, 38 Pa. 231, 80 Am. Dec. 478.

An attorney at law who has rendered valuable services to his client is not entitled to have a lien declared for compensation for such services where there is no fund under the control of the court upon which it could fix a lien. New Memphis Gaslight Co. Cases, 105 Tenn. 268, 60 S. W. 206, 80 Am. St. Rep. 880.

[10] Robinson v. Rogers, 237 N. Y. 467, 143 N. E. 647, 33 A.L.R. 1291; Sargent v. McLeod, 209 N. Y. 360, 103 N. E. 164, 52 L.R.A.(N.S.) 380; Re Woods, 158 Tenn. 383, 13 S. W. (2d) 800, 62 A.L.R. 904.

[11] Grant v. Lookout Mountain Co. 93 Tenn. 691, 28 S. W. 90, 27 L.R.A. 98.

Money paid to a litigant in settlement of a claim is held to be "recovered" within the meaning of that word as used in an attorney's lien law. Standidge v. Chicago R. Co. 254 Ill. 524, 98 N. E. 963, 40 L.R.A.(N.S.) 529, Ann. Cas. 1913C, 65.

[12] Greenleaf v. Minneapolis, St. P. & S. Ste. M. R. Co. 30 N. D. 112, 151 N. W. 879, Ann. Cas. 1917D, 908.

Attorneys recovering money for a client under the disability provision of an insurance policy, pursuant to a contract for contingent fee, have a lien on the amount recovered to the extent of their fee. Chattanooga Sewer Pipe Works v. Dumler, 153 Miss. 276, 120 So. 450, 62 A.L.R. 999.

[13] Fralick v. Coeur D'Alene Bank & T. Co. 35 Idaho, 749, 208 P. 835, 27 A.L.R. 110.

[14] Costigan v. Stewart, 76 Kan. 353, 91 P. 83, 11 L.R.A.(N.S.) 630.

Annotation: 11 L.R.A.(N.S.) 630.

[15] Greenleaf v. Minneapolis, St. P. & S. Ste. M. R. Co. 30 N. D. 112, 151 N. W. 879, Ann. Cas. 1917D, 908, holding that after notice, the lien exists in an inchoate form until a condition arises connecting the unliquidated liability into an amount certain.

[16] Re Paschal (Texas v. White) 10 Wall. (U. S.) 483, 19 L. ed. 992.

Annotation: 2 A.L.R. 275, s. 24 A.L.R. 934.

[17] State v. National Surety Co. 29 Idaho, 670, 161 P. 1026, 2 A.L.R. 251; People ex rel. Stephens v. Holten, 304 Ill. 394, 136 N. E. 738, 24 A.L.R. 929.

Annotation: 2 A.L.R. 274, s. 24 A.L.R. 933.

Thus, a statute giving attorneys a lien on claims placed in their hands for collection does not apply in suits by taxpayers to recover public funds misappropriated by public officials. People ex rel. Stephens v. Holten, 304 Ill. 394, 136 N. E. 738, 24 A.L.R. 929.

A statute which provides for an attorney's lien upon his client's cause of action or upon the judgment or fund realized for the client does not grant a lien on the proceeds of a judgment in favor of the state where the sovereign power is not expressly included in the statutory provision. State v. National Surety Co. 29 Idaho, 670, 161 P. 1026, 2 A.L.R. 251.

The right of an attorney to assert a lien upon a recovery on a claim against the United States under an agreement for a conditional fee is inconsistent with the provision of a Federal statute that all transfers and assignments of any claim upon the United States or of any interest therein shall be absolutely null and void unless made with certain formalities and after the allowance of the claim and the issuing of a warrant therefor.[18]

§ 241. Property Received by Client in Satisfaction of Judgment.—In some jurisdictions it has been held that where land is taken or condemned to be sold in satisfaction of a judgment, an attorney's lien on the judgment is transferred to the land.[19] However, as a general rule, the attorney's lien does not exist after the client has accepted satisfaction of his judgment or attach to property received in satisfaction of it.[20]

E. ENFORCEMENT OF CHARGING LIEN

§ 242. Generally.—An attorney's lien is enforceable through the control the courts have of their judgments and records and by means of their own process. If an attorney applies to the court to protect his lien, the court will prevent money from being paid over until his demand is satisfied.[1] Such a proceeding may not constitute an action, within the literal operation of the statute of limitations, but in enforcing the lien, the court will, it seems, be governed by the analogy of the statute.[2] There is no right to jury trial in such a proceeding.[3] The lien of an attorney upon a judgment recovered by him is governed by the law of the state where the judgment was recovered and the lien attached, and not by the law of the state where the judgment is sought to be collected or the lien enforced.[4]

§ 243. Enforcement in Original Action.—It is held, in some jurisdictions, that an attorney's lien on property recovered may be enforced upon an application to the court made in the original action in which the services were rendered.[5] In such cases the court may declare a lien by order in that cause, and the proceeding to enforce the lien is by reference or by bill, to which the client is made a defendant, stating the nature and particulars of the attor-

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It seems doubtful if in any case an attorney's lien can be successfully asserted against money appropriated by a legislature to any person or corporation, public or private, while in the hands or under the control of an officer of the state. State v. Moore, 40 Neb. 854, 59 N. W. 755, 25 L.R.A. 774.

[18] Manning v. Leighton, 65 Vt. 84, 26 A. 258, 24 L.R.A. 684.

An agreement by the client making the payment of the attorney's compensation a lien upon the claim asserted against the government and any money or evidence of indebtedness issued thereon, before the allowance of the claim and the rendition of any services by the attorney, is invalid as an assignment of an interest in the claim. Nutt v. Knut, 200 U. S. 12, 50 L. ed. 348, 26 S. Ct. 216.

[19] Annotation: 93 A.L.R. 673.

A lien for attorneys' fees allowed by a judgment foreclosing a real estate mortgage attaches to the land and may be enforced against it after it has been bid in by the mortgagee or his assignee with notice for an amount less than that due on the mortgage, which has been credited on the judgment, especially when the sale is brought about without payment of the fees through the connivance or fraud of the purchaser or those acting in his behalf. Loofbourow v. Hicks, 24 Utah, 49, 66 P. 602, 55 L.R.A. 874.

[20] Annotation: 2 A.L.R. 483.

[1] Annotation: 51 Am. St. Rep. 271.

[2] Annotation: 51 Am. St. Rep. 273.

[3] McCracken v. Joliet, 271 Ill. 270, 111 N. E. 131, Ann. Cas. 1917C, 144; Standidge v. Chicago R. Co. 254 Ill. 524, 98 N. E. 963, 40 L.R.A.(N.S.) 529, Ann. Cas. 1913C, 65.

[4] Central R. & Bkg. Co. v. Pettus, 113 U. S. 116, 28 L. ed. 915, 5 S. Ct. 387; Citizens' Nat. Bank v. Culver, 54 N. H. 327, 20 Am. Rep. 134.

Annotation: 31 L.R.A.(N.S.) 1216; 51 Am. St. Rep. 273.

[5] Standidge v. Chicago R. Co. 254 Ill. 524, 98 N. E. 963, 40 L.R.A.(N.S.) 529, Ann. Cas. 1913C, 65; Noell v. Missouri P. R. Co. 335 Mo. 687, 74 S. W. (2d) 7, 94 A.L.R. 684; High Point Casket Co. v. Wheeler, 182 N. C. 459, 109 S. E. 378, 19 A.L.R. 391; Roberts v. Vaughn, 142 Tenn. 361, 219 S. W. 1034, 9 A.L.R. 1528; Manning v. Leighton, 65 Vt. 84, 26 A. 258, 24 L.R.A. 684.

Annotation: 93 A.L.R. 698.

ney's services and the compensation claimed.[6] Statutory provision has been made, also, for the enforcement of the lien on petition and due notice to the adverse party. Such a provision is not unconstitutional as depriving the defendant of a right to a jury trial.[7]

§ 244. **Equitable Remedy.**—In the absence of statutes giving jurisdiction to courts of law, the proper method—or, at least, one method—for enforcing an attorney's charging lien is by a resort to equity;[8] such a lien is equitable in its nature.[9] Courts of law may recognize it when the res is in possession of the lienor and the owner is seeking to deprive him of such possession. But where the thing is not in possession and some affirmative action is required by the attorney, he, like other lien claimants, must seek relief in equity. In some instances, a formal suit should be instituted; in others, an application to the court rendering the judgment for the proper order is sufficient.[10]

§ 245. **Independent Action at Law.**—While, in the absence of statutory provisions, a court of equity alone has jurisdiction to enforce an attorney's charging lien,[11] in a number of jurisdictions, by virtue of statutory provisions, the attorney's charging lien may be enforced by an independent action at law.[12] As a general rule, under statutes giving the attorney a lien for his services on the client's cause of action or money in the hands of the adverse party, the action is brought against the opposing party who has failed to recognize such lien;[13] but to establish an attorney's lien against a judgment for alimony paid to the clerk of the court, the defendant in the divorce proceedings is not a necessary party.[14]

§ 246. **Liability of Adverse Party for Destroying Lien.**—After an attorney's lien has attached, the party adverse to his client cannot, if he has notice thereof,[15] destroy it by a voluntary settlement made without the consent or knowledge of the attorney without rendering himself liable for the value of such lien.[16] The defendant is not, however, under any affirmative duty to protect the lien, as by a suit to litigate its existence and validity, where, before paying the amount agreed to in the settlement, he informs the attorney of the fact of the settlement and judgment thereon and notifies him to take steps to protect his lien.[17] Moreover, while there is some authority to the contrary,[18] according to the weight of authority, the rights of the attorney against the adverse party, where a compromise has been made without his knowledge or consent, depend entirely upon the merits of his client's case.[19] It is held, also, that the adverse party may set up the defense that the contract for the attorney's compensation is unconscionable, illegal, and void.[20] Moreover, the attorney cannot go against the defendant to enforce his lien in an action dismissed in good faith by his client without receiving anything,[1] and the mere fact of entering into a compromise agreement without payment of the amount agreed upon does not render the defendant personally liable to the attorney.[2]

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[6] Annotation: 51 Am. St. Rep. 273.

[7] Standidge v. Chicago R. Co. 254 Ill. 524, 98 N. E. 963, 40 L.R.A.(N.S.) 529, Ann. Cas. 1913C, 65.
Annotation: Ann. Cas. 1913C, 69.

[8] Ingersoll v. Coram, 211 U. S. 335, 53 L. ed. 208, 29 S. Ct. 92; Standidge v. Chicago R. Co. 254 Ill. 524, 98 N. E. 963, 40 L.R.A.(N.S.) 529, Ann. Cas. 1913C, 65; Fillmore v. Wells, 10 Colo. 228, 15 P. 343, 3 Am. St. Rep. 567; Hammond, W. & E. C. R. Co. v. Kaput, 61 Ind. App. 543, 110 N. E. 109, citing R. C. L.; Noell v. Missouri P. R. Co. 335 Mo. 687, 74 S. W. (2d) 7, 94 A.L.R. 684; Alexander v. Munroe, 54 Or. 500, 101 P. 903, 103 P. 514, 135 Am. St. Rep. 840; Anderson v. Star-Bair Oil Co. 34 Wyo. 332, 243 P. 394, citing R. C. L.
Annotation: 93 A.L.R. 696.

[9] Scott v. Kirtley, 113 Fla. 637, 152 So. 721, 93 A.L.R. 661.

[10] Fillmore v. Wells, 10 Colo. 228, 15 P. 343, 3 Am. St. Rep. 567.

[11] Prichard v. Fulmer, 22 N. M. 134, 159 P. 39, 2 A.L.R. 474.

[12] Standidge v. Chicago R. Co. 254 Ill. 524, 98 N. E. 963, 40 L.R.A.(N.S.) 529, Ann. Cas. 1913C, 65; O'Connor v. St. Louis Transit Co. 198 Mo. 622, 97 S. W. 150, 115 Am. St. Rep. 495, 8 Ann. Cas. 703; Roberts v. Vaughn, 142 Tenn. 361, 219 S. W. 1034, 9 A.L.R. 1528.

Where a statutory liability of a legal character is created and no particular or exclusive remedy is provided for its enforcement, it has been held that the attorney's lien may be enforced by an action at law corresponding to trespass on the case, and that the action may be brought before a justice of the peace where the amount in controversy is within the justice's jurisdiction. O'Connor v. St. Louis Transit Co. 198 Mo. 622, 97 S. W. 150, 115 Am. St. Rep. 495, 8 Ann. Cas. 703.

[13] O'Connor v. St. Louis Transit Co. 198 Mo. 622, 97 S. W. 150, 115 Am. St. Rep. 495, 8 Ann. Cas. 703.

[14] Hubbard v. Ellithorpe, 135 Iowa, 259, 112 N. W. 796, 124 Am. St. Rep. 271.

[15] **Payment by the judgment debtor to the creditor** after such notification is invalid, according to the American Law Institute Restatement, Agency, § 464, p. 1094.

Where the judgment debtor in good faith pays or satisfies the judgment before notice of the lien of the judgment creditor's attorney, the latter cannot enforce the judgment as against him. Townsend v. Chamberlain, 81 Or. 163, 158 P. 664, Ann. Cas. 1918C, 330.

[16] Union P. R. Co. v. Laughlin, 247 U. S. 204, 62 L. ed. 1073, 38 S. Ct. 436; Merrick v. Giddings (Morris v. Giddings) 115 U. S. 300, 29 L. ed. 403, 6 S. Ct. 65; Chreste v.

§ 247. Vacation of Settlement, Dismissal, or Satisfaction.—In a number of states it has been held, either by virtue of express statutory authority or in the exercise of the inherent power of courts to protect their officers, that an attorney whose lien has attached may apply to the court for relief against any disposition of the litigation or judgment thereon by the parties which may affect his rights. Thus, he may move to set aside a fraudulent or collusive settlement or dismissal of a suit consummated for the purpose of defrauding him out of his compensation,[3] and notice to the original plaintiff of the pendency of such motion has been held to be unnecessary.[4] Moreover, according to the weight of authority, where the client makes a fraudulent or collusive settlement intended to deprive the attorney of his compensation, the attorney is permitted to proceed with the suit in the client's name for the purpose of protecting his interest; in fact, some cases permit the attorney to intervene to prosecute the original action to final judgment where the attorney has a lien, even though no element of fraud or collusion is present, although as a general rule, the mere fact of the existence of a lien in favor of the attorney

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Louisville R. Co. 167 Ky. 75, 180 S. W. 49, L.R.A.1917B, 1123, Ann. Cas. 1917C, 867; Noell v. Missouri P. R. Co. 335 Mo. 687, 74 S. W. (2d) 7, 94 A.L.R. 684; Greenleaf v. Minneapolis, St. P. & S. Ste. M. R. Co. 30 N. D. 112, 151 N. W. 879, Ann. Cas. 1917D, 908; Crump v. Guyer, 60 Okla. 222, 157 P. 321, 2 A.L.R. 331.

Annotation: 51 Am. St. Rep. 271; Ann. Cas. 1917D, 919.

A party paying a judgment or the amount of a settlement, knowing it to be charged with an attorney's lien, is bound to retain, and the law conclusively assumes he has retained, a sufficient amount to pay the lien. Sargent v. McLeod, 209 N. Y. 360, 103 N. E. 164, 52 L.R.A.(N.S.) 380.

In Noell v. Missouri P. R. Co. 335 Mo. 687, 74 S. W. (2d) 7, 94 A.L.R. 684, it was held that the attorney could recover the value of such lien in an independent action at law. In Sterling Milk Products Co. v. Brown, 146 Okla. 302, 294 P. 117, citing R. C. L., however, it was held that such an action was an equity suit.

If the contract of employment has been previously terminated by the client, the attorney can have no recourse against the opposite party because of the settlement. Plummer v. Northern P. R. Co. 98 Wash. 67, 167 P. 73, 7 A.L.R. 104 (contract repudiated by infant client).

[17] Noell v. Missouri P. R. Co. 335 Mo. 687, 74 S. W. (2d) 7, 94 A.L.R. 684.

[18] Annotation: 2 A.L.R. 340.

[19] Jones v. Morgan, 39 Ga. 310, 99 Am. Dec. 458; Crump v. Guyer, 60 Okla. 222, 157 P. 321, 2 A.L.R. 331.

Annotation: 2 A.L.R. 337.

An action against the defendant to recover on an attorney's lien will not lie where a suit to set aside a deed and recover the property on the ground that the plaintiff was a minor, which was settled without the consent of the plaintiff's attorney, could not have been sustained because a statute empowered the plaintiff to make such conveyances. Crump v. Guyer, 60 Okla. 222, 157 P. 321, 2 A.L.R. 331.

[20] Morehouse v. Brooklyn Heights R. Co. 185 N. Y. 520, 78 N. E. 179, 7 Ann. Cas. 377.

[1] Rowe v. Fogle, 88 Ky. 105, 10 S. W. 426, 2 L.R.A. 708.

[2] Noell v. Missouri P. R. Co. 335 Mo. 687, 74 S. W. (2d) 7, 94 A.L.R. 684.

[3] Aspinwall v. Sabin, 22 Neb. 73, 34 N. W. 72, 3 Am. St. Rep. 258; Jackson v. Stearns, 48 Or. 25, 84 P. 798, 5 L.R.A.(N.S.) 390.

[4] Aspinwall v. Sabin, 22 Neb. 73, 34 N. W. 72, 3 Am. St. Rep. 258.

does not enable him to proceed with the action after the parties have in good faith compromised or settled it.[5] Where the parties have settled a judgment without the knowledge of the attorney and the plaintiff has executed a satisfaction of such judgment, the attorney, if he has a lien upon the judgment for his services, may apply to the court to have the satisfaction set aside and the judgment reinstated to the extent of the amount due him for his services and execution issued therefor.[6]

§ 248. Enforcement against Judgment.—The authorities are not entirely in harmony as to the right of the attorney to sue on the judgment by virtue of his lien against it. While such right is asserted in some decisions, in others it is held that the lien does not authorize the attorney to bring suit thereon in his client's name without authority.[7] According to the American Law Institute, the attorney is entitled to have the judgment enforced and to receive from the proceeds thereof compensation for his services and indemnity for expenses incurred by him in the case. But the right is one of priority only in the sums realized from the execution of the judgment; it does not include a right to maintain an action against the debtor as an assignee of the judgment.[8]

When judgment has been obtained, an execution issued, and the attorney's lien has attached thereto, such lien extends to suits arising from, and incidental to, the enforcement of the judgment. Thus, where judgment in a replevin suit is rendered for the defendant, the attorney, as equitable assignee, has the right to enforce the replevin bond to the extent of his lien, and he may hold the officer liable for taking a replevin bond with insufficient sureties where the execution issued against them cannot be satisfied by reason of their insolvency.[9]

XI. PUNISHMENT, SUSPENSION, AND DISBARMENT OF ATTORNEYS

A. In General

§ 249. Generally.—The court, independently of statute,[10] by reason of the necessary and inherent power vested in it to control the conduct of its own affairs and to maintain its own dignity, has a summary jurisdiction to deal with the alleged misconduct of an attorney and inflict appropriate punishment therefor[11] by suspending or disbarring him.[12] This power of the court

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[5] See supra, § 184.

[6] Northrup v. Hayward, 102 Minn. 307, 113 N. W. 701, 12 Ann. Cas. 341.

[7] Horton v. Champlin, 12 R. I. 550, 34 Am. Rep. 722.

[8] Restatement, Agency, § 464, p. 1093.

[9] Newbert v. Cunningham, 50 Me. 231, 79 Am. Dec. 612.

[10] Com. v. Roe, 129 Ky. 650, 112 S. W. 683, 19 L.R.A.(N.S.) 413.

[11] Ex parte Bradley, 7 Wall. (U. S.) 364, 19 L. ed. 214; Wernimont v. State, 101 Ark. 210, 142 S. W. 194, Ann. Cas. 1913D, 1156; Re Clifton, 115 Fla. 168, 155 So. 324, citing R. C. L.; West v. Field, 181 Ga. 152, 181 S. E. 661, 101 A.L.R. 465; Bar Asso. v. Casey, 211 Mass. 187, 97 N. E. 751, 39 L.R.A.(N.S.) 116, Ann. Cas. 1913A, 1226; Manning v. French, 149 Mass. 391, 21 N. E. 945, 4 L.R.A. 339; Grant v. State, 67 Tex. Crim. Rep. 155, 148 S. W. 760, 42 L.R.A. (N.S.) 428; Norfolk & P. Bar Asso. v. Drewry, 161 Va. 833, 172 S. E. 282, citing R. C. L.

Annotation: 2 Am. St. Rep. 847.

The court may tax costs against an attorney as a punishment for filing an unnecessarily gross and indelicate pleading. Brown v. Brown, 4 Ind. 627, 58 Am. Dec. 641.

The court cannot, by ex parte order, require the publisher of a newspaper, although he is also an attorney at law, to justify in open court an article in which he raises a suspicion that the jury was bribed in an action tried before the court where the information may necessitate the naming of persons in good standing before the community and subject the publisher to libel suits. Warren v. Connolly, 165 Mich. 274, 130 N. W. 637, 33 L.R.A.(N.S.) 314.

A court's jurisdiction is to be exercised according to a standard of conscience, and not according to technical rules. Gould v. State, 99 Fla. 662, 127 So. 309, 69 A.L.R. 699.

As to summary jurisdiction in compelling to discipline its officers is a dual one; the court prefers the charges and determines them.[13] The purpose of suspending or disbarring an attorney is to remove from the profession a person whose misconduct has proved him unfit to be intrusted with the duties and responsibilities belonging to the office of an attorney, and thus to protect the public and those charged with the administration of justice, rather than to punish the attorney.[14] The idea of punishment is usually held to have no appropriate place,[15] and no punitive sentence can be imposed.[16]

§ 250. Preliminary Inquest.—The courts have inherent jurisdiction or power to conduct, antecedent to the institution of disbarment proceedings, a general investigation into the conduct and practices of attorneys whenever it has probable cause to believe that professional misconduct has occurred. This is a quasi administrative remedy, without adverse parties plaintiff or defendant, the purpose of which is to collect and assemble facts and information which will enable the court to take such action as it may deem expedient for the public welfare.[17] To this end the court may compel an attorney to testify to his professional acts, provided the inquiry is secret in its preliminary stages and is subject to the attorney's privilege against self-incrimination.[18]

§ 251. Power of Courts to Suspend or Disbar.—In the absence of constitutional or statutory restrictions, a court of superior or general jurisdiction has inherent power and authority to suspend an attorney from practice as such, or to disbar or strike from the rolls an attorney of such court found guilty of conduct in any respect unbecoming the standard of propriety which should be maintained by members of the legal profession.[19] This power to

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adherence by an attorney of his duties to his client, see supra, § 143.

As to power to punish as for contempt, see CONTEMPT [Also 6 R. C. L. p. 493, § 7].

[12] See infra, § 251.

[13] People ex rel. Karlin v. Culkin, 248 N. Y. 465, 162 N. E. 487, 60 A.L.R. 851.

[14] Ex parte Wall, 107 U. S. 265, 27 L. ed. 552, 2 S. Ct. 569; Wernimont v. State, 101 Ark. 210, 142 S. W. 194, Ann. Cas. 1913D, 1156; Re Vaughan, 189 Cal. 491, 209 P. 353, 24 A.L.R. 858; Gould v. State, 99 Fla. 662, 127 So. 309, 69 A.L.R. 699; Re Kerl, 32 Idaho, 737, 188 P. 40, 8 A.L.R. 1259; Re Craven, 178 La. 372, 151 So. 625, 90 A.L.R. 973; Re Keenan, 287 Mass. 577, 192 N. E. 65, 96 A.L.R. 679.

[15] Wernimont v. State, 101 Ark. 210, 142 S. W. 194, Ann. Cas. 1913D, 1156; Re Durant, 80 Conn. 140, 67 A. 497, 10 Ann. Cas. 539; State v. McRae, 49 Fla. 389, 38 So. 605, 6 Ann. Cas. 580; Bar Asso. v. Casey, 211 Mass. 187, 97 N. E. 751, 39 L.R.A.(N.S.) 116, Ann. Cas. 1913A, 1226; Re Delano, 58 N. H. 5, 42 Am. Rep. 555; Re Lentz, 65 N. J. L. 134, 46 A. 761, 50 L.R.A. 415; Re Thatcher, 83 Ohio St. 246, 93 N. E. 895, Ann. Cas. 1912A, 810; Ex parte Finn, 32 Or. 519, 52 P. 756, 67 Am. St. Rep. 550; Re Kirby, 10 S. D. 322, 73 N. W. 92, 39 L.R.A. 856; Re Evans, 22 Utah, 366, 62 P. 913, 53 L.R.A. 952, 83 Am. St. Rep. 794.

Annotation: 15 L.R.A.(N.S.) 525; 2 Am. St. Rep. 848, 860; 45 Am. St. Rep. 73.

[16] Gould v. State, 99 Fla. 662, 127 So. 309, 69 A.L.R. 699.

In Beckner v. Com. 126 Ky. 318, 103 S. W. 378, 128 Am. St. Rep. 287, however, the court refused to disbar an attorney for making a false affidavit in an action wherein he was not acting as attorney, holding that like other witnesses giving false testimony, he was subject to punishment for the crime of perjury only.

[17] Re Keenan, 287 Mass. 577, 192 N. E. 65, 96 A.L.R. 679; People ex rel. Karlin v. Culkin, 248 N. Y. 465, 162 N. E. 487, 60 A.L.R. 851.

Annotation: 60 A.L.R. 860.

After the inquiry is ended, it remains for the court to determine whether notice should issue to the particular attorney to show cause why he should not be disbarred. Re Keenan, 287 Mass. 577, 192 N. E. 65, 96 A.L.R. 679.

The requirements of the law as to the formulation of a charge are not applicable. People ex rel. Karlin v. Culkin, 248 N. Y. 465, 162 N. E. 487, 60 A.L.R. 851.

[18] People ex rel. Karlin v. Culkin, 248 N. Y. 465, 162 N. E. 487, 60 A.L.R. 851.

[19] Ex parte Wall, 107 U. S. 265, 27 L. ed. 552, 2 S. Ct. 569; Re Secombe, 19 How. (U. S.) 9, 15 L. ed. 565; Ex parte Burr, 9 Wheat. (U. S.) 529, 6 L. ed. 152; Goldstone v. State Bar, 214 Cal. 490, 6 P. (2d) 513, 80 A.L.R. 701; Re Clifton, 115 Fla. 168, 155 So. 324, citing R. C. L.; Gould v. State, 99 Fla. 662, 127 So. 309, 69 A.L.R. 699; State v. Kirke, 12 Fla. 278, 95 Am. Dec. 314; State v. Finley, 30 Fla. 325, 11 So. 674, 18 L.R.A. 401; People v. Amos, 246 Ill. 299, 92 N. E. 857, 138 Am. St. Rep. 239; Re Day, 181 Ill. 73, 54 N. E. 646, 50 L.R.A. 519; State v. Mosher, 128 Iowa, 82, 103 N. W. 105, 5 Ann. Cas. 984; Re Hanson, 99 Kan. 23, 160 P. 1141, citing R. C. L.; Chreste v. Com. 171

remove attorneys from the bar is possessed by all courts which have authority to admit attorneys to practice.[20] In some states, however, while the power to suspend in a proper case is held to be possessed by all courts of record, yet the power to disbar is vested in a particular court.[1] Courts of special or limited jurisdiction have no power to disbar an attorney unless such power has been expressly conferred upon them,[2] and the legislature may limit the power of courts of superior or general jurisdiction to disbar; that power is not inherent in the sense that these courts cannot exist in the absence of such power.[3] However, the power to determine whether an attorney has committed acts or been guilty of conduct which, either at common law or by provision of statute, constitutes a cause for disbarment is a judicial power that can be exercised by the court only.[4]

The right to practice before the bar of the Supreme Court of the United States cannot be taken away except by the action of such court.[5]

§ 252. Liability of Attorney to Disbarment or Suspension.— The fact that one has been admitted to the bar and licensed to practice the profession of law does not confer upon him any vested right to continue in the practice of such profession.[6] That right may be revoked by a proceeding to disbar him, based upon conduct rendering him unfit to hold a license to practice or to exercise the duties and responsibilities belonging to the office of an attorney,[7] without violating any constitutional privilege or right.[8] An attorney who has been legally called upon to give testimony or produce evidence tend-

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Ky. 77, 186 S. W. 919, Ann. Cas. 1918E, 122; Com. v. Roe, 129 Ky. 650, 112 S. W. 683, 19 L.R.A.(N.S.) 413; Nelson v. Com. 128 Ky. 779, 109 S. W. 337, 16 L.R.A.(N.S.) 272; Re Cohen, 261 Mass. 484, 159 N. E. 495, 55 A.L.R. 1309; Re Whitcomb, 120 Mass. 118, 21 Am. Rep. 502; Fitchette v. Taylor, 191 Minn. 582, 254 N. W. 910, 94 A.L.R. 356; Re Richards, 333 Mo. 907, 63 S. W. (2d) 672, citing R. C. L.; Re Delano, 58 N. H. 5, 42 Am. Rep. 555; State ex rel. Wood v. Raynolds, 22 N. M. 1, 158 P. 413, citing R. C. L.; Re Ebbs, 150 N. C. 44, 63 S. E. 190, 19 L.R.A.(N.S.) 892, 17 Ann. Cas. 592; Wolfe's Disbarment, 288 Pa. 331, 135 A. 732, 50 A.L.R. 380; Snyder's Case, 301 Pa. 276, 152 A. 33, 76 A.L.R. 666; Re Davies, 93 Pa. 116, 39 Am. Rep. 729; Re Austin, 5 Rawle (Pa.) 191, 28 Am. Dec. 657; Danforth v. Egan, 23 S. D. 43, 119 N. W. 1021, 139 Am. St. Rep. 1030, 20 Ann. Cas. 418; Ingersoll v. Coal Creek Coal Co. 117 Tenn. 263, 98 S. W. 178, 9 L.R.A.(N.S.) 282, 119 Am. St. Rep. 1003, 10 Ann. Cas. 829; Re Hilton, 48 Utah, 172, 158 P. 691, Ann. Cas. 1918A, 271; Re Robinson, 48 Wash. 153, 92 P. 929, 15 L.R.A.(N.S.) 525, 15 Ann. Cas. 415; Re Stolen, 193 Wis. 602, 214 N. W. 379, 216 N. W. 127, 55 A.L.R. 1355; State Law Examiners v. Phelan, 43 Wyo. 481, 5 P. (2d) 263, 78 A.L.R. 1317.

Annotation: 13 L.R.A. 767; 15 L.R.A. (N.S.) 525; 45 Am. St. Rep. 72; 138 Am. St. Rep. 243; 5 Ann. Cas. 990; 15 Ann. Cas. 419.

It is both a right and a duty of the court to purge its officers of an unworthy member. Re Keenan, 287 Mass. 577, 192 N. E. 65, 96 A.L.R. 679.

The status of an attorney as an officer of a court is a matter of which such court only has jurisdiction. Re Craven, 178 La. 372, 151 So. 625, 90 A.L.R. 973.

[20] Ex parte Robinson, 19 Wall. (U. S.) 513, 22 L. ed. 205; Bradley v. Fisher, 13 Wall. (U. S.) 335, 20 L. ed. 646; Wernimont v. State, 101 Ark. 210, 142 S. W. 194, Ann. Cas. 1913D, 1156; State Bar Commission ex rel. Williams v. Sullivan, 35 Okla. 745, 131 P. 703, L.R.A.1915D, 1218; Re Saddler, 35 Okla. 510, 130 P. 906, 44 L.R.A.(N.S.) 1195.

[1] Fairfield County Bar v. Taylor, 60 Conn. 11, 22 A. 441, 13 L.R.A. 767.

Annotation: 5 Ann. Cas. 991; 15 Ann. Cas. 419.

[2] State v. Crosby, 24 Nev. 115, 50 P. 127, 77 Am. St. Rep. 786; Re Hahn, 85 N. J. Eq. 510, 96 A. 589, Ann. Cas. 1918B, 830.

Annotation: 5 Ann. Cas. 991.

[3] Gould v. State, 99 Fla. 662, 127 So. 309, 69 A.L.R. 699; Re Ebbs, 150 N. C. 44, 63 S. E. 190, 19 L.R.A.(N.S.) 892, 17 Ann. Cas. 592; Re Saddler, 35 Okla. 510, 130 P. 906, 44 L.R.A.(N.S.) 1195.

Annotation: 44 L.R.A.(N.S.) 1195; 45 Am. St. Rep. 73.

[4] Re Saddler, 35 Okla. 510, 130 P. 906, 44 L.R.A.(N.S.) 1195.

[5] Selling v. Radford, 243 U. S. 46, 61 L. ed. 585, 37 S. Ct. 377, Ann. Cas. 1917D, 569.

[6] Annotation: 8 L.R.A.(N.S.) 1274.

[7] Wernimont v. State, 101 Ark. 210, 142 S. W. 194, Ann. Cas. 1913D, 1156; People ex rel. Chicago Bar Asso. v. Baker, 311 Ill. 66, 142 N. E. 554, 31 A.L.R. 737; Simmons v. State, 12 Mo. 268, 49 Am. Dec. 131; State ex rel. Atty. Gen. v. Breckenridge, 126 Okla. 86, 258 P. 744, 53 A.L.R. 1239.

[8] Ex parte Wall, 107 U. S. 265, 27 L. ed. 552, 2 S. Ct. 569; Re Keenan, 287 Mass. 577, 192 N. E. 65, 96 A.L.R. 679; Ex parte Cashin, 128 Miss. 224, 90 So. 850, citing R. C. L.; Re Breen, 30 Nev. 164, 93 P. 997, 17 L.R.A. (N.S.) 572.

Annotation: 20 Am. St. Rep. 556.

ing to establish that he received a bribe is not immune from disbarment therefor, under a constitutional guaranty of immunity from prosecution.[9] His right to practice is not, however, a mere matter of grace or favor revocable at the pleasure of the court or the command of the legislature;[10] he can be deprived of it only for good cause shown in a judicial proceeding conducted in the manner pointed out by law.[11] He is entitled to hold his office during good behavior.[12]

The fact that the attorney is a judge or holds some other office, eligibility for which may be affected by his disbarment, does not affect the duty or power of the court. Nor is the resignation of an attorney without the consent or permission of the court effectual to preclude his disbarment, when proceedings therefor were pending at the time of his resignation.[13]

§ 253. Discretion of Court in Suspending or Disbarring.—The power to disbar is not an arbitrary and despotic one, to be exercised at the pleasure of the court or from passion, prejudice, or personal hostility; it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court as the rights and dignity of the court itself.[14] It should disbar or suspend an attorney only where the continuance of the attorney in practice would be subversive to the proper administration of justice or incompatible with a proper respect of the court for itself or a proper regard for the integrity of the profession.[15] The court should also exercise a sound discretion in determining whether the attorney should be disbarred or merely suspended for a period.[16] The consequences of disbarment are so severe, both in degrading him in the eyes of the community and in depriving him of his means of livelihood that courts generally take that step only when the misconduct of the attorney may properly be characterized as gross, and in cases of lighter offenses or of a first delinquency, the minor punishment of suspension is usually inflicted.[17] In some instances, the courts have forborne even to suspend the attorney from the practice of his profession for past misconduct where, since such offense, he has conducted himself with such integrity that the court would not be justified in considering him unworthy of the confidence of clients.[18]

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[9] Re Biggers, 24 Okla. 842, 104 P. 1083, 25 L.R.A.(N.S.) 622; Re Stolen, 193 Wis. 602, 214 N. W. 379, 216 N. W. 127, 55 A.L.R. 1355.

[10] Ex parte Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366.

[11] Randall v. Brigham, 7 Wall. 523, (U. S.) 19 L. ed. 285; Ex parte Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366; People ex rel. Chicago Bar Asso. v. Baker, 311 Ill. 66, 142 N. E. 554, 31 A.L.R. 737; People v. Kavanagh, 220 Ill. 49, 77 N. E. 107, 110 Am. St. Rep. 223; Re Day, 181 Ill. 73, 54 N. E. 646, 50 L.R.A. 519; Hanson v. Grattan, 84 Kan. 843, 115 P. 646, 34 L.R.A.(N.S.) 240.

[12] Re Day, 181 Ill. 73, 54 N. E. 646, 50 L.R.A. 519; Re Austin, 5 Rawle (Pa.) 191, 28 Am. Dec. 657.

[13] Ex parte Thompson, 32 Or. 499, 52 P. 570, 40 L.R.A. 194.

[14] Ex parte Bradley, 7 Wall. (U. S.) 364, 19 L. ed. 214; Ex parte Secombe, 19 How. (U. S.) 9, 15 L. ed. 565; Ex parte Burr, 9 Wheat. (U. S.) 529, 6 L. ed. 152; State v. Peck, 88 Conn. 447, 91 A. 274, L.R.A.1915A, 663, Ann. Cas. 1917B, 227; Re Wourms, 31 Idaho, 291, 170 P. 919, citing R. C. L.; People v. Amos, 246 Ill. 299, 92 N. E. 857, 138 Am. St. Rep. 239; State Law Examiners v. Hart, 104 Minn. 88, 116 N. W. 212, 17 L.R.A.(N.S.) 585, 15 Ann. Cas. 197; Re Delano, 58 N. H. 5, 42 Am. Rep. 555; State ex rel. Atty. Gen. v. Breckenridge, 126 Okla. 86, 258 P. 744, 53 A.L.R. 1239; State v. Winton, 11 Or. 456, 5 P. 337, 50 Am. Rep. 486; Re Austin, 5 Rawle (Pa.) 191, 28 Am. Dec. 657.

Annotation: 15 L.R.A.(N.S.) 525; 2 Am. St. Rep. 848, 860; 45 Am. St. Rep. 73.

[15] Ex parte Wall, 107 U. S. 265, 27 L. ed. 552, 2 S. Ct. 569; Bradley v. Fisher, 13 Wall. (U. S.) 335, 20 L. ed. 646; Wernimont v. State, 101 Ark. 210, 142 S. W. 194, Ann. Cas. 1913D, 1156; Com. v. Roe, 129 Ky. 650, 112 S. W. 683, 19 L.R.A.(N.S.) 413.

The interests of the attorney must in every case be weighed in the balance against the rights of the public, and the court should endeavor to guard and protect both with fairness and impartiality. People v. MacCabe, 18 Colo. 186, 32 P. 280, 19 L.R.A. 231, 36 Am. St. Rep. 270.

[16] Bradley v. Fisher, 13 Wall. (U. S.) 335, 20 L. ed. 646; Lenihan v. Com. 165 Ky. 93, 176 S. W. 948, L.R.A.1917B, 1132.

The fact that a disciplinary proceeding against a lawyer is the first of the kind to be brought is properly to be taken into consideration in fixing the penalty to be imposed. Smith v. State Bar, 211 Cal. 249, 294 P. 1057, 73 A.L.R. 393.

[17] People ex rel. Maupin v. MacCabe, 18 Colo. 186, 32 P. 280, 19 L.R.A. 231, 36 Am. St. Rep. 270; Re Dampier, 46 Idaho, 195, 267 P. 452, citing R. C. L.; Re Lentz, 65 N. J.

After disbarring an attorney, the court may, on his petition for reinstatement, modify the judgment to suspension.[19]

§ 254. Effect of Suspension or Disbarment.—A disbarred attorney can appear in court only in circumstances entitling any layman to appear. His status is the same as of one who has never been admitted to practice;[1] a like rule applies, during the period of his suspension, to one who has been suspended.[2]

Where eligibility to public office is restricted to those who have been admitted to practice, it is generally held that disbarment or suspension operates as a disqualification for such public office,[3] although it has been held that a prosecuting attorney may continue to appear in court as such until removed from office according to law, despite a temporary suspension for misconduct.[4] Disbarment or suspension cannot, of course, have any effect upon the official status of one whose public office does not require membership of the bar as a qualification.[5] Nor does disbarment or suspension deprive one of his right to appear in an action in his own behalf; thus he may become the assignee of a chose in action and may prosecute an action thereon, provided the transfer is genuine and not simulated for the purpose of evading the judgment of disbarment or suspension.[6]

§ 255. —Right to Practice in Other Courts of Same Jurisdiction.—With regard to the effect of the disbarment or suspension of an attorney by one court of a state upon his status as an attorney in other courts of the same state, the authorities are not uniform.[7] In most jurisdictions disbarment by

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L. 134, 46 A. 761, 50 L.R.A. 415; Re Robinson, 48 Wash. 153, 92 P. 929, 15 L.R.A. (N.S.) 525, 15 Ann. Cas. 415. See also Re Schnitzer, 33 Nev. 581, 112 P. 848, 33 L.R.A. (N.S.) 941; Re Crum, 55 N. D. 876, 215 N. W. 682, 55 A.L.R. 220; State ex rel. Atty. Gen. v. Breckenridge, 126 Okla. 86, 258 P. 744, 53 A.L.R. 1239; State ex rel. McLaughlin v. Graves, 73 Or. 331, 144 P. 484, L.R.A. 1915C, 259; Snyder's Case, 301 Pa. 276, 152 A. 33, 76 A.L.R. 666.

Annotation: 13 L.R.A. 768; 15 L.R.A. (N.S.) 525; 2 Am. St. Rep. 848, 850.

An attorney at law may be suspended for a definite time and until a designated judgment against him shall be fully satisfied, under a statute authorizing the court to deprive him of the right to practice, either permanently or for a limited period. Re Tyler, 78 Cal. 307, 20 P. 674, 12 Am. St. Rep. 55.

[18] Re Lentz, 65 N. J. L. 134, 46 A. 761, 50 L.R.A. 415.

[19] Annotation: 48 A.L.R. 1243.

[1] Re Duncan, 83 S. C. 186, 65 S. E. 210, 24 L.R.A.(N.S.) 750, 18 Ann. Cas. 657; Danforth v. Egan, 23 S. D. 43, 119 N. W. 1021, 139 Am. St. Rep. 1030, 20 Ann. Cas. 418, Cravens v. McBrayer (Tex. Civ. App.) 255 S. W. 994 (modified in (Tex. Com. App.) 265 S. W. 694) citing R. C. L.

Annotation: 24 L.R.A.(N.S.) 754; 18 Ann. Cas. 658.

[2] Re Lizotte, 32 R. I. 386, 79 A. 960, 35 L.R.A.(N.S.) 794, holding a suspended attorney guilty of contempt of court if he retains upon his office door and stationery the statement that he is an attorney, and consults with clients, makes collections, and does other legal work the same as before his suspension, except so far as it requires his appearance in court proceedings.

[3] Danforth v. Egan, 23 S. D. 43, 119 N. W. 1021, 139 Am. St. Rep. 1030, 20 Ann. Cas. 418; State ex rel. Willis v. Monfort, 93 Wash. 4, 159 P. 889, L.R.A.1917B, 801.

Annotation: 24 L.R.A.(N.S.) 756; L.R.A. 1917B, 803; 20 Ann. Cas. 422.

[4] Snyder's Case, 301 Pa. 276, 152 A. 33, 76 A.L.R. 666.

[5] State v. Peck, 88 Conn. 447, 91 A. 274, L.R.A. 1915A, 663, Ann. Cas. 1917B, 227.

Annotation: 24 L.R.A.(N.S.) 756.

[6] Annotation: 24 L.R.A.(N.S.) 754.

[7] Annotation: Ann. Cas. 1917D, 572.

In England it is provided by statute that any attorney struck from the roll by order of one court is to be struck from the rolls of other courts (Annotation: 2 Am. St. Rep. 861, Ann. Cas. 1917D, 573). Where, however, an attorney has been suspended for a term of years by one court for contempt, it is not compulsory on other courts of co-ordinate jurisdiction, as in the case of striking from the rolls, to suspend him, but they will look into the affidavits, and one court deprives the person thus disbarred of the right to appear as attorney in all other courts of the state;[8] in others, disbarment or suspension in one court does not affect his right to practice in other courts of co-ordinate or superior jurisdiction in the same jurisdiction.[9] Disbarment by the highest court of the state precludes the right to appear as attorney in any other court of that state.[10]

Where a court of inferior and co-ordinate jurisdiction merely suspends an attorney from practice, this does not have the effect of suspending him from practice in other inferior courts, or in the court of last resort.[11] And under a statute providing that any judge of a designated court shall have power to suspend any attorney from practice in the court over which he presides, the power is limited to the particular court in which the judge is presiding at the time he makes the order of suspension.[12]

§ 256. —Right to Practice in Another Jurisdiction.—An attorney's privilege to appear in courts of sister states is granted to him as a matter rather of comity than of right,[13] and will be denied to one who has been disbarred in his own state.[14] Ordinarily the courts of one state will not admit to practice an attorney who has been disbarred by another state, especially where admission is sought on the basis of admission to practice in such other state.[15] However, disbarment of an attorney in one state does not, of itself, affect his status as an attorney in another state. Moreover, disbarment by a state court does not necessarily affect the status of an attorney before the Federal court, nor is it binding upon the latter court in a technical sense.[16] The fact that an attorney who was a practitioner in the highest courts of a state has been struck from the roll of the District Court of the United States in that state, for contempt, is no ground for refusal to admit him to practice in the United States Supreme Court.[17]

B. Grounds for Suspension or Disbarment

§ 257. Generally.—Disbarment of an attorney may be based upon acts done

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exercise their own discretion (Annotation: 95 Am. Dec. 344).

[8] State v. Mosher, 128 Iowa, 82, 103 N. W. 105, 5 Ann. Cas. 984; Danforth v. Egan, 23 S. D. 43, 119 N. W. 1021, 139 Am. St. Rep. 1030, 20 Ann. Cas. 418; Re Evans, 22 Utah, 366, 62 P. 913, 53 L.R.A. 952, 83 Am. St. Rep. 794, judgment vacated on rehearing in 42 Utah, 282, 130 P. 217.

Annotation: 5 Ann. Cas. 992; Ann. Cas. 1917D, 572.

An order suspending an attorney from practice in "all of the courts of this state" prohibits him from practicing in the probate or other inferior courts during the term of such suspension. State ex rel. Patton v. Marron, 22 N. M. 632, 167 P. 9, L.R.A.1918B, 217.

[9] State v. Kirke, 12 Fla. 278, 95 Am. Dec. 314.

Annotation: 24 L.R.A.(N.S.) 757; 2 Am. St. Rep. 861; Ann. Cas. 1917D, 572.

In jurisdictions where the position of an attorney at law is independent of his position as a solicitor in chancery, a proceeding to disbar him from practice in the chancery court does not affect his connection with the law courts of the state. Annotation: 15 Ann. Cas. 419; Ann. Cas. 1917D, 572.

Where an attorney was disbarred in the criminal court of the District of Columbia, it was held that he was not thereby disbarred from the bar of the Supreme Court of that district, since the criminal court was then an independent and separate court. Bradley v. Fisher, 13 Wall. (U. S.) 335, 20 L. ed. 646.

[10] Annotation: 24 L.R.A.(N.S.) 757.

[11] Annotation: 95 Am. Dec. 344.

[12] Annotation: 5 Ann. Cas. 991, 992.

[13] See supra, § 16.

[14] Danforth v. Egan, 23 S. D. 43, 119 N. W. 1021, 139 Am. St. Rep. 1030, 20 Ann. Cas. 418.

[15] Annotation: 24 L.R.A.(N.S.) 757; Ann. Cas. 1917D, 572.

[16] Selling v. Radford, 243 U. S. 46, 61 L. ed. 585, 37 S. Ct. 377, Ann. Cas. 1917D, 569; Bradley v. Fisher, 13 Wall. (U. S.) 335, 20 L. ed. 646; Manning v. French, 149 Mass. 391, 21 N. E. 945, 4 L.R.A. 339, writ of error dismissed in 133 U. S. 186, 33 L. ed. 582, 10 S. Ct. 258.

Annotation: Ann. Cas. 1917D, 573.

[17] Ex parte Tillinghast, 4 Pet. (U. S.) 108, 7 L. ed. 798.

in or out of court,[18] or upon facts that would preclude his admission.[19] An attorney may be disbarred or suspended for any violations of the oath taken by him, his duties as attorney and counselor,[20] or the rule of conduct prescribed by the legislature,[1] but not for prosecuting cases on contingent fees, even though the court considers such practice unethical.[2] In many jurisdictions, the acts for which an attorney may be suspended or disbarred are enumerated by statute, although the absence of a statute describing the causes for which an attorney may be disbarred does not prevent attorneys from being disbarred when they have been guilty of any misconduct that shows them to be lacking in honesty, probity, and good demeanor, or unworthy to continue as officers of the court.[3] Some statutes require the disbarment or suspension of attorneys for certain acts or under certain circumstances, as, for example, when an attorney has been convicted of a crime.[4] Usually it is held that statutes providing for suspension or disbarment on certain specified grounds do not limit the common-law power of the court, and that an attorney may be suspended or removed for other causes than those mentioned in the statute,[5] which are merely cumulative.[6] In some jurisdictions, however, it is held that where a statute prescribes the causes for disbarment, a court cannot summarily disbar for causes not therein specified.[7] It is held to be within the legislative power thus to limit the power of the court to disbar, at least in so far as nonprofessional misconduct is concerned,[8] or even to the extent of compelling courts to permit persons to act as attorneys who have confessedly been false to their obligations as such.[9]

§ 258. **Misconduct before Admission.**—An attorney may be disbarred for misconduct committed before his admission to the bar, and this notwithstanding that his certificate to practice was issued after a board of law examiners, as required by law, passed its judgment upon his moral character and standing.[10] In order, however, to justify disbarment for a breach of good faith committed before admission, the transaction must be so corrupt and false as to constitute a criminal act or so unprincipled and disgraceful as to be reprehensible to a high degree.[11]

§ 259. **Fraud in Procuring Admission.**—An attorney may be disbarred for fraud in procuring his admission to the bar; in some jurisdictions this is a statutory ground for disbarment.[12] Thus, one who procures his admission to the bar by falsely swearing that he had previously been admitted to the bar in another state, or upon false affidavits as to his period of clerkship,[13] who fraudulently conceals the fact that he has been convicted of a crime involving moral turpitude, especially if, since the issuance of his license, he has been guilty of professional misconduct,[14] or who conceals the fact that he had just previously been disbarred in another state,[15] may be disbarred, although concealment of the fact that disbarment proceedings were had, which did not result in disbarment, is not sufficient.[16]

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[18] Snyder's Case, 301 Pa. 276, 152 A. 33, 76 A.L.R. 666; Norfolk & P. Bar Asso. v. Drewry, 161 Va. 833, 172 S. E. 282, citing R. C. L.

[19] Chreste v. Com. 178 Ky. 311, 198 S. W. 929, citing R. C. L.

[20] Re Hilton, 48 Utah, 172, 158 P. 691, Ann. Cas. 1918A, 271.

[1] Henderson v. Knoxville, 157 Tenn. 477, 9 S. W. (2d) 697, 60 A.L.R. 652.

[2] Ibid.

[3] Re Secombe, 19 How. (U. S.) 9, 15 L. ed. 565; Lenihan v. Com. 165 Ky. 93, 176 S. W. 948, L.R.A.1917B, 1132.

[4] See infra, § 279.

[5] State v. Mosher, 128 Iowa, 82, 103 N. W. 105, 5 Ann. Cas. 984; Lenihan v. Com. 165 Ky. 93, 176 S. W. 948, L.R.A.1917B, 1132; Com. v. Roe, 129 Ky. 650, 112 S. W. 683, 19 L.R.A.(N.S.) 413; Re Delano, 58 N. H. 5, 42 Am. Rep. 555; Re Ebbs, 150 N. C. 44, 63 S. E. 190, 19 L.R.A.(N.S.) 892, 17 Ann. Cas. 592; Wolfe's Disbarment, 288 Pa. 331, 135 A. 732, 50 A.L.R. 380.

Annotation: 19 L.R.A.(N.S.) 413; 42 Am. St. Rep. 849; 5 Ann. Cas. 991.

[6] State Bar Commission ex rel. Williams v. Sullivan, 35 Okla. 745, 131 P. 703, L.R.A. 1915D, 1218.

[7] Annotation: 19 L. ed. 214; 2 Am. St. Rep. 849; 5 Ann. Cas. 991.

[8] Re Saddler, 35 Okla. 510, 130 P. 906, 44 L.R.A.(N.S.) 1195.

[9] Annotation: 45 Am. St. Rep. 72.

[10] Gould v. State, 99 Fla. 662, 127 So. 309, 69 A.L.R. 699.

A statute disqualifying an attorney from practicing on account of past acts is not unconstitutional as an ex post facto law. Re Craven, 178 La. 372, 151 So. 625, 90 A.L.R. 973.

[11] Gould v. State, 99 Fla. 662, 127 So. 309, 69 A.L.R. 699.

§ 260. Moral Turpitude; Want or Loss of Moral Character.—An attorney may be disbarred for moral turpitude.[17] The statutes generally make a good moral character a condition precedent to admission to the bar.[18] The continued possession of a fair private and professional character,[19] or of a good moral character, is a requisite condition for the rightful continuance in the practice of the law for one who has been admitted, and its loss requires suspension or disbarment,[1] even though the statutes do not specify that as a ground of disbarment.[2] The moral turpitude for which an attorney may be disbarred may consist of misconduct in either his professional[3] or his nonprofessional activities.[4]

§ 261. Professional Misconduct Generally.—Generally speaking, an attorney may be suspended or disbarred for misconduct which shows him to be an unfit or unsafe person to enjoy the privileges and to manage the business of others in the capacity of attorney,[5] or which tends to bring reproach upon the legal profession or injure it in the favorable opinion of the public.[6] He cannot justify his wilful misconduct in his profession on the ground that his conduct was usual in the practice of the law,[7] nor does youth or inexperience extenuate an offense that is inconsistent with the common honesty.[8] There must, however, be a clear case of misconduct which affects the standing and character of the lawyer as an attorney,[9] and it has been said that disbarment should be meted out only for misconduct that may properly be characterized as gross.[10]

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[12] Gould v. State, 99 Fla. 662, 127 So. 309, 69 A.L.R. 699.
Annotation: 20 Ann. Cas. 212.

[13] Annotation: 20 Ann. Cas. 213, 214.

[14] Gould v. State, 99 Fla. 662, 127 So. 309, 69 A.L.R. 699; People v. Gilmore, 214 Ill. 569, 73 N. E. 737, 69 L.R.A. 701.

[15] Re Mosher, 24 Okla. 61, 102 P. 705, 24 L.R.A.(N.S.) 530, 20 Ann. Cas. 209.
Annotation: 24 L.R.A.(N.S.) 531; 20 Ann. Cas. 212.

[16] Annotation: 24 L.R.A.(N.S.) 531.

[17] Re Hilton, 48 Utah, 172, 158 P. 691, Ann. Cas. 1918A, 271.

[18] Ibid.

[19] Selling v. Radford, 243 U. S. 46, 61 L. ed. 585, 37 S. Ct. 377, Ann. Cas. 1917D, 569.

[1] People ex rel. Chicago Bar Asso. v. Wheeler, 259 Ill. 99, 102 N. E. 188, 45 L.R.A. (N.S.) 1202, Ann. Cas. 1914C, 286; People ex rel. Deneen v. Smith, 200 Ill. 442, 66 N. E. 27, 93 Am. St. Rep. 206; Re Stolen, 193 Wis. 602, 214 N. W. 379, 216 N. W. 127, 55 A.L.R. 1355; Re Richter, 187 Wis. 490, 204 N. W. 492, 41 A.L.R. 485.
Annotation: 19 L. ed. 214.

[2] State v. Mosher, 128 Iowa, 82, 103 N. W. 105, 5 Ann. Cas. 984.

[3] See infra, §§ 268 et seq.

[4] See infra, §§ 276 et seq.

[5] Re Robinson, 19 Wall. (U. S.) 505, 22 L. ed. 205; Wernimont v. State, 101 Ark. 210, 142 S. W. 194, Ann. Cas. 1913D, 1156; Re Durant, 80 Conn. 140, 67 A. 497, 10 Ann. Cas. 539; Lenihan v. Com. 165 Ky. 93, 176 S. W. 948, L.R.A.1917B, 1132; Nelson v. Com. 128 Ky. 779, 109 S. W. 337, 16 L.R.A. (N.S.) 272.
Annotation: 13 L.R.A. 767.

[6] Wernimont v. State, 101 Ark. 210, 142 S. W. 194, Ann. Cas. 1913D, 1156; State v. Fisher, 103 Neb. 736, 174 N. W. 320, citing R. C. L.

[7] Ex parte Finn, 32 Or. 519, 52 P. 756, 67 Am. St. Rep. 550.

[8] People v. Macauley, 230 Ill. 208, 82 N. E. 612, 120 Am. St. Rep. 287.

[9] Ex parte Wall, 107 U. S. 265, 27 L. ed. 552, 2 S. Ct. 569.
The law does not demand that every technical infraction of its provisions by an attorney shall require his disbarment, although he should endeavor to observe it literally; it is those infractions of duty that involve moral turpitude and evince a depraved character, which demand his disbarment. Re Reily, 75 Okla. 192, 183 P. 728, 7 A.L.R. 89.

It is not necessary that the misconduct should be such as would render the attorney liable to criminal prosecution; misconduct which shows that he is unfit to discharge the duties of his office, or is unworthy of confidence, even though the conduct is outside of his professional dealings, is sufficient.[11] It is usually held that any fault which would have been sufficient to prevent the admission of one as an attorney will justify his removal.[12]

While some decisions hold that a bad or fraudulent motive must be shown to require the disbarment of an attorney, although the acts charged against him are proved to have been committed,[13] yet they should be construed with reference to the charges made in those cases, since there are also cases in which disbarment has been ordered without particular reference to the motive which inspired the reprehensible conduct complained of.[14]

§ 262. Perverting or Obstructing Justice.—The courts have inherent power to suspend or remove any practitioner whose conduct tends to impede, obstruct, or prevent the administration of the law, or destroy the confidence of the people in such administration.[15] Thus, an attorney may be suspended or disbarred for preparing and having, or permitting his client to verify, pleadings which he knows or has reason to believe are false;[16] presenting false or unfounded affidavits for the purpose of deceiving or misleading the court;[17] commencing fictitious or unfounded litigation;[18] colluding with a debtor to enable him, under color of law, to defraud his creditors;[19] bringing a suit for divorce upon the identical pleadings upon which, after full hearing, another court of concurrent jurisdiction has dismissed the suit for want of equity, without disclosing that fact;[20] appearing in court to conduct litigation while in such a state of intoxication that the court is unable to proceed;[1] conspiring to get the opposing attorney drunk in order to gain an advantage in a cause;[2] corrupting a juror;[3] obtaining information from the grand jury on official matters before it;[4] presenting mutilated copies of papers to a court for the purpose of deceiving and misleading it; inducing a United States commissioner to believe that he had authority to issue a writ of habeas corpus, admit a prisoner to bail, and thus bring about his escape; causing the wife of a client to visit a judge and seek to commit him to the cause of the client in advance of trial;[5] or making public addresses which tend to prejudice the consideration of pending litigation.[6] Such conduct must, however, have been prompted by base or unworthy motives; an attorney cannot be disbarred because he made a motion which was not supported by the facts, or corrected a decree, after it had been signed, by inserting immaterial words omitted therefrom through clerical oversight.[7]

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[10] Re Lentz, 65 N. J. L. 134, 46 A. 761, 50 L.R.A. 415.

[11] Hertz v. United States (C. C. A. 8th) 18 F. (2d) 52, citing R. C. L.; People v. Keegan, 18 Colo. 237, 32 P. 424, 36 Am. St. Rep. 274; People v. Macauley, 230 Ill. 208, 82 N. E. 612, 120 Am. St. Rep. 287; People v. Smith, 200 Ill. 442, 66 N. E. 27, 93 Am. St. Rep. 206; Nelson v. Com. 128 Ky. 779, 109 S. W. 337, 16 L.R.A.(N.S.) 272.

Annotation: 45 Am. St. Rep. 74.

[12] Delano's Case, 58 N. H. 5, 42 Am. Rep. 555.

Annotation: 19 L.R.A.(N.S.) 415, 416.

[13] State v. Finley, 30 Fla. 325, 11 So. 674, 18 L.R.A. 401.

[14] Annotation: 18 L.R.A. 401.

[15] Wernimont v. State, 101 Ark. 210, 142 S. W. 194, Ann. Cas. 1913D, 1156; Gould v. State, 99 Fla. 662, 127 So. 309, 69 A.L.R. 699; State v. Mannix, 133 Or. 329, 288 P. 507, citing R. C. L.; Ingersoll v. Coal Creek Coal Co. 117 Tenn. 263, 98 S. W. 178, 9 L.R.A.(N.S.) 282, 119 Am. St. Rep. 1003, 10 Ann. Cas. 829; Re O'Brien, 95 Vt. 167, 113 A. 527, 14 A.L.R. 859.

Resort to any form of device for the purpose of preventing the decision of a cause upon the merits may constitute ground for suspension or disbarment, whether such fraud or deceit is practiced upon the court, the adverse party, or the latter's counsel. Annotation: 45 Am. St. Rep. 82.

Some statutes expressly provide that an attorney who is guilty of deceit or collusion, or consents thereto, with intent to deceive a court or judge or party to an action or proceedings, may be disbarred. Re Mosher, 24 Okla. 61, 102 P. 705, 24 L.R.A. (N.S.) 530, 20 Ann. Cas. 209.

[16] People ex rel. Chicago Bar Asso. v. Martin, 288 Ill. 615, 124 N. E. 340, 14 A.L.R. 854.

Annotation: 14 A.L.R. 869.

[17] Re Vaughan, 189 Cal. 491, 209 P. 353, 24 A.L.R. 858 (false affidavit to secure an extension of time for filing a supersedeas bond); Re Wharton, 114 Cal. 367, 46 P. 172, 55 Am. St. Rep. 72 (false and fraudulent affidavits of service of summons); People ex rel. Chicago Bar Asso. v. Martin, 288 Ill. 615, 124 N. E. 340, 14 A.L.R. 854 (false affidavit of lack of notice to secure an injunction against a sale of property under execution).

Annotation: 14 A.L.R. 869; 2 Am. St. Rep. 851; 45 Am. St. Rep. 82.

It is professional misconduct to prepare and forward to a client for verification an affidavit showing the disqualification of the judge. Re Carleton, 33 Mont. 431, 88 P. 788, 114 Am. St. Rep. 826.

[18] Re Macy, 109 Kan. 1, 196 P. 1095, 14 A.L.R. 848.

[19] People v. Keegan, 18 Colo. 237, 32 P. 424, 36 Am. St. Rep. 274.

Annotation: 2 Am. St. Rep. 851.

[20] People v. Case, 241 Ill. 279, 89 N. E. 638, 25 L.R.A.(N.S.) 578.

§ 263. —Fabricating or Suppressing Papers or Evidence and Tampering with Witnesses.—An attorney may be suspended or disbarred for concealing, suppressing, or failing to produce a paper or document material to the issues,[8] for offering in evidence as valid an instrument which he knows is not valid and lawful,[9] for using as evidence documents known by him to be fabricated[10] or testimony known to him to be false and perjured,[11] for tampering with witnesses,[12] for paying or offering to pay a nonexpert witness money in addition to the usual witness fees, though with the honest intention of procuring only truthful testimony,[13] for inducing witnesses subpœnaed by the other side to absent themselves,[14] or for colluding in the manufacture of deceptive evidence.[15] But it has been held that an attorney cannot be disbarred for making a false affidavit for use in a pending cause wherein he is not acting as attorney.[16]

§ 264. Misconduct toward Court or Judge.—Generally an attorney may not be disbarred as a punishment for contempt of court.[17] As a general rule, in so far as acts done or words spoken may merit punishment, a court should punish the same in the exercise of its inherent power to deal with persons found guilty of contempt.[18] However, there are instances where aggravated and base contempts may be punished by disbarment or suspension.[19]

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[1] Re Macy, 109 Kan. 1, 196 P. 1095, 14 A.L.R. 848.

[2] Dickens's Case, 67 Pa. 169, 5 Am. Rep. 420.
Annotation: 2 Am. St. Rep. 852.

[3] Re Keenan, 287 Mass. 577, 192 N. E. 65, 96 A.L.R. 679.

[4] Re Hittson, 20 N. M. 319, 150 P. 733, L.R.A.1916A, 1171.

[5] Annotation: 45 Am. St. Rep. 82.

[6] Snyder's Case, 301 Pa. 276, 152 A. 33, 76 A.L.R. 666.

[7] Annotation: 45 Am. St. Rep. 83.

[8] Annotation: L.R.A.1917B, 384.
An attorney who, when called upon by opposing counsel to produce a copy or duplicate of an original contract in his possession, stated that it was not in his possession or custody or under his control, when as a matter of fact it had been concealed by him, is guilty of unprofessional conduct subjecting him to a reprimand, even though such contract was not material to the determination of the issues in the case on trial. Re Marron, 22 N. M. 252, 160 P. 391, L.R.A.1917B, 378.

[9] Re Marron, 22 N. M. 252, 160 P. 391, L.R.A.1917B, 378.

[10] Re O'Brien, 95 Vt. 167, 113 A. 527, 14 A.L.R. 859.

[11] People v. Beattie, 137 Ill. 553, 27 N. E. 1096, 31 Am. St. Rep. 384.
Annotation: 14 A.L.R. 868.

[12] Re Eldridge, 82 N. Y. 161, 37 Am. Rep. 558.
Annotation: 14 A.L.R. 871.

[13] Re O'Keefe, 49 Mont. 369, 142 P. 638, L.R.A.1915A, 514.
Annotation: L.R.A.1915A, 514.

[14] Taylor v. Com. 192 Ky. 410, 233 S. W. 895, citing R. C. L.
Annotation: 2 Am. St. Rep. 851; 45 Am. St. Rep. 82.

[15] Annotation: 45 Am. St. Rep. 82.

[16] Beckner v. Com. 126 Ky. 318, 103 S. W. 378, 128 Am. St. Rep. 287.

[17] People ex rel. Mulford v. Turner, 1 Cal. 143, 52 Am. Dec. 295; State ex rel. Huffaker v. Crosby, 24 Nev. 115, 50 P. 127, 77 Am. St. Rep. 786.
Annotation: 45 Am. St. Rep. 83.

Clearly, the court has no power to disbar for a contempt committed before another court.[20]

§ 265. **—Abusive Conduct.**—An attorney may be suspended or disbarred for violation of his duty to pay that courtesy and respect due to courts of justice and judicial officers which he is required to observe at all times.[1] An attorney who endeavors to coerce a judge in the decision of a cause by personal attack, threats, or other means of intimidation,[2] or who indulges in invective or in scandalous innuendo that tends to degrade the court or to impair its respectability and usefulness,[3] may be disbarred or suspended. It is not necessary that the threat, indignity, or insult to the judge should occur in open court or should constitute a statutory contempt of court.[4] The fact, however, that an attorney, in the course of legal proceedings, imputes prejudice to the court or judge under circumstances which create a privilege,[5] or that he addresses a letter to a judge, expressed in respectful language, stating that he has lost the confidence of the public, and suggesting the propriety of his resigning from office,[6] does not call for disbarment, nor are political speeches reflecting upon the integrity of the court such misconduct as calls for permanent disbarment.[7]

§ 266. **—Criticism of Judicial Acts.**—There can be no question as to the right of a court to suspend or disbar an attorney for comment upon and criticism of the judicial acts of a court or its members, when couched in such language as to establish clearly the bad character of the offender and his unfitness to remain a member of the legal profession.[8] Suspension or disbarment may be based upon abusive and defamatory criticisms of judicial acts, when immaterial and irrelevant, incorporated in a pleading, argument, or brief,[9] or upon the fact that the attorney writes abusive letters or addresses opprobrious language to a judge in reference to his decisions or official acts, or publishes, in reference thereto, statements containing such language.[10] It is evident, however, that not all criticism is a ground for disbarment. Bona fide criticism of a court which does not pass the limits of decency and propriety under the circumstances or tend to bring the court into disrepute or lessen the respect due it is not a ground for disbarment.[11] Moreover, since the purpose of the rule against harsh and unjust criticism of judicial acts is to prevent the impairment of the administration of justice, such rule is usually applied with less strictness to past than to pending causes,[12] and has even been held inapplicable to past decisions.[13] Considerable latitude is allowed in the criticism of the decisions of judges running for re-election,[14] although that fact does not give to an attorney the right to misrepresent wilfully the judge's decisions or to make false charges of corruption or incompetence against him.[15] Criticism not written or spoken in the capacity of attorney will not afford ground for disbarment unless it is so vile and opprobrious as to manifest moral delinquency.[16]

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[18] Annotation: 45 Am. St. Rep. 83; 57 Am. St. Rep. 583.

[19] State Law Examiners v. Hart, 104 Minn. 88, 116 N. W. 212, 17 L.R.A.(N.S.) 585, 15 Ann. Cas. 197.

An attorney who fails to return, as directed by the court, fees paid him as referee in a litigated case will be suspended from his rights and privileges as a member of the bar for his failure to respect the decision of the court. Re Gilbert, 276 U. S. 294, 72 L. ed. 580, 48 S. Ct. 309.

[20] Re Bradley, 7 Wall. (U. S.) 364, 19 L. ed. 214.

[1] Re Secombe, 19 How. (U. S.) 9, 15 L. ed. 565; State Bar Commission ex rel. Williams v. Sullivan, 35 Okla. 745, 131 P. 703, L.R.A.1915D, 1218.

Annotation: 45 Am. St. Rep. 85.

[2] Bradley v. Fisher, 13 Wall. (U. S.) 335, 20 L. ed. 646; People v. Green, 7 Colo. 237, 244, 3 P. 65, 374, 49 Am. Rep. 351; Wilhelm's Case, 269 Pa. 416, 112 A. 560, citing R. C. L. (indicating popular feeling pending litigation); Re Austin, 5 Rawle (Pa.) 191, 28 Am. Dec. 657.

Annotation: 19 L. ed. 214; 2 Am. St. Rep. 852; 45 Am. St. Rep. 84.

An attorney who states in a petition for a rehearing that it is commonly reported that the court was controlled by political motives in its decision in the case, and suggests that in order to relieve itself from such slanderous rumors it should entertain the petition and that the petition need not become public property, violates his statutory duty to maintain due respect to the court and to abstain from offensive personality, and is guilty of an attempt to intimidate the court into a favorable decision, although he himself disavows his belief in the truth of the scandalous statements and of any intention to reflect on the court. Re Robinson, 48 Wash. 153, 92 P. 929, 15 L.R.A.(N.S.) 525, 15 Ann. Cas. 415.

[3] Pittsburgh, C. C. & St. L. R. Co. v. Muncie & P. Traction Co. 166 Ind. 466, 77 N. E. 941, 9 Ann. Cas. 165.

Annotation: 9 Ann. Cas. 166, 168.

[4] Bradley v. Fisher, 13 Wall. (U. S.) 335, 20 L. ed. 646; People v. Green, 7 Colo. 237, 244, 3 P. 65, 374, 49 Am. Rep. 351; Re Hilton, 48 Utah, 172, 158 P. 691, Ann. Cas. 1918A, 271.

Annotation: Ann. Cas. 1918A, 284.

A mere libel upon a judge is not, however, a cause of disbarment unless its object is shown to have been "the acquirement of an influence over a judge in the exercise of his judicial functions, by the instrumentality of popular prejudices." Ex parte Steinman, 95 Pa. 220, 40 Am. Rep. 637.

[5] Re Sherwood, 259 Pa. 254, 103 A. 42, L.R.A.1918D, 447.

Annotation: L.R.A.1918D, 450.

An attorney who has removed a cause from a state to a Federal court on the ground of local prejudice is privileged in stating to the Federal court that the state judges are so prejudiced that his client cannot get a fair trial in the state courts. Re Sherwood, 259 Pa. 254, 103 A. 42, L.R.A. 1918D, 447.

[6] Re Austin, 5 Rawle (Pa.) 191, 28 Am. Dec. 657.

[7] Snyder's Case, 301 Pa. 276, 152 A. 33, 76 A.L.R. 666.

§ 267. —Effect of Retraction, Disavowal, or Apology.—A disavowal by the attorney of any intentional disrespect in making improper or defamatory criticisms of the court, or a proper retraction and apology for his misconduct, will be considered in mitigation of his offense, and the court will refrain from disbarring him,[17] although such a disavowal, retraction, or apology does not purge the words of their contemptuous character, for everyone is presumed to intend the natural and probable consequences of his acts.[18]

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[8] Neel v. State, 9 Ark. 259, 50 Am. Dec. 209; State Law Examiners v. Hart, 104 Minn. 88, 116 N. W. 212, 17 L.R.A.(N.S.) 585, 15 Ann. Cas. 197; State v. Root, 5 N. D. 487, 67 N. W. 590, 57 Am. St. Rep. 568; Re Hilton, 48 Utah, 172, 158 P. 691, Ann. Cas. 1918A, 271.

Annotation: 15 Ann. Cas. 205.

[9] Re Philbrook, 105 Cal. 471, 38 P. 511, 884, 45 Am. St. Rep. 59; Atty. Gen. v. Nelson, 263 Mich. 686, 249 N. W. 439, citing R. C. L.; Re Breen, 30 Nev. 164, 93 P. 997, 17 L.R.A.(N.S.) 572; Re Robinson, 48 Wash. 153, 92 P. 929, 15 L.R.A.(N.S.) 525, 15 Ann. Cas. 415.

Annotation: 53 A.L.R. 1245; 15 L.R.A. (N.S.) 525; 9 Ann. Cas. 168; 15 Ann. Cas. 205; Ann. Cas. 1918A, 283.

[10] Re Humphrey, 174 Cal. 290, 163 P. 60, citing R. C. L.; People v. Green, 7 Colo. 237, 244, 3 P. 65, 374, 49 Am. Rep. 351; State Law Examiners v. Hart, 104 Minn. 88, 116 N. W. 212, 17 L.R.A.(N.S.) 585, 15 Ann. Cas. 197; State v. Root, 5 N. D. 487, 67 N. W. 590, 57 Am. St. Rep. 568; State ex rel. Atty. Gen. v. Breckenridge, 126 Okla. 86, 258 P. 744, 53 A.L.R. 1239; State Bar Commission ex rel. Williams v. Sullivan, 35 Okla. 745, 131 P. 703, L.R.A.1915D, 1218; Re Hilton, 48 Utah, 172, 158 P. 691, Ann. Cas. 1918A, 271.

Annotation: 53 A.L.R. 1247; 15 L.R.A. (N.S.) 526; 15 Ann. Cas. 205; Ann. Cas. 1918A, 283.

An attorney may be disbarred for printing and publishing a pamphlet falsely, purposely, and maliciously attacking the integrity of the courts and the judges thereof, designed to misrepresent the courts and the judges thereof wilfully, purposely, and maliciously bring them into disrepute, and lessen the respect due them. State Bar Commission ex rel. Williams v. Sullivan, 35 Okla. 745, 131 P. 703, L.R.A.1915D, 1218.

[11] People ex rel. Elliott v. Green, 7 Colo. 237, 244, 3 P. 65, 374, 49 Am. Rep. 351; State Law Examiners v. Hart, 104 Minn. 88, 116 N. W. 212, 17 L.R.A.(N.S.) 585, 15 Ann. Cas. 197; Re Breen, 30 Nev. 164, 93 P. 997, 17 L.R.A.(N.S.) 572; State Bar Commission ex rel. Williams v. Sullivan, 35 Okla. 745, 131 P. 703, L.R.A.1915D, 1218; Austin's Case, 5 Rawle (Pa.) 191, 28 Am. Dec. 657; Re Hilton, 48 Utah, 172, 158 P. 691, Ann. Cas. 1918A, 271.

Annotation: 53 A.L.R. 1244; 17 L.R.A. (N.S.) 572; 15 Ann. Cas. 205.

[12] State Law Examiners v. Hart, 104 Minn. 88, 116 N. W. 212, 17 L.R.A.(N.S.) 585, 15 Ann. Cas. 197.

Annotation: 53 A.L.R. 1245; 15 Ann. Cas. 205.

[13] Re Pryor, 18 Kan. 72, 26 Am. Rep. 747.

Annotation: 53 A.L.R. 1245; 15 Ann. Cas. 205.

[14] State ex rel. Atty. Gen. v. Circuit Ct. 97 Wis. 1, 72 N. W. 193, 38 L.R.A. 554, 65 Am. St. Rep. 90.

[15] Annotation: 53 A.L.R. 1251; Ann. Cas. 1918D, 287.

[16] Ex parte Steinman, 95 Pa. 220, 40 Am. Rep. 637.

Annotation: 53 A.L.R. 1253.

[17] Re Philbrook, 105 Cal. 471, 38 P. 511, 884, 45 Am. St. Rep. 59; People v. Green, 7

§ 268. Breach of Duties Owing to Client or Former Client.—For an attorney to act toward a client otherwise than with the utmost good faith is unprofessional; therefore, any advice given by an attorney which he does not believe to be correct, and any action whatever taken by him with a view of affecting his client injuriously, or of obtaining some advantage for himself, to the prejudice of his client, justifies a disbarment.[19] The charging of an attorney's fee grossly disproportionate to the services performed is such misconduct as to merit disciplinary action,[20] and may justify the attorney's disbarment, in the absence of contingencies justifying a large fee.[1] It also is a ground for suspension or disbarment for an attorney to undertake, without the knowledge or consent of the parties, to represent adverse parties to the same litigation, or to represent parties having conflicting or adverse interests,[2] especially where, as city or public prosecuting attorney, he acts as counsel for persons whom it is his duty to prosecute.[3] An attorney may be suspended or disbarred also when he represents one whose interest is adverse to that of a former client,[4] where he uses in behalf of his second client and against a former client information acquired in the employment of the latter,[5] or where he uses such information to secure his employment in the prosecution of an adverse claim.[6] Gross malpractice[7] and the giving of improper advice

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Colo. 237, 244, 3 P. 65, 374, 49 Am. Rep. 351; Re Breen, 30 Nev. 164, 93 P. 997, 17 L.R.A. (N.S.) 572; State ex rel. Atty. Gen. v. Breckenridge, 126 Okla. 86, 258 P. 744, 53 A.L.R. 1239; Dickens' Case, 67 Pa. 169, 5 Am. Rep. 420; Re Austin, 5 Rawle (Pa.) 206, 28 Am. Dec. 657; Re Robinson, 48 Wash. 153, 92 P. 929, 15 L.R.A.(N.S.) 525, 15 Ann. Cas. 415.

Annotation: 53 A.L.R. 1254; 15 L.R.A. (N.S.) 525; 45 Am. St. Rep. 71; 15 Ann. Cas. 206; Ann. Cas. 1918A, 286.

[18] People ex rel. Elliott v. Green, 7 Colo. 237, 244, 3 P. 65, 374, 49 Am. Rep. 351; Re Breen, 30 Nev. 164, 93 P. 997, 17 L.R.A.(N.S.) 572.

Annotation: 53 A.L.R. 1254; 15 Ann. Cas. 206.

[19] Fairfield County Bar v. Taylor, 60 Conn. 11, 22 A. 441, 13 L.R.A. 767; People v. Beattie, 137 Ill. 553, 27 N. E. 1096, 31 Am. St. Rep. 384; State v. Mosher, 128 Iowa, 82, 103 N. W. 105, 5 Ann. Cas. 984; State ex rel. Dale v. Vernor, 79 Okla. 124, 191 P. 729, citing R. C. L.

Annotation: 45 Am. St. Rep. 81; Ann. Cas. 1912B, 214.

An attorney who abandons his client and sacrifices his interests by surrendering to the adverse party the notes on which his client's claim is based, without consideration being received for the client, may be disbarred. People ex rel. Chicago Bar Asso. v. Sullivan, 279 Ill. 634, 117 N. E. 134, L.R.A. 1918A, 1136.

Similarly, an attorney who, after receiving the money to satisfy a trust deed, is retained by the grantor to defend a suit for its foreclosure and permits judgment to go against his client without setting up the fact of payment will be disbarred. People ex rel. Chicago Bar Asso. v. Martin, 288 Ill. 615, 124 N. E. 340, 14 A.L.R. 854.

[20] Goldstone v. State Bar, 214 Cal. 490, 6 P. (2d) 513, 80 A.L.R. 701.

[1] Goldstone v. State Bar, 214 Cal. 490, 6 P. (2d) 513, 80 A.L.R. 701; Re Cary, 146 Minn. 80, 177 N. W. 801, 9 A.L.R. 1272.

Annotation: 80 A.L.R. 706.

[2] Re Carleton, 33 Mont. 431, 84 P. 788, 114 Am. St. Rep. 826.

The absolute disbarment of an attorney is justified where, upon receiving an unenforceable claim against his own client, he caused a complaint to be served in the name of another attorney, and then advised his client to settle, falsely telling him, with full knowledge of the facts, that the claim was good and could be collected out of his property. Fairfield County Bar ex rel. Fessenden v. Taylor, 60 Conn. 11, 22 A. 441, 13 L.R.A. 767.

[3] Annotation: L.R.A.1918F, 833.

An attorney may be disbarred for taking a retainer not to appear on behalf of a municipality in certain pending suits commenced by him in his name while he was the official attorney of such city, though such retainer was taken after he went out of office, and he never had any personal knowledge of the suits. Re Cowdery, 69 Cal. 32, 10 P. 47, 58 Am. Rep. 545.

[4] Re Cowdery, 69 Cal. 32, 10 P. 47, 58 Am. Rep. 545; Fairfield County Bar v. Taylor, 60 Conn. 11, 22 A. 441, 13 L.R.A. 767; Re Marron, 22 N. M. 252, 160 P. 391, L.R.A. 1917B, 378.

Annotation: 51 A.L.R. 1315; Ann. Cas. 1912B, 214.

[5] Murphy v. Riggs, 238 Mich. 151, 213 N. W. 110, 51 A.L.R. 1303.

[6] Re Marron, 22 N. M. 252, 160 P. 391, L.R.A.1917B, 378.

[7] Ex parte Wall, 107 U. S. 265, 27 L. ed. 552, 2 S. Ct. 569.

to a client to resort to illegal acts to right a supposed wrong[8] have been held to be grounds for disbarment. However, disobedience of the client's instructions, or mere breach of promise, or giving information which may be used against a former client, are not considered grounds for disbarment or suspension unless there are some circumstances of fraud or corruption.[9] Nor is disbarment required by the failure of the attorney to observe statutes affecting the rights of his client,[10] by mere negligence in the performance of his duty, by misrepresentation of facts to his clients because of his failure to know the truth,[11] or by mere laziness or inattention to duty, in the absence of any moral delinquency or dishonorable or corrupt motive.[12] Moreover, gross ignorance of the law is not, apparently, a ground for disbarment, where a knowledge of the law is not, by statute, made a prerequisite to admission to the bar.[13]

§ 269. **Conversion or Misappropriation of Client's Property.**—One of the most frequent grounds of disbarment or suspension of attorneys is the conversion or wrongful retention, misappropriation, or misapplication of moneys or property received by them in their professional character.[14] In some states this is a statutory ground for disbarment; no statute is necessary, however, to warrant disbarment where there has been any actual appropriation to his own use of moneys collected by an attorney.[15]

It has been held, however, that to constitute a wrongful retention of money sufficient to warrant disbarment, some element of fraud or dishonesty must appear. In other words, mere nonpayment or use of the client's money by an attorney, in the absence of intent to defraud or of dishonesty, is no ground for disbarring him,[16] even though his action is in disregard of an order and rule of court and without special circumstances justifying it.[17] Mere retention is no ground for disbarment where the client is indebted to the attorney in an amount equal to or in excess of the sum withheld,[18] or where the balance owed to the client is the subject of a bona fide dispute involving no fraud or deception,[19] or where such retention is due to an attachment while the property was in the attorney's hands.[20]

§ 270. **—When Done by One Member of Law Firm.**—If moneys are collected by a member of a firm of attorneys and misappropriated by one of their number without the knowledge of his partners, only the member making the misappropriation can be disbarred; the innocent members cannot be disbarred even though they have not satisfied their civil liability by paying over the moneys.[1] If, however, the other members of the firm have knowledge of the misappropriation and permit denials that the money was collected to be made in the firm name, all may be disbarred.[2]

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[8] Re Hittson, 20 N. M. 319, 150 P. 733, L.R.A.1916A, 1171.
Annotation: L.R.A.1916A, 1175.

[9] Annotation: 2 Am. St. Rep. 857.

[10] Re O'Keefe, 49 Mont. 369, 142 P. 638, L.R.A.1915A, 514.

[11] Re Miller, 55 Nev. 444, 38 P. (2d) 972, citing R. C. L.; Re Robertson, 28 S. D. 70, 132 N. W. 684, 36 L.R.A.(N.S.) 442.

[12] Gould v. State, 99 Fla. 662, 127 So. 309, 69 A.L.R. 699; Re Robertson, 28 S. D. 70, 132 N. W. 684, 36 L.R.A.(N.S.) 442.
Annotation: 69 A.L.R. 705.

[13] Annotation: 69 A.L.R. 705; 2 Am. St. Rep. 857.

[14] People ex rel. Black v. Smith, 290 Ill. 241, 124 N. E. 807, 9 A.L.R. 183; Re Wilson, 79 Kan. 674, 100 P. 635, 21 L.R.A.(N.S.) 517, 17 Ann. Cas. 690; Com. v. Roe, 129 Ky. 650, 112 S. W. 683, 19 L.R.A.(N.S.) 413; Re Cherry, 166 Minn. 448, 208 N. W. 197, 45 A.L.R. 1108; Re Dahl, 159 Minn. 481, 199 N. W. 429, 43 A.L.R. 52; Re Thresher, 33 Mont. 441, 84 P. 876, 114 Am. St. Rep. 834, 8 Ann. Cas. 845; Re Ebbs, 150 N. C. 44, 63 S. E. 190, 19 L.R.A.(N.S.) 892, 17 Ann. Cas. 592; Re Davies, 93 Pa. 116, 39 Am. Rep. 729.
Annotation: 43 A.L.R. 54; 19 L.R.A. (N.S.) 414; 45 Am. St. Rep. 78.
It is a breach of integrity and a manifestation of a lack of probity for an attorney wrongfully to withhold the money of his client. Com. v. Roe, 129 Ky. 650, 112 S. W. 683, 19 L.R.A.(N.S.) 413.

[15] Re Tyler, 78 Cal. 307, 20 P. 674, 12 Am. St. Rep. 55.
Annotation: 45 Am. St. Rep. 78.

[16] Duffin v. Com. 208 Ky. 452, 271 S. W. 555, citing R. C. L.; Bonner v. Goodloe, 205 Ky. 555, 266 S. W. 62, citing R. C. L.; Re Lentz, 65 N. J. L. 134, 46 A. 761, 50 L.R.A. 415.
Mere carelessness and delay in reporting collections is insufficient. Re Robertson, 28 S. D. 70, 132 N. W. 684, 36 L.R.A.(N.S.) 442.

[17] Annotation: 43 A.L.R. 58; 17 Ann. Cas. 692.

[18] Annotation: 43 A.L.R. 69.

[19] Re Marron, 22 N. M. 252, 160 P. 391, L.R.A.1917B, 378.
Annotation: 43 A.L.R. 69.

[20] Annotation: 43 A.L.R. 69.

§ 271. —Matters in Defense or Mitigation.—No circumstances will justify an attorney in appropriating his client's funds to his personal use. Intention to repay at the time of the conversion is no defense to the disbarment proceedings.[3] Moreover, where it is shown that the attorney acted in bad faith toward his client in detaining or misappropriating funds of the client, or that the wrong was committed or aided by means of false representations, fraud, or deceit, the fact that the attorney has made restitution or settlement with the client does not prevent disbarment,[4] especially where restitution is not made until after the commencement of the disbarment proceedings.[5] Such settlement or restitution releases the attorney from civil liability, but does not purge him of his offense, nor does it prove that he has become a fit person to remain on the rolls.[6] A different rule applies, however, where the appropriation is without intent to defraud and is followed by repayment before the institution of disbarment proceedings and by exemplary conduct in both public and private life.[7]

Such matters as the youth, inexperience, old age, poverty, previous good character, intoxication, insanity, absence of fraudulent intent, and the smallness of the amount involved, while not, strictly speaking, defenses, have been held in some, but not all, cases to be mitigating circumstances justifying a lightening of the punishment to mere temporary suspension or severe reprimand.[8]

§ 272. Contracts Contrary to Public Policy.—An attorney who, in the pursuit of his profession, makes an agreement against public policy, such as a champertous contract, is guilty of a gross breach of professional duty which may justify his disbarment.[9]

§ 273. Unethical Conduct.—An attorney may, in some cases, be suspended or disbarred for conduct which, while not criminal in its character or calculated to obstruct justice, is, nevertheless, in contravention of the ethics of the profession.[10] An instance of this is the act of an attorney in slandering another attorney and thereby depriving him of clients,[11] by a wanton or malicious accusation of a serious nature, made falsely and without reasonable cause,[12] whether such aspersion is made in a pleading in an action,[13] in the course of a disbarment proceeding, in an attempt to intermeddle between the attorney and his client, or otherwise.[14] Similarly, an attorney may be disbarred as morally unfitted for his office for aspersing the character or reputation of a litigant when such aspersion is irrelevant.[15] It is also misconduct sufficient to disbar or suspend an attorney for him to mislead or intimidate debtors through the use of letters or notices simulating legal process,[16] to make unwarranted use of legal process, or to allow his name to be used by others.[17] However, it would be going too far to hold that an attorney may be disbarred solely because he has failed to live up to the ideals which the canons of ethics of a bar association set for its members as attorneys and citizens.[18] There must be an element of immorality or dishonesty, or some violation of private interests or the public good.[19] It is not unprofessional conduct meriting disbarment for a member of the bar to conduct quiz classes to prepare law students, who have completed the required course of study, for their bar examinations.[20]

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[1] State v. Breslin, 67 Okla. 125, 169 P. 897, citing R. C. L.

Annotation: 43 A.L.R. 76; 19 L.R.A.(N.S.) 418; 2 Am. St. Rep. 857; 45 Am. St. Rep. 78; 17 Ann. Cas. 694.

[2] Annotation: 19 L.R.A.(N.S.) 419.

[3] Annotation: 43 A.L.R. 65, 66.

[4] Re Davies, 93 Pa. 116, 39 Am. Rep. 729. Annotation: 43 A.L.R. 66.

The bringing of a civil suit to enforce payment of money unlawfully withheld by an attorney from his client, and the recovery of a judgment for the amount so withheld, do not bar proceedings to have the attorney disbarred. Annotation: 43 A.L.R. 71; 17 Ann. Cas. 695.

[5] Com. v. Hinton, 254 Ky. 798, 72 S. W. (2d) 481, citing R. C. L.; Com. v. Roe, 129 Ky. 650, 112 S. W. 683, 19 L.R.A.(N.S.) 413; Re Davies, 93 Pa. 116, 39 Am. Rep. 729.

Annotation: 43 A.L.R. 68; 19 L.R.A.(N.S.) 414.

[6] Annotation: 19 L.R.A.(N.S.) 416; 2 Am. St. Rep. 860; 45 Am. St. Rep. 78.

[7] Re Lentz, 65 N. J. L. 134, 46 A. 761, 50 L.R.A. 415.

[8] Annotation: 43 A.L.R. 72–75.

[9] Re Evans, 22 Utah, 366, 62 P. 913, 53 L.R.A. 952, 83 Am. St. Rep. 794, judgment vacated on rehearing in 42 Utah, 282, 130 P 217.

If an attorney representing a woman suing for divorce, and having an agreement with her to divide with him any alimony which may be awarded her, obtains an allowance for attorneys' fees and an award for alimony without disclosing such agreement, he is guilty of professional misconduct. Re Carleton, 33 Mont. 431, 84 P. 788, 114 Am. St. Rep. 826.

§ 274. —Solicitation of Business.—An attorney may be suspended or disbarred for the solicitation of employment, either personally or through others,[1] particularly when employment is solicited in personal injury cases.[2] Stat-

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[10] Re Hilton, 48 Utah, 172, 158 P. 691, Ann. Cas. 1918A, 271.
Annotation: 19 L. ed. 214; 45 Am. St. Rep. 81.

[11] Annotation: L.R.A. 1916F, 396; 45 Am. St. Rep. 81.

[12] Re Reid, 45 App. D. C. 240, L.R.A. 1916F, 394.

[13] Re Reid, 45 App. D. C. 240, L.R.A.1916F, 394; Re Macy, 109 Kan. 1, 196 P. 1095, 14 A.L.R. 848.
Annotation: L.R.A.1916F, 396.

An attorney at law who files a pleading charging an opposing attorney with misconduct which would subject him to criminal prosecution and ouster from an office held by him is guilty of such misconduct as shows him to be unfit to practice law, if he knew or should have known that the charge was false. Re Macy, 109 Kan. 1, 196 P. 1095, 14 A.L.R. 848.

An attorney will be disbarred who, by irrelevant affidavit, falsely and without reasonable cause charges his opponent with causing the transfer of the cause from one justice of the court to another for hearing, thereby gaining an unfair advantage and being guilty of unfair practice, and with having colluded with a justice of the court to establish a basis for a claim that there had been a legal adjudication of the question involved therein, when the court was without jurisdiction. Re Reid, 45 App. D. C. 240, L.R.A.1916F, 394.

[14] Annotation: L.R.A.1916F, 398, 399.

[15] Re Macy, 109 Kan. 1, 196 P. 1095, 14 A.L.R. 848; Re Richter, 187 Wis. 490, 204 N. W. 492, 41 A.L.R. 485.
Annotation: 41 A.L.R. 494.

[16] Re Dows, 168 Minn. 6, 209 N. W. 627, 47 A.L.R. 265.
Annotation: 47 A.L.R. 268.

[17] Annotation: 47 A.L.R. 269.

[18] Re Clifton, 33 Idaho, 614, 196 P. 670, 19 A.L.R. 931.

[19] People ex rel. Chicago Bar Asso. v. Baker, 311 Ill. 66, 142 N. E. 554, 31 A.L.R. 737.

Where the court has found that an attorney caused suit to be brought on notes which he knew had been paid, procuring a reputable attorney who did not know of the payment to bring the action and verify the petition, such finding establishes the charge that he was guilty of unprofessional conduct involving moral turpitude. Re Thatcher, 83 Ohio St. 246, 93 N. E. 895, Ann. Cas. 1912A, 810.

[20] People ex rel. Chicago Bar Asso. v. Baker, 311 Ill. 66, 142 N. E. 554, 31 A.L.R. 737.
Annotation: 31 A.L.R. 748.

[1] Lenihan v. Com. 165 Ky. 93, 176 S. W. 948, L.R.A.1917B, 1132; Re Cohen, 261 Mass. 484, 159 N. E. 495, 55 A.L.R. 1309; State ex rel. Mackintosh v. Rossman, 53 Wash. 1, 101 P. 357, 21 L.R.A.(N.S.) 821, 17 Ann. Cas. 625.
Annotation: 55 A.L.R. 1313; L.R.A.1917B, 1131; 17 Ann. Cas. 628; Ann. Cas. 1918E, 133.

An attorney who, knowing of testimony material to a litigant, discloses the same to counsel for such litigant only upon condition that he be employed as associate counsel is guilty of misconduct calling for his disbarment or suspension. Chreste v. Com. 171 Ky. 77, 186 S. W. 99, Ann. Cas. 1918E, 122.

[2] Annotation: 73 A.L.R. 401.

An attorney may be suspended for securing business by calling upon an injured infant, and, upon refusal of its parents to bring action for the injury, asking permission to take it to have the wound examined, and, while having it in his possession, se-utes have been held valid which declare that an attorney who seeks or obtains employment in any action, suit, or case by means of solicitation either personally or through others shall be disbarred, even though such statutes are limited in their application to personal injury cases.[3] Some courts recognize a distinction between personal solicitation and the employment of agents and runners to solicit business and stir up litigation, holding the latter act much more reprehensible and calling for disbarment even though the first may not justify such punishment.[4] The fact that an attorney guilty of such improper practice was ignorant of the impropriety of his acts, and ceases therefrom, will usually be held to be ground for leniency on the part of the court in fixing the penalty for his misconduct.[5]

§ 275. —Advertising.—An attorney cannot, without a flagrant violation of the ethics of his profession, advertise his talents or skill as a merchant advertises his wares, and for such practice he may properly be suspended or disbarred.[6] Such disciplinary measures have frequently been taken against attorneys who advertise for divorce litigation, particularly those who advertise their special ability and facilities in the procuring of divorces speedily and without publicity.[7] In many states such practices are expressly prohibited by statute.[8]

§ 276. Misconduct outside Scope of Professional Relation.—The misconduct for which an attorney may be disbarred is not limited to what occurs in the course of his work as a member of the bar.[9] Misconduct outside of his professional dealings may be sufficient to justify his disbarment,[10] when indica-

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curing the appointment of a stranger as guardian, after informing it that neither of its parents could act as such. Lenihan v. Com. 165 Ky. 93, 176 S. W. 948, L.R.A.1917B, 1132.

[3] McCloskey v. Tobin, 252 U. S. 107, 64 L. ed. 481, 40 S. Ct. 306; Kelley v. Judge of Recorder's Ct. (Kelley v. Boyne) 239 Mich. 204, 214 N. W. 316, 53 A.L.R. 273; State v. Rossman, 53 Wash. 1, 101 P. 357, 21 L.R.A. (N.S.) 821, 17 Ann. Cas. 625.

Annotation: 53 A.L.R. 279; 44 L.R.A. (N.S.) 1196.

Such acts are made criminal offenses in some states. People v. Smith, 200 Ill. 442, 66 N. E. 27, 93 Am. St. Rep. 206.

[4] Chreste v. Com. 171 Ky. 77, 186 S. W. 919, Ann. Cas. 1918E, 122.

[5] Smith v. State Bar, 211 Cal. 249, 294 P. 1057, 73 A.L.R. 393; People v. McCabe, 18 Colo. 186, 32 P. 280, 19 L.R.A. 231, 36 Am. St. Rep. 270; Re Schnitzer, 33 Nev. 581, 112 P. 848, 33 L.R.A.(N.S.) 941; Ingersoll v. Coal Creek Coal Co. 117 Tenn. 263, 98 S. W. 178, 9 L.R.A.(N.S.) 282, 119 Am. St. Rep. 1003, 10 Ann. Cas. 829.

Annotation: 18 L.R.A. 401.

[6] People v. McCabe, 18 Colo. 186, 32 P. 280, 19 L.R.A. 231, 36 Am. St. Rep. 270; People v. Smith, 200 Ill. 442, 66 N. E. 27, 93 Am. St. Rep. 206; Re Cohen, 261 Mass. 484, 159 N. E. 495, 55 A.L.R. 1309.

Annotation: 55 A.L.R. 1314; 9 L.R.A. (N.S.) 282; 17 Ann. Cas. 628.

[7] People v. McCabe, 18 Colo. 186, 32 P. 280, 19 L.R.A. 231, 36 Am. St. Rep. 270; People v. Smith, 200 Ill. 442, 66 N. E. 27, 93 Am. St. Rep. 206; Re Cohen, 261 Mass. 484, 159 N. E. 495, 55 A.L.R. 1309; Re Schnitzer, 33 Nev. 581, 112 P. 848, 33 L.R.A.(N.S.) 941; Re Donovan, 43 S. D. 98, 178 N. W. 143, 9 A.L.R. 1497; Ingersoll v. Coal Creek Coal Co. 117 Tenn. 263, 98 S. W. 178, 9 L.R.A.(N.S.) 282, 119 Am. St. Rep. 1003, 10 Ann. Cas. 829; Re Evans, 22 Utah, 366, 62 P. 913, 53 L.R.A. 952, 83 Am. St. Rep. 794.

Annotation: 9 A.L.R. 1500; 55 A.L.R. 1318; 33 L.R.A.(N.S.) 941; Ann. Cas. 1918E, 133.

An attorney guilty of advertising for divorce business will be suspended from practice even though, because of his general character and the difficulty of taking up other business, disbarment would be inadvisable. Re Donovan, 43 S. D. 98, 178 N. W. 143, 9 A.L.R. 1497.

For an attorney to send news items to the public press concerning divorce cases in which he is mentioned as attorney and referred to by name as an expert on marriage, which are subsequently compiled in a booklet for distribution, is clearly unprofessional and dishonorable conduct. Ibid.

Publishing advertisements in other states, for the purpose of attracting their citizens to the state for the purpose of instituting divorce proceedings in its courts and giving employment to the attorney will furnish grounds for suspension or disbarment. Re Schnitzer, 33 Nev. 581, 112 P. 848, 33 L.R.A. (N.S.) 941.

[8] Annotation: Ann. Cas. 1916A, 904.

[9] Wolfe's Disbarment, 288 Pa. 331, 135 A. 732, 50 A.L.R. 380.

[10] Bartos v. United States Dist. Ct. (C. C. A. 8th) 19 F. (2d) 722, citing R. C. L.; Re Durant, 80 Conn. 140, 67 A. 497, 10 Ann. Cas. 539; Com. v. Roe, 129 Ky. 650, 112 S. W. 683, 19 L.R.A.(N.S.) 413; People ex rel. Chicago Bar Asso. v. Meyerovitz, 278 Ill. 356, 116 N. E. 189, citing R. C. L.; Nelson v.

tive of moral unfitness for the profession.[11] It is not necessary that the wrongful acts for which an attorney may be disbarred shall be indictable.[12] Accordingly, an attorney may be disbarred or suspended for moral delinquency while fulfilling a position of trust,[13] as where he converts or otherwise misappropriates money intrusted to him otherwise than in his professional capacity as attorney.[14] Deceit practiced to procure the passage of legislation in which the attorney is interested[15] and various other acts[16] are held sufficient to justify disbarment or suspension from office.

§ 277. —**Personal Vices Not Affecting Integrity.**—Indulgence of vices affecting to some extent the moral character, but not personal or professional integrity, has usually been held not a sufficient ground for disbarment.[17] Thus, personal vices, such as bad manners, bad language,[18] and sexual immorality,[19] especially if several years have elapsed since the offense occurred during which the attorney has lived an exemplary life,[20] and other acts of a more or less reprehensible nature which do not amount to a crime have generally been held insufficient as a ground for suspension or disbarment.[1] In other words, merely discreditable conduct as an individual, outside of his profession, will not furnish ground for the exercise of the summary jurisdiction of the court.[2] Nor will an attorney be disbarred because he lent money at a usurious rate of interest, there being no circumstances of hardship or oppression,[3] or because he, being also the editor of a newspaper, published in

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Com. 128 Ky. 779, 109 S. W. 337, 16 L.R.A. (N.S.) 272; Dickens' Case, 67 Pa. 169, 5 Am. Rep. 420; Re Burton, 67 Utah, 118, 246 P. 188, citing R. C. L.; Norfolk & P. Bar Asso. v. Drewry, 161 Va. 833, 172 S. E. 282, citing R. C. L.; Re Stolen, 193 Wis. 602, 214 N. W. 379, 216 N. W. 127, 55 A.L.R. 1355.
Annotation: 45 Am. St. Rep. 74.

[11] State v. Peck, 88 Conn. 447, 91 A. 274, L.R.A.1915A, 663, Ann. Cas. 1917B, 227; People v. Appleton, 105 Ill. 474, 44 Am. Rep. 812; Re Cary, 146 Minn. 80, 177 N. W. 801, 9 A.L.R. 1272; Re Ebbs, 150 N. C. 44, 63 S. E. 190; 19 L.R.A.(N.S.) 892, 19 Ann. Cas. 592; Ex parte Steinman, 95 Pa. 220, 40 Am. Rep. 637; Krickau v. Williams, 36 R. I. 85, 89 A. 152, Ann. Cas. 1916C, 1145.

Annotation: 9 A.L.R. 190, s. 43 A.L.R. 108, and 55 A.L.R. 1374; 2 Am. St. Rep. 850.

Fraudulent conduct or unfair dealing by an attorney, in a transaction not directly connected with any professional employment and not operating to defraud a client or to deceive the court, is nevertheless ground for suspension or disbarment where it involves such moral delinquency as to show the attorney to be wanting in integrity. People ex rel. Healy v. Macauley, 230 Ill. 208, 82 N. E. 612, 120 Am. St. Rep. 287.

[12] Wolfe's Disbarment, 288 Pa. 331, 135 A. 732, 50 A.L.R. 380.

[13] Delano's Case, 58 N. H. 5, 42 Am. Rep. 555.

Annotation: 9 A.L.R. 193, s. 43 A.L.R. 108, and 55 A.L.R. 1374; 17 Ann. Cas. 692; Ann. Cas. 1917B, 236.

A contrary view was formerly taken in People ex rel. Hughes v. Appleton, 105 Ill. 474, 44 Am. Rep. 812, but this case has since been overruled. See annotation: 9 A.L.R. 194.

[14] Re Wilson, 79 Kan. 674, 100 P. 635, 21 L.R.A.(N.S.) 517, 17 Ann. Cas. 690.
Annotation: 43 A.L.R. 77.

[15] Marshall v. Baltimore & O. R. Co. 16 How. (U. S.) 314, 14 L. ed. 953; Re Cary, 146 Minn. 80, 177 N. W. 801, 9 A.L.R. 1272.
Annotation: 9 A.L.R. 1277.

[16] Annotation: 9 A.L.R. 204, s. 43 A.L.R. 112, and 55 A.L.R. 1375.

[17] Annotation: 2 Am. St. Rep. 850–857; 40 Am. Rep. 642.

[18] Annotation: 9 A.L.R. 203, s. 43 A.L.R. 111, and 55 A.L.R. 1375.

[19] People ex rel. Black v. Smith, 290 Ill. 241, 124 N. E. 807, 9 A.L.R. 183.
Annotation: 9 A.L.R. 202, s. 43 A.L.R. 111, and 55 A.L.R. 1375.

Such evidence, however, may be considered in connection with other evidence in the case in determining whether the attorney is a fit and proper person to hold a license to practice law. People ex rel. Black v. Smith, 290 Ill. 241, 124 N. E. 807, 9 A.L.R. 183.

[20] Re Sherin, 27 S. D. 232, 130 N. W. 761, 40 L.R.A.(N.S.) 801, Ann. Cas. 1913D, 446, modified on rehearing in 28 S. D. 420, 133 N. W. 701, 40 L.R.A.(N.S.) 812.

[1] Annotation: 9 A.L.R. 205, s. 43 A.L.R. 114, and 55 A.L.R. 1375.

[2] Annotation: 42 Am. Rep. 557.

Participation in making pretended gifts as a means of giving notoriety to an exhibition innocent in itself is not a ground for disbarment. Dickens's Case, 67 Pa. 169, 5 Am. Rep. 420.

[3] People ex rel. Chicago Bar Asso. v. Wheeler, 259 Ill. 99, 102 N. E. 188, 45 L.R.A. (N.S.) 1202, Ann. Cas. 1914C, 286.
Annotation: Ann. Cas. 1914C, 287.

it a libelous article charging a judge with prostituting the machinery of justice to serve party purposes in a certain case.[4]

§ 278. **—Misconduct in Official Capacity.**—It is a generally recognized rule that an attorney may be suspended or disbarred for misconduct unconnected with his professional duties while acting in an official capacity.[5] Thus, conduct of an attorney in the exercise of a judicial office clearly revealing moral delinquency,[6] such as an unwarranted criticism by a trial judge of the action of the reviewing court in reversing a decision of the trial judge,[7] or other conduct by a judge of an illegal or unconstitutional nature;[8] the making of a false jurat or acknowledgment while acting as notary public or commissioner of deeds;[9] wilful disregard of his duties or gross negligence in their performance as a justice of the peace;[10] the misappropriation of funds held as tax collector;[11] the failure to prosecute criminal offenses, giving active encouragement of violations of the law;[12] acting as counsel for persons whom he is required to prosecute, using his office to further his private practice,[13] and other acts against good morals and in violation of his oath of office while serving as prosecuting attorney are sufficient to justify disbarment or suspension from practice.[14] The acceptance as a campaign contribution of money by an attorney acting as a prosecuting officer, knowing that such money was intended to influence him in the performance of his public duties, is a wilful violation of his duties as an attorney at law and a ground for disbarment.[15]

§ 279. **Commission or Conviction of Crime.**—The commission of an intentional and wilful criminal act indicates an unfitness to be intrusted with the administration of the law, although not every criminal act will justify a disbarment,[16] especially where the act is one that may be committed without involving bad moral character with respect to the duties of the attorney's profession, or where he commits some discreditable act,[17] or where, notwithstanding the commission of some discreditable act, it may be fairly inferred that the attorney's moral character is not such as will lead him to an abuse of the privileges of his profession or a disregard of his duties either to the court or his client.[18] Generally speaking, however, the conviction of any offense which the law characterizes as infamous establishes prima facie the unfitness of the attorney to be continued on the rolls and must be accepted as sufficient cause of disbarment.[19] So also, an attorney convicted of a misdemeanor which imports fraud or dishonesty will be struck off the rolls.[20] It is within the power of the legislature to require the disbarment of an attorney who is convicted of a felony or misdemeanor which involves moral turpitude, and in many states there are statutes of this kind.[1] The moral turpitude referred to in such statutes consists of an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.[2] The commission of perjury,[3] forgery,[4] extortion,[5] bribery,[6] violations of the liquor law,[7] especially if the offense is repeated,[8] larceny, even petit larceny,[9] and acceptance of stolen property are all held to be offenses involving moral turpitude, within the meaning of such statutes,[10] or at least they constitute such evidence of moral delinquency as to justify the disbarment or suspension of an attorney guilty thereof. Nor is such a statute repealed by a subsequent one authorizing an attorney's disbarment for cause shown, although one section of the latter statute provides that when he is charged with embezzlement or other professional misconduct, he shall be ordered to show cause why he shall not be disbarred and the matter shall be referred to a committee for hearing.[11]

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[4] Ex parte Steinman, 95 Pa. 220, 40 Am. Rep. 637.

[5] Re Cowdery, 69 Cal. 32, 10 P. 47, 58 Am. Rep. 545; State v. Peck, 88 Conn. 447, 91 A. 274, L.R.A.1915A, 663, Ann. Cas. 1917B, 227; Re Breen, 30 Nev. 164, 93 P. 997, 17 L.R.A. (N.S.) 572; Delano's Case, 58 N. H. 5, 42 Am. Rep. 555.

Annotation: L.R.A.1915A, 663; Ann. Cas. 1917B, 232.

[6] State v. Peck, 88 Conn. 447, 91 A. 274, L.R.A.1915A, 663, Ann. Cas. 1917B, 227; Re Rempfer, 51 S. D. 393, 216 N. W. 355, 55 A.L.R. 1346; Re Stolen, 193 Wis. 602, 214 N. W. 379, 216 N. W. 127, 55 A.L.R. 1355.

Annotation: 9 A.L.R. 195, s. 43 A.L.R. 108, and 55 A.L.R. 1374; L.R.A.1915A, 664; Ann. Cas. 1917B, 232.

The charging by a probate judge of a fee for pretended services as an attorney to an estate before him for settlement and his enforcing payment through deception, threat, and the exercise of his authority as presiding judge are sufficient to warrant his disbarment as an attorney at law. State v. Peck, 88 Conn. 447, 91 A. 274, L.R.A. 1915A, 663, Ann. Cas. 1917B, 227.

An attorney who, while county judge, uses his office to exact an illegal fee from one brought before him for violation of the liquor laws, secures an exorbitant fee for another attorney from a person brought before him, appears as attorney for one accused of an offense which may be brought before him as judge, and fails as state's attorney to collect a fine imposed by him as judge, will be disbarred. Re Rempfer, 51 S. D. 393, 216 N. W. 355, 55 A.L.R. 1346.

The obtaining by a judge of a court of record having jurisdiction of liquor cases of a loan from a bootlegger betrays a lack of moral character unfitting him to hold the office of attorney at law, and he may be punished by disbarment as a matter of discipline and for its restraining influence upon others. Re Stolen, 193 Wis. 602, 214 N. W. 379, 216 N. W. 127, 55 A.L.R. 1355.

[7] Re Breen, 30 Nev. 164, 93 P. 997, 17 L.R.A.(N.S.) 572.

[8] Annotation: L.R.A.1915A, 664.

[9] Ex parte Finn, 32 Or. 519, 52 P. 756, 67 Am. St. Rep. 550.

Annotation: 9 A.L.R. 196, s. 43 A.L.R. 108, and 55 A.L.R. 1375; Ann. Cas. 1917B, 236.

[10] Annotation: L.R.A.(N.S.) 1915A, 663.

[11] Re Delano's Case, 58 N. H. 5, 42 Am. Rep. 555.

[12] Annotation: L.R.A.1918A, 1192; Ann. Cas. 1917B, 234.

[13] Annotation: L.R.A.1918F, 833.

In Re Cowdery, 69 Cal. 32, 10 P. 47, 58 Am. Rep. 545, the court held that the fidelity which a city attorney owed to the city and county existed after the expiration of his term of office, so that his acceptance of money from persons interested in consideration of his agreement not to represent the city in pending appeals inaugurated during his term of office was misconduct warranting his suspension for six months.

[14] Re Crum, 55 N. D. 876, 215 N. W. 682, 55 A.L.R. 220.

Annotation: 9 A.L.R. 197, s. 43 A.L.R. 109, and 55 A.L.R. 1375; L.R.A.1915A, 665; L.R.A.1918A, 1192; Ann. Cas. 1917B, 234.

[15] Re Crum, 55 N. D. 876, 215 N. W. 682, 55 A.L.R. 220.

Annotation: 55 A.L.R. 230.

§ 280. —Sabotage, Rioting, Treason, and Disloyalty.—Public advocacy of sabotage and criminal syndicalism as a means of accomplishing social and industrial reform,[12] active participation in unlawful assemblages,[13] lynching or mob violence,[14] and acts of treason, sedition, or disloyalty on the part of an attorney, particularly if they violate a criminal statute, are sufficient grounds for disbarment or suspension,[15] although mere anarchistic beliefs and opinions, unless expressions thereof are uttered under circumstances and in a manner calculated to lead others to violate and disregard existing laws,[16] or unpatriotic conduct and utterances not amounting to treason or to the violation of any statute or of the oaths and duties of an attorney, do not subject him to disbarment.[17]

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[16] Annotation: 45 Am. St. Rep. 77.

[17] Dickens's Case, 67 Pa. 169, 5 Am. Rep. 420.

[18] Annotation: 45 Am. St. Rep. 77.

[19] State ex rel. McLean v. Johnson, 174 N. C. 345, 93 S. E. 847, L.R.A.1918A, 1189; Re Ebbs, 150 N. C. 44, 63 S. E. 190, 19 L.R.A.(N.S.) 892, 17 Ann. Cas. 592; Ex parte Mason, 29 Or. 18, 43 P. 651, 54 Am. St. Rep. 772; Re Kirby, 10 S. D. 322, 73 N. W. 92, 39 L.R.A. 856, on rehearing in 10 S. D 414, 73 N. W. 907, 39 L.R.A. 859.
Annotation: 45 Am. St. Rep. 77.

[20] Ex parte Wall, 107 U. S. 265, 27 L. ed. 552, 2 S. Ct. 569.

[1] Re Collins, 188 Cal. 701, 206 P. 990, 32 A.L.R. 1062; Re Kerl, 32 Idaho, 737, 188 P. 40, 8 A.L.R. 1259; Re Henry, 15 Idaho, 755, 99 P. 1054, 21 L.R.A.(N.S.) 207; Re Ebbs, 150 N. C. 44, 63 S. E. 190, 19 L.R.A.(N.S.) 892, 17 Ann. Cas. 592; Re Saddler, 35 Okla. 510, 130 P. 906, 44 L.R.A.(N.S.) 1195.
Annotation: 32 A.L.R. 1069; L.R.A. 1915C, 565.

[2] Re Henry, 15 Idaho, 755, 99 P. 1054, 21 L.R.A.(N.S.) 207.

[3] Re O'Brien, 95 Vt. 167, 113 A. 527, 14 A.L.R. 859.
Annotation: 9 A.L.R. 200, s. 43 A.L.R. 110, and 55 A.L.R. 1375.

[4] Re Sutton, 50 Mont. 88, 145 P. 6, Ann. Cas. 1917A, 1223.

[5] Re Sherin, 27 S. D. 232, 130 N. W. 761, 40 L.R.A.(N.S.) 801, Ann. Cas. 1913D, 446, modified on rehearing in 28 S. D. 420, 133 N. W. 701, 40 L.R.A.(N.S.) 812.
Annotation: Ann. Cas. 1914C, 288.

[6] Annotation: 9 A.L.R. 1277.

[7] State v. Bieber, 121 Kan. 536, 247 P. 875, 48 A.L.R. 252; State ex rel. McLean v. Johnson, 174 N. C. 345, 93 S. E. 847, L.R.A. 1918A, 1189.
Annotation: 40 A.L.R. 1049, s. 71 A.L.R. 218; L.R.A.1918A, 1192.

[8] State ex rel. McLean v. Johnson, 174 N. C. 345, 93 S. E. 847, L.R.A.1918A, 1189.

[9] Re Henry, 15 Idaho, 755, 99 P. 1054, 21 L.R.A.(N.S.) 207.

[10] Re Kirby, 10 S. D. 322, 73 N. W. 92, 39 L.R.A. 856, on rehearing in 10 S. D. 414, 73 N. W. 907, 39 L.R.A. 859.

[11] Ibid.

§ 281. **—Necessity of Prior Conviction or Prosecution.**—Conviction of an attorney for a crime committed by him is not necessary as a basis for disbarment for committing the acts constituting the crime.[18] In the absence of statutes which are deemed conclusive on the question, the authorities are agreed that where the conduct charged as a ground for disbarring an attorney falls within the sphere of his official duty, the court may proceed summarily against him without awaiting the result of the criminal prosecution,[19] although it may in its discretion do so.[20]

On the other hand, the courts will not, as a general rule, proceed with disbarment proceedings based upon alleged criminal conduct of an attorney not connected with his status as an attorney until a conviction has been had in a criminal proceeding.[1] This rule, however, is not an inflexible one; and where the crime charged affects the moral character of the attorney or indicates a lack of honesty, integrity, and fidelity, the court may proceed with disbarment proceedings before conviction. In other words, the rule is one of propriety and not of power,[2] and its application is determined by the circumstances of the case. If the evidence is conflicting and any doubt of the attorney's guilt exists, no court would assume to proceed summarily, but would leave the case to be determined by a jury. But where the case is clear and the denial is evasive, there is no fixed rule of law to prevent the court from exercising its authority.[3] Again, if the charges involve both official and nonofficial conduct, the court will proceed without awaiting the outcome of the criminal prosecution, at least as to the alleged official conduct.[4]

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[12] Re Smith, 133 Wash. 145, 233 P. 288, 43 A.L.R. 102.

[13] Ex parte Wall, 107 U. S. 265, 27 L. ed. 552, 2 S. Ct. 569; State ex rel. McLaughlin v. Graves, 73 Or. 331, 144 P. 484, L.R.A. 1915C, 259.

Annotation: 9 A.L.R. 201, s. 43 A.L.R. 110, and 55 A.L.R. 1375.

[14] Ex parte Wall, 107 U. S. 265, 27 L. ed. 552, 2 S. Ct. 569; State ex rel. McLaughlin v. Graves, 73 Or. 331, 144 P. 484, L.R.A. 1915C, 259.

Annotation: L.R.A.1915C, 259.

[15] Re Kerl, 32 Idaho, 737, 188 P. 40, 8 A.L.R. 1259; Margolis's Case, 269 Pa. 206, 112 A. 478, 12 A.L.R. 1186.

Annotation: 8 A.L.R. 1262, s. 12 A.L.R. 1189, and 19 A.L.R. 936; 9 A.L.R. 201, s. 43 A.L.R. 110, and 55 A.L.R. 1375.

An attorney should be disbarred who, by his addresses, advises people to prepare and equip themselves to own the industries of the state, aids in circulating publications which have been barred from the mails because of seditious utterances, and attempts to interfere with the working of the conscription law for the raising of an army. Margolis's Case, 269 Pa. 206, 112 A. 478, 12 A.L.R. 1186.

[16] Margolis's Case, 269 Pa. 206, 112 A. 478, 12 A.L.R. 1186.

[17] Re Clifton, 33 Idaho, 614, 196 P. 670, 19 A.L.R. 931.

[18] People ex rel. Black v. Smith, 290 Ill. 241, 124 N. E. 807, 9 A.L.R. 183; State v. Fisher, 103 Neb. 736, 174 N. W. 320, citing R. C. L.; Re O'Brien, 95 Vt. 167, 113 A. 527, 14 A.L.R. 859.

[19] Re Wharton, 114 Cal. 367, 46 P. 172, 55 Am. St. Rep. 72; People ex rel. Black v. Smith, 290 Ill. 241, 124 N. E. 807, 9 A.L.R. 183; Re Thresher, 33 Mont. 441, 84 P. 876, 114 Am. St. Rep. 834, 8 Ann. Cas. 845; State ex rel. McCormick v. Winton, 11 Or. 456, 5 P. 337, 50 Am. Rep. 486; Stone v. Board of Governance, 312 Pa. 576, 168 A. 473, 90 A.L.R. 1109; Re Sherin, 27 S. D. 232, 130 N. W. 761, 40 L.R.A.(N.S.) 801, Ann. Cas. 1913D, 446, modified on rehearing in 28 S. D. 420, 133 N. W. 701, 40 L.R.A.(N.S.) 812.

Annotation: 90 A.L.R. 1111, 1116; 8 Ann. Cas. 847.

[20] Annotation: 90 A.L.R. 1112.

[1] Ex parte Wall, 107 U. S. 265, 27 L. ed. 552, 2 S. Ct. 569; Snyder's Case, 301 Pa. 276, 152 A. 33, 76 A.L.R. 666; Ex parte Steinman, 95 Pa. 220, 40 Am. Rep. 637; Re Sherin, 27 S. D. 232, 130 N. W. 761, 40 L.R.A. (N.S.) 801, Ann. Cas. 1913D, 446, modified on rehearing in 28 S. D. 420, 133 N. W. 701, 40 L.R.A.(N.S.) 812.

Annotation: 90 A.L.R. 1112, 1119; 2 Am. St. Rep. 852; 45 Am. St. Rep. 79, 80; 8 Ann. Cas. 847, 848, 849.

[2] People ex rel. Chicago Bar Asso. v. Meyerovitz, 278 Ill. 356, 116 N. E. 189, citing R. C. L.; People v. Appleton, 105 Ill. 474, 44 Am. Rep. 812; Re Thresher, 33 Mont. 441, 84 P. 876, 114 Am. St. Rep. 834, 8 Ann. Cas. 845; Delano's Case, 58 N. H. 5, 42 Am. Rep. 555; State ex rel. Joseph v. Mannix, 133 Or. 329, 288 P. 507, 290 P. 745, citing R. C. L.; State v. Winton, 11 Or. 456, 5 P. 337, 50 Am. Rep. 486; Stone v. Board of Governance, 312 Pa. 576, 168 A. 473, 90 A.L.R. 1109; Re Sherin, 27 S. D. 232, 130 N. W. 761, 40 L.R.A.(N.S.) 801, Ann. Cas. 1913D, 446, modified on rehearing in 28 S.

In some jurisdictions the question has been settled by statutes expressly requiring a confession of crime in open court or a prior conviction upon an indictment and verdict before an attorney can be disbarred for an offense disconnected with the professional or official duties of an attorney.[5] Such statutes are constitutional.[6] However, a statute providing for the disbarment of an attorney by means of a civil suit for acts for which, when committed, he could have been disbarred only after trial and conviction in a criminal court violates the inhibition in the Federal Constitution against the passage of bills of attainder and ex post facto laws.[7]

§ 282. —Effect of Pending Prosecution.—In determining the effect of a pending criminal charge upon proceedings for disbarment based upon the same offense, the cases usually distinguish between offenses committed by the attorney as an individual and those committed by him as an attorney; the general rule is that when the offense for which a criminal charge is pending was committed by the attorney in his private character, disbarment proceedings for the same misconduct should await termination of the criminal charges,[8] whereas if the criminal charge falls within the sphere of his official duty, the pendency thereof is no objection to disbarment proceedings.[9] Clearly, proceedings to disbar an attorney for use of false evidence in a case should not be stayed to await the result of a criminal proceeding for perjury in connection with testimony given by him in another proceeding.[10]

The effect of a conviction of felony as a ground for disbarring an attorney is not annulled by the pendency of proceedings to review the conviction.[11] Even if the statute requires a conviction, it is held that there may be a disbarment, though an appeal from the judgment of conviction is pending, where the statute provides for reinstatement in case of a reversal.[12]

§ 283. —Effect of Failure to Indict, Nol. Pros., or Acquittal. — In the absence of a statutory provision requiring a conviction of a crime as a con-

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D. 420, 133 N. W. 761, 40 L.R.A.(N.S.) 812; Re O'Brien, 95 Vt. 167, 113 A. 527, 14 A.L.R. 859.

Annotation: 90 A.L.R. 1113, 1119; 2 Am. St. Rep. 853; 45 Am. St. Rep. 80.

[3] Ex parte Wall, 107 U. S. 265, 27 L. ed. 552, 2 S. Ct. 569.

Annotation: 2 Am. St. Rep. 853.

[4] Stone v. Board of Governance, 312 Pa. 576, 168 A. 473, 90 A.L.R. 1109.

Annotation: 90 A.L.R. 1123.

[5] Re Ebbs, 150 N. C. 44, 63 S. E. 190, 19 L.R.A.(N.S.) 892, 17 Ann. Cas. 592; Re Saddler, 35 Okla. 510, 130 P. 906, 44 L.R.A.(N.S.) 1195.

Annotation: 90 A.L.R. 1115; 19 L.R.A. (N.S.) 418; 2 Am. St. Rep. 849; 8 Ann. Cas. 848.

[6] Re Saddler, 35 Okla. 510, 130 P. 906, 44 L.R.A.(N.S.) 1195.

Annotation: 44 L.R.A.(N.S.) 1195.

[7] Annotation: 32 A.L.R. 1069; 44 L.R.A. (N.S.) 1196.

[8] Annotation: 76 A.L.R. 674.

While criminal proceedings instituted against an attorney are not a bar to disbarment proceedings based on the same charges, the latter should not be forced to a conclusion while the criminal proceedings are pending. Snyder's Case, 301 Pa. 276, 152 A. 33, 76 A.L.R. 666.

[9] State Bar Commission ex rel. Williams v. Sullivan, 35 Okla. 745, 131 P. 703, L.R.A. 1915D, 1218.

Annotation: 76 A.L.R. 675.

[10] Re O'Brien, 95 Vt. 167, 113 A. 527, 14 A.L.R. 859.

[11] Re Kirby, 10 S. D. 322, 73 N. W. 92, 39 L.R.A. 856, on rehearing in 10 S. D. 414, 73 N. W. 907, 39 L.R.A. 859.

[12] Re Minner, 133 Kan. 789, 3 P. (2d) 473, 79 A.L.R. 35.

dition precedent to disbarment therefor, the refusal of a grand jury to find an indictment for the same criminal misconduct charged in disbarment proceedings,[13] the dismissal or a nol. pros. of the prosecution based upon an indictment found for such misconduct,[14] or even the acquittal of an attorney of the criminal charge upon which disbarment proceedings are based,[15] constitutes no defense to the disbarment proceedings where the misconduct charged falls within the sphere of the attorney's official duties, and shows his unfitness to be intrusted with the powers and obligations of his profession.[16]

§ 284. **—Effect of Pardon.**—With regard to the effect of a pardon on the right of a court to disbar an attorney for conviction of a crime, the authorities are not in harmony,[17] although to some extent this difference of opinion arises from the nature of the charges on which the proceedings to disbar are based. It is the generally accepted view that a pardon will not operate as a bar to disbarment proceedings based upon the criminal misconduct for which the attorney was convicted, where that misconduct was connected with the attorney's professional capacity or employment, evidences moral turpitude, or indicates lack of good moral character and unfitness for the profession,[18] at least where evidence of good moral character is held necessary to an attorney's license.[19] This is clearly the rule where the pardon is a conditional one.[20] A pardon granted in one state to an attorney for a conviction therein for an infamous crime involving moral turpitude and lack of professional integrity is not a defense to a proceeding to disbar him in another state.[1] Some courts take the ground that an attorney may be disbarred if his acts subsequent to the pardon show that he has not reformed and is morally unfit to be an officer of the court;[2] other courts, however, hold a pardon to be a good defense to disbarment proceedings,[3] particularly where the proceedings are founded on, and depend alone on, a statute making the fact of conviction a ground for disbarment.[4] Even where a pardon is not available to prevent a disbarment, if the attorney denies the allegations that he has been guilty of gross or other professional misconduct, admits that he was tried and convicted as charged, and avers that he was not guilty, that he did not receive a fair trial, and that because of his innocence and improper conviction, he was granted a full and free pardon, he will be allowed to offer proof in his defense.[5]

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[13] Re O'Brien, 95 Vt. 167, 113 A. 527, 14 A.L.R. 859.

[14] State Bar Commission ex rel. Williams v. Sullivan, 35 Okla. 745, 131 P. 703, L.R.A. 1915D, 1218; Wolfe's Disbarment, 288 Pa. 331, 135 A. 732, 50 A.L.R. 380; Re O'Brien, 95 Vt. 167, 113 A. 527, 14 A.L.R. 859.

Where criminal proceedings are taken by a client against his attorney for embezzlement of the client's funds, and upon his complaint proceedings are also taken to disbar the attorney, the fact that a settlement is made, and the client consents to the entry of a nol. pros., does not prevent the disbarring of the attorney. Re Davies, 93 Pa. 116, 39 Am. Rep. 729.

[15] People v. Thomas, 36 Colo. 126, 91 P. 36, 10 Ann. Cas. 886; Barach's Case, 279 Pa. 89, 123 A. 727, citing R. C. L.; Snyder's Case, 301 Pa. 276, 152 A. 33, 76 A.L.R. 666; Re O'Brien, 95 Vt. 167, 113 A. 527, 14 A.L.R. 859.

Annotation: 90 A.L.R. 1112; 10 Ann. Cas. 887.

[16] Wolfe's Disbarment, 288 Pa. 331, 135 A. 732, 50 A.L.R. 380.

[17] Annotation: 50 A.L.R. 384; Ann. Cas. 1917A, 1226.

[18] People ex rel. Bar Asso. v. Burton, 39 Colo. 164, 88 P. 1063, 121 Am. St. Rep. 165; People ex rel. Deneen v. Gilmore, 214 Ill. 569, 73 N. E. 737, 69 L.R.A. 701; Nelson v. Com. 128 Ky. 779, 109 S. W. 337, 16 L.R.A. (N.S.) 272; Wolfe's Disbarment, 288 Pa. 331, 135 A. 732, 50 A.L.R. 380; Re Davies, 93 Pa. 116, 39 Am. Rep. 729.

Annotation: 50 A.L.R. 385; Ann. Cas. 1917A, 1226.

[19] Nelson v. Com. 128 Ky. 779, 109 S. W. 337, 16 L.R.A.(N.S.) 272.

[20] Re Sutton, 50 Mont. 88, 145 P. 6, Ann. Cas. 1917A, 1223; State ex rel. McLean v. Johnson, 174 N. C. 345, 93 S. E. 847, L.R.A. 1918A, 1189.

[1] People ex rel. Bar Asso. v. Burton, 39 Colo. 164, 88 P. 1063, 121 Am. St. Rep. 165; People ex rel. Deneen v. Gilmore, 214 Ill. 569, 73 N. E. 737, 69 L.R.A. 701.

[2] Annotation: 50 A.L.R. 385; 16 L.R.A. (N.S.) 272, 273.

[3] Annotation: 50 A.L.R. 384; 16 L.R.A. (N.S.) 272; Ann. Cas. 1917A, 1226.

In Ex parte Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366, the petitioner, who had been a member of the so-called Confederate Congress during the secession of the South, but had been pardoned by the President of the United States, applied for a license to practice law in the United States courts without first taking an oath to the effect that he had never voluntarily given aid to any government hostile to the United States, etc., as required by statute. It was held, by a divided court, that to exclude petitioner from the practice of law for that offense would be to enforce a punishment for the offense, notwithstanding the pardon.

§ 285. **Acts or Convictions in Other Jurisdictions.**—An attorney may be disbarred for acts committed in another jurisdiction.[6] A state court may disbar an attorney for an act committed with respect to proceedings in a Federal court,[7] and conversely a Federal court may disbar an attorney for offenses against a state court, as, for instance, where an attorney participated with a mob in taking a prisoner from the custody of state officers and lynching him.[8] It is, moreover, the generally accepted rule that statutes providing for the disbarment of attorneys on conviction of a felony include convictions had in courts of other states or of the United States.[9] Some statutes, however, requiring disbarment of an attorney who is convicted of a crime have been construed not to require disbarment because of a crime in another state.[10]

C. PROCEDURE

§ 286. **Generally.**—The manner in which disbarment proceedings shall be conducted is matter of judicial regulation.[11] The character and scope of the investigation to be made must depend upon the character of the acts of misconduct and wrong relied upon, of the place of their commission, and the nature of the proof relied upon to establish their existence.[12] The charge must generally be made to the court in which the attorney practices, although in some states it may be exhibited to a judge out of court, if the attorney has notice and is properly cited to appear.[13] A judge should decline to sit in a case involving personal animosity between himself and the attorney,[14] and it has been held that a change of venue, or a trial before a judge pro tem., will be granted an attorney in proceedings to disbar him, where it is shown that the regular judge entertains a prejudice against him.[15] But the mere fact that a judge is a member of a bar association does not disqualify him to sit in disbarment proceedings instituted by such association.[16]

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[4] Annotation: Ann. Cas. 1917A, 1226.

The rule that an attorney cannot be disbarred for an offense for which he has been pardoned, is confined to those cases where disbarment is a part of the penalty for the offense, and the courts have no inherent power to disbar except for a conviction of the offense. Nelson v. Com. 128 Ky. 779, 109 S. W. 337, 16 L.R.A.(N.S.) 272.

[5] People ex rel. Bar Asso. v. Burton, 39 Colo. 164, 88 P. 1063, 121 Am. St. Rep. 165.

[6] People ex rel. Healy v. Macauley, 230 Ill. 208, 82 N. E. 612, 120 Am. St. Rep. 287; People ex rel. Deneen v. Gilmore, 214 Ill. 569, 73 N. E. 737, 69 L.R.A. 701.

Annotation: 19 L.R.A.(N.S.) 892; 17 Ann. Cas. 599.

The power to disbar on such grounds has been held to have been properly exercised in the case of an attorney guilty of offenses committed in other states in pursuance of a scheme to defraud a person wrongfully held as a prisoner under state laws for fighting a duel in another state, for acting in concert with negroes in a foreign country in an attack upon white people, etc. Annotation: 17 Ann. Cas. 599.

[7] Annotation: 17 Ann. Cas. 600.

[8] Annotation: 17 Ann. Cas. 601.

[9] Re Kerl, 32 Idaho, 737, 188 P. 40, 8 A.L.R. 1259; Re Minner, 133 Kan. 789, 3 P. (2d) 473, 79 A.L.R. 35; Re Kirby, 10 S. D. 322, 73 N. W. 92, 39 L.R.A. 856, rehearing in 10 S. D. 414, 73 N. W. 907, 39 L.R.A. 859.

Annotation: 79 A.L.R. 38.

The legislature may provide that the conviction of an attorney in any jurisdiction of a felony or misdemeanor involving moral turpitude, whether his acts are so designated by local laws or not, shall be sufficient cause for revoking his license. Re Kerl, 32 Idaho, 737, 188 P. 40, 8 A.L.R. 1259.

[10] Re Ebbs, 150 N. C. 44, 63 S. E. 190, 19 L.R.A.(N.S.) 892, 17 Ann. Cas. 592.

[11] Randall v. Brigham, 7 Wall. (U. S.) 523, 19 L. ed. 285.

[12] Selling v. Radford, 243 U. S. 46, 61 L. ed. 585, 37 S. Ct. 377, Ann. Cas. 1917D, 569.

[13] Annotation: 2 Am. St. Rep. 860; 5 Ann. Cas. 992.

[14] Snyder's Case, 301 Pa. 276, 152 A. 33, 76 A.L.R. 666.

[15] Annotation: 2 Am. St. Rep. 860; 95 Am. Dec. 343.

§ 287. Nature of Proceeding.—The action of a court in exercising its power to declare a forfeiture of the privilege or franchise of an attorney is judicial in character, but the inquiry made is in the nature of an investigation by the court into the conduct of one of its own officers, and is not the trial of an action or suit, the order entered being but an exercise of the disciplinary jurisdiction which a court has over its officers.[17] It is quite generally held that the proceeding is not a criminal proceeding, but is a proceeding civil in its nature,[18] and is governed by the rules applicable to all civil actions.[19] Some courts, however, regard disbarment proceedings as being criminal or at least quasi criminal,[20] and hold that provisions of statutes for disbarment of attorneys are penal in their nature and to be strictly construed.[21] Still others hold that the proceeding is neither a civil action nor a criminal proceeding, but rather, is a proceeding sui generis.[1]

§ 288. Time within Which Proceedings Must Be Instituted.—The ordinary statutes of limitation have no application to disbarment proceedings,[2] nor does the circumstance that the facts set up as a ground for disbarment constitute a crime, prosecution for which in a criminal proceeding is barred by limitations, affect the disbarment proceeding,[3] except where conviction of the crime for which the revocation of the attorney's license is asked is a necessary prerequisite.[4] However, proceedings instituted after a great lapse of time from the commission of the act complained of are regarded with disfavor,[5] and the court may refuse to hear an application to disbar that has been unreasonably delayed.[6] In some jurisdictions express statutory provision is made as to the time within which disbarment or suspension proceedings must be instituted.[7] Such a limitation may be made even though the inherent power of the court to disbar cannot be defeated by legislative action.[8] Such statutes are usually given a prospective construction and take effect and become operative on the date of their passage.[9] Such a statute does not, however, bar a proceeding based upon an act of misconduct which set into operation a force which was still continuing at the time the proceeding was brought.[10]

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[16] Ex parte State Bar Asso. 92 Ala. 113, 8 So. 768, 12 L.R.A. 134; Bar Asso. v. Casey, 211 Mass. 187, 97 N. E. 751, 39 L.R.A.(N.S.) 116, Ann. Cas. 1913A, 1226.

Annotation: 39 L.R.A.(N.S.) 116; Ann. Cas. 1913A, 1229.

[17] Re Durant, 80 Conn. 140, 67 A. 497, 10 Ann. Cas. 539.

A disbarment proceeding is in the interest of the public, and not primarily in the interest of the legal profession. Hyatt v. Hamilton County, 121 Iowa, 292, 96 N. W. 855, 63 L.R.A. 614, 100 Am. St. Rep. 354.

Such proceedings involve no private interest save that of the attorney and afford no redress for private grievance, but are undertaken and prosecuted solely for the public welfare. Re Keenan, 287 Mass. 577, 192 N. E. 65, 96 A.L.R. 679.

[18] Ex parte Wall, 107 U. S. 265, 27 L. ed. 552, 2 S. Ct. 569; Randall v. Brigham, 7 Wall. (U. S.) 523, 19 L. ed. 285 (Massachusetts rule); Wernimont v. State, 101 Ark. 210, 142 S. W. 194, Ann. Cas. 1913D, 1156; Gould v. State, 99 Fla. 662, 127 So. 309, 69 A.L.R. 699; State v. McRae, 49 Fla. 389, 38 So. 605, 6 Ann. Cas. 580; Keithley v. Stevens, 238 Ill. 199, 87 N. E. 375, 128 Am. St. Rep. 120; State v. Mosher, 128 Iowa, 82, 103 N. W. 105, 5 Ann. Cas. 984; Lenihan v. Com. 165 Ky. 93, 176 S. W. 948, L.R.A.1917B, 1132; Re Craven, 178 La. 372, 151 So. 625, 90 A.L.R. 973; Re Thresher, 33 Mont. 441, 84 P. 876, 114 Am. St. Rep. 834, 8 Ann. Cas. 845; Re Ebbs, 150 N. C. 44, 63 S. E. 190, 19 L.R.A.(N.S.) 892, 17 Ann. Cas. 592; State Bar Commission ex rel. Williams v. Sullivan, 35 Okla. 745, 131 P. 703, L.R.A.1915D, 1218; Re Biggers, 24 Okla. 842, 104 P. 1083, 25 L.R.A.(N.S.) 622; Re Morrison, 43 S. D. 185, 178 N. W. 732, citing R. C. L.; Re Kirby, 10 S. D. 322, 73 N. W. 92, 39 L.R.A. 856, rehearing in 10 S. D. 414, 73 N. W. 907, 39 L.R.A. 859; Re Evans, 22 Utah, 366, 62 P. 913, 83 Am. St. Rep. 794, 53 L.R.A. 952; State v. Rossman, 53 Wash. 1, 101 P. 357, 21 L.R.A.(N.S.) 821, 17 Ann. Cas. 625; Hall v. Eary, 114 W. Va. 82, 170 S. E. 904, citing R. C. L.

[19] Wernimont v. State, 101 Ark. 210, 142 S. W. 194, Ann. Cas. 1913D, 1156.

[20] Middlebrook v. State, 43 Conn. 257, 21 Am. Rep. 650; Lenihan v. Com. 165 Ky. 93, 176 S. W. 948, L.R.A.1917B, 1132.

Annotation: 19 L. ed. 214; 2 Am. St. Rep. 848.

[21] Annotation: 95 Am. Dec. 335.

[1] State v. Peck, 88 Conn. 447, 91 A. 274, L.R.A.1915A, 663, Ann. Cas. 1917B, 227.

A proceeding before a state bar board, under a statute providing that the highest court, after charges are brought to its attention, may, in its discretion, refer them to the board for investigation and, after the board reports back, direct proceedings in disbarment to be instituted, is not public in its nature. McCurdy v. Hughes, 63 N. D. 435, 248 N. W. 512, 87 A.L.R. 683.

[2] State Bar Commission ex rel. Williams v. Sullivan, 35 Okla. 745, 131 P. 703, L.R.A. 1915D, 1218; Re Egan, 36 S. D. 228, 154 N. W. 521, citing R. C. L.

Annotation: 45 A.L.R. 1111; 11 L.R.A. (N.S.) 557, s. L.R.A.1915D, 1218.

[3] Annotation: 45 A.L.R. 1111; 11 L.R.A. (N.S.) 557, s. L.R.A.1915D, 1218.

[4] Annotation: 11 L.R.A.(N.S.) 558, s. L.R.A.1915D, 1218.

§ 289. Notice and Opportunity to Be Heard.—Except where the matters constituting the ground of its action occur in open court in the presence of its judges, the power of the court to disbar or suspend an attorney should not be exercised without notice to the offending party of the grounds of complaint against him and without a hearing affording him ample opportunity of explanation and defense.[11] Some courts hold that the attorney should be heard even where the offense was committed in open court.[12] Thus, it has been held that when an attorney at law, charged with a criminal contempt of court, is tried upon such charge and found guilty, the court has no authority to suspend or disbar him from practice as a punishment for the contempt, as the accused must first be accorded a trial under the safeguards governing disbarment proceedings.[13] On the other hand, it is held that an attorney is not unconstitutionally deprived of his rights by striking his name from the roll, without further hearing, upon his conviction of a crime involving moral turpitude, since he had his day in court when he was put on trial for the crime;[14] particularly is the attorney not entitled to notice by citation or other process when the record of conviction is, by statute, made conclusive evidence against him.[15]

Usually when a proper case is presented by charges made against the attorney,[16] the court will grant a rule to show cause why the attorney's name should not be struck from the roll, which rule is served and returned,[17] and the case heard and determined.[18] In some instances a rule to show cause or a summons to answer may be a sufficient commencement of the proceeding.[19] It is not ordinarily regular to grant a rule to show cause why an attorney should not be stricken from the roll without an affidavit charging the facts against him, and proper service thereof; if, however, the alleged wrongful act is done in the actual presence and knowledge of the judge, he may proceed of his own motion to grant a rule to show cause.[20] Where personal service cannot be had, as in the case of an attorney residing outside the state, jurisdiction in disbarment proceedings may be obtained by substituted or constructive service.[1]

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[5] Annotation: L.R.A.1915D, 1218; 2 Am. St. Rep. 860.

[6] Annotation: 45 A.L.R. 1111; 2 Am. St. Rep. 860.

[7] Re Cherry, 166 Minn. 448, 208 N. W. 197, 45 A.L.R. 1108.

Annotation: 45 A.L.R. 1111.

[8] Annotation: 45 A.L.R. 1112.

The suggestion in State Bar Commission ex rel. Williams v. Sullivan, 35 Okla. 745, 131 P. 703, L.R.A.1915D, 1218, that a limitation upon the time for instituting suit would infringe the inherent power of the court to disbar has been repudiated by a later decision. Annotation: 45 A.L.R. 1112.

[9] Re Mosher, 24 Okla. 61, 102 P. 705, 24 L.R.A.(N.S.) 530, 20 Ann. Cas. 209 (one year after commission of act charged).

Annotation: L.R.A.1915D, 1218.

[10] Re Cherry, 166 Minn. 448, 208 N. W. 197, 45 A.L.R. 1108.

[11] Ex parte Robinson, 19 Wall. (U. S.) 513, note, 22 L. ed. 205; Bradley v. Fisher, 13 Wall. (U. S.) 335, 20 L. ed. 646; Randall v. Brigham, 7 Wall. (U. S.) 523, 19 L. ed. 285; Ex parte Bradley, 7 Wall. (U. S.) 364, 19 L. ed. 214; Ex parte Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366; People v. Turner, 1 Cal. 143, 52 Am. Dec. 295; State v. Peck, 88 Conn. 447, 91 A. 274, L.R.A.1915A, 663, Ann. Cas. 1917B, 227; Re Durant, 80 Conn. 140, 67 A. 497, 10 Ann. Cas. 539; Re Keenan, 287 Mass. 577, 192 N. E. 65, 96 A.L.R. 679; Warren v. Connolly, 165 Mich. 274, 130 N. W. 637, 33 L.R.A.(N.S.) 314; Re Hahn, 85 N. J. Eq. 510, 96 A. 589, Ann. Cas. 1918B, 830; People ex rel. Karlin v. Culkin, 248 N. Y. 465, 162 N. E. 487, 60 A.L.R. 851; Re Eldridge, 82 N. Y. 161, 37 Am. Rep. 558; State v. Root, 5 N. D. 487, 67 N. W. 590, 57 Am. St. Rep. 568; Ex parte Steinman, 95 Pa. 220, 40 Am. Rep. 637; Re Davies, 93 Pa. 121, 39 Am. Rep. 729; State ex rel. Lewis County Bar Asso. v. Willis, 95 Wash. 251, 163 P. 737, citing R. C. L.

Annotation: 19 L. ed. 214, 2 Am. St. Rep. 859.

Special notice to an attorney is not necessary before the rendition of a judgment disbarring him. Star Bar Commission ex rel. Williams v. Sullivan, 35 Okla. 745, 131 P. 703, L.R.A.1915D, 1218.

[12] Annotation: 19 L. ed. 214.

[13] People ex rel. Beattie v. Kavanagh, 220 Ill. 49, 77 N. E. 107, 110 Am. St. Rep. 223; State v. Root, 5 N. D. 487, 67 N. W. 590, 57 Am. St. Rep. 568.

[14] Re Collins, 188 Cal. 701, 206 P. 990, 32 A.L.R. 1062.

[15] Re Sutton, 50 Mont. 88, 145 P. 6, Ann Cas. 1917A, 1223.

§ 290. In Whose Name and by Whom Proceeding Instituted.—Generally speaking, disbarment proceedings may be instituted by any person or persons interested—as, for instance, by a client injured by the attorney's act,[2] by the commonwealth's attorney,[3] by a bar association or its committee,[4] or by attorneys not constituting such committee.[5] It also is the right and duty of the court, upon its own initiative, to institute proceedings for the suspension or disbarment of an attorney when it appears that the attorney is unworthy to continue as an officer of the court,[6] or the court may direct some member of the bar to present and prosecute the charges.[7] Disbarment is not an adversary proceeding in the strict sense; there is no party plaintiff with a private interest.[8] The person who has called the court's attention to alleged misconduct is in no sense a party[9] or a moral sponsor of the same who is responsible for costs if any are cast.[10]

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[16] See infra, § 291.

[17] State v. Kirke, 12 Fla. 278, 95 Am. Dec. 314; Bar Asso. v. Casey, 211 Mass. 187, 97 N. E. 751, 39 L.R.A.(N.S.) 116, Ann. Cas. 1913A, 1226; Re Kirby, 10 S. D. 322, 73 N. W. 92, 39 L.R.A. 856, rehearing in 10 S. D. 414, 73 N. W. 907, 39 L.R.A. 859.

Annotation: 19 L. ed. 214; 2 Am. St. Rep. 858.

[18] State v. Kirke, 12 Fla. 278, 95 Am. Dec. 314.

[19] Re Keenan, 287 Mass. 577, 192 N. E. 65, 96 A.L.R. 679.

[20] Bar Asso. v. Casey, 211 Mass. 187, 97 N. E. 751, 39 L.R.A.(N.S.) 116, Ann. Cas. 1913A, 1226; Ex parte Steinman, 95 Pa. 220, 40 Am. Rep. 637. And see State v. Mosher, 128 Iowa, 82, 103 N. W. 105, 5 Ann. Cas. 984; Warren v. Connolly, 165 Mich. 274, 130 N. W. 637, 33 L.R.A.(N.S.) 314.

Annotation: 2 Am. St. Rep. 859.

[1] Re Craven, 178 La. 372, 151 So. 625, 90 A.L.R. 973.

Annotation: 90 A.L.R. 979.

[2] Lenihan v. Com. 165 Ky. 93, 176 S. W. 948, L.R.A.1917B, 1132; Com. v. Roe, 129 Ky. 650, 112 S. W. 683, 19 L.R.A.(N.S.) 413.

Annotation: 19 L.R.A.(N.S.) 414.

A statute providing for the appointment of a grievance committee, among whose duties is the presentation to the court of charges against attorneys, does not preclude provision by the court for presentment of such charges by other persons. State v. Peck, 88 Conn. 447, 91 A. 274, L.R.A.1915A, 663, Ann. Cas. 1917B, 227.

Failure of the court to order the filing of charges for disbarment is not available to the accused after the court has taken jurisdiction and tried the case. Star Bar Commission ex rel. Williams v. Sullivan, 35 Okla. 745, 131 P. 703, L.R.A.1915D, 1218.

[3] Wernimont v. State, 101 Ark. 210, 142 S. W. 194, Ann. Cas. 1913D, 1156; State v. Peck, 88 Conn. 447, 91 A. 274, L.R.A.1915A, 663, Ann. Cas. 1917B, 227; Lenihan v. Com. 165 Ky. 93, 176 S. W. 948, L.R.A.1917B, 1132; Com. v. Roe, 129 Ky. 650, 112 S. W. 683, 19 L.R.A.(N.S.) 413.

Animosity on the part of a state's attorney toward another attorney does not render him incompetent to present charges against him for his disbarment. State v. Peck, 88 Conn. 447, 91 A. 274, L.R.A.1915A, 663, Ann. Cas. 1917B, 227.

A proceeding to disbar an attorney because he has collected money for clients which he has refused, upon demand, to pay over may be instituted by the commonwealth's attorney in the name of the commonwealth, although a statute permits him to be disbarred for the cause specified upon application of the person whose money is withheld. Com. v. Roe, 129 Ky. 650, 112 S. W. 683, 19 L.R.A.(N.S.) 413. Annotation: 19 L.R.A.(N.S.) 414.

If the state's attorney acts, he does not appear as a prosecuting officer, his duty being only to do what others might do in calling the attention of the court to the alleged misconduct, thereafter conforming to the behests of the court. State v. Peck. 88 Conn. 447, 91 A. 274, L.R.A.1915A, 663, Ann. Cas. 1917B, 227.

The Attorney General may properly appear in a proceeding to test the right of a corporation to engage in the practice of law. Re Co-operative Law Co. 198 N. Y. 479, 92 N. E. 15, 32 L.R.A.(N.S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879.

[4] Lenihan v. Com. 165 Ky. 93, 176 S. W. 948, L.R.A.1917B, 1132.

Annotation: 73 A.L.R. 1336; 19 L.R.A. (N.S.) 419.

[5] Fairfield County Bar v. Taylor, 60 Conn. 11, 22 A. 441, 13 L.R.A. 767.

Annotation: 17 Ann. Cas. 697.

Attorneys preferring charges against another attorney for the purpose of having him disbarred need not show that they constitute a committee appointed by the bar association of the county for that purpose, either to establish their right to institute the proceeding or to give the court jurisdiction. Fairfield County Bar v. Taylor, 60 Conn. 11, 22 A. 441, 13 L.R.A. 767.

Disbarment proceedings may be entitled in the name of the state, the people, or the commonwealth;[11] but it has been held that an order for an attorney at law to show cause why he should not be disbarred is not a process within the meaning of a constitutional provision requiring process to be in the name of the state.[12]

§ 291. Charges.—The usual practice in proceedings in state courts to disbar an attorney is to make written charges or allegations of misconduct,[13] verified by affidavit,[14] although verification is not always required[15] or may be waived.[16] No indictment or information[17] or formal or technical allegations or descriptions of the alleged offense are necessary.[18] The charges made should, however, be clear, specific and circumstantial.[19] The specific offense charged, the insulting words used, or the disrespectful acts done should be set out so that the attorney may be aware of the precise nature of the accusation he is to meet and may know how to defend.[20] In the Federal courts it is not even necessary that the charges against the attorney be written. All that is requisite is that when proceedings are not taken for matters occurring in open court in the presence of the judges, notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defense.[1]

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[6] State v. Peck, 88 Conn. 447, 91 A. 274, L.R.A.1915A, 663, Ann. Cas. 1917B, 227; Lenihan v. Com. 165 Ky. 93, 176 S. W. 948, L.R.A.1917B, 1132.
Annotation: 19 L. ed. 214.

[7] Wernimont v. State, 101 Ark. 210, 142 S. W. 194, Ann. Cas. 1913D, 1156; State v. Mosher, 128 Iowa, 82, 103 N. W. 105, 5 Ann. Cas. 984.
In such case, the order directing the drawing up of the accusation need not recite the facts upon which the accusation is founded, and the prosecution, in preparing the accusation, may include any matter deemed appropriate; it is not limited to what the court may have in mind in directing that proceedings be commenced. Brown v. Warren County, 156 Iowa, 20, 135 N. W. 4, 42 L.R.A.(N.S.) 527, Ann. Cas. 1915B, 185; State v. Mosher, 128 Iowa, 82, 103 N. W. 105, 5 Ann. Cas. 984.

[8] Re Keenan, 287 Mass. 577, 192 N. E. 65, 96 A.L.R. 679.

[9] State v. Peck, 88 Conn. 447, 91 A. 274, L.R.A.1915A, 663, Ann. Cas. 1917B, 227.

[10] State Bar Commission ex rel. Williams v. Sullivan, 35 Okla. 745, 131 P. 703, L.R.A.1915D, 1218.
Persons who institute proceedings to disbar an attorney are entitled to their costs as against him in case the proceeding is successful. Re Kirby, 10 S. D. 322, 73 N. W. 92, 39 L.R.A. 856, rehearing in 10 S. D. 414, 73 N. W. 907, 39 L.R.A. 859.

[11] Com. v. Roe, 129 Ky. 650, 112 S. W. 683, 19 L.R.A.(N.S.) 413.
Annotation: 2 Am. St. Rep. 859.

[12] Re Kirby, 10 S. D. 322, 73 N. W. 92, 39 L.R.A. 856, rehearing in 10 S. D. 414, 73 N. W. 907, 39 L.R.A. 859.
Disbarment proceedings are not formal, and the prosecution may be conducted in the name of the state by its prosecuting officer, or the court may require a member of the bar to present and prosecute the charges. Wernimont v. State, 101 Ark. 210, 142 S. W. 194, Ann. Cas. 1913D, 1156.

[13] State v. Kirke, 12 Fla. 278, 95 Am. Dec. 314; Re Keenan, 287 Mass. 577, 192 N. E. 65, 96 A.L.R. 679; Re Davies, 93 Pa. 116, 39 Am. Rep. 729.

[14] Ex parte Burr, 9 Wheat. (U. S.) 529, 6 L. ed. 152; State v. Kirke, 12 Fla. 278, 95 Am. Dec. 314.
Annotation: 2 Am. St. Rep. 858.
The sufficiency of the verification must be determined by an inspection of it, and evidence cannot be taken for the purpose of showing that the affiant had no personal knowledge as to the charges. State Bar Commission ex rel. Williams v. Sullivan, 35 Okla. 745, 131 P. 703, L.R.A.1915D, 1218.

[15] **In disbarment proceedings instituted by the state bar commission** by the order and direction of the Supreme Court, no verification of the specification of charges is necessary under § 267, Comp. Laws 1909 of Oklahoma. State Bar Commission ex rel. Williams v. Sullivan, 35 Okla. 745, 131 P. 703, L.R.A.1915D, 1218.

[16] **This requirement is waived by the attorney** where the proceedings are instituted at his request. Ex parte Burr, 9 Wheat. (U. S.) 529, 6 L. ed. 152.

[17] Gould v. State, 99 Fla. 662, 127 So. 309, 69 A.L.R. 699; Snyder's Case, 301 Pa. 276, 152 A. 33, 76 A.L.R. 666.

[18] Randall v. Brigham, 7 Wall. (U. S.) 523, 19 L. ed. 285; State v. Peck, 88 Conn. 447, 91 A. 274, L.R.A.1915A, 663, Ann. Cas. 1917B, 227; Re Keenan, 287 Mass. 577, 192 N. E. 65, 96 A.L.R. 679.

[19] Gould v. State, 99 Fla. 662, 127 So. 309, 69 A.L.R. 699; State ex rel. Fowler v. Finley, 30 Fla. 325, 11 So. 674, 18 L.R.A. 401.
The sufficiency of the complaint must be determined upon examination of the complaint as a whole. State v. Peck, 88 Conn. 447, 91 A. 274, L.R.A.1915A, 663, Ann. Cas. 1917B, 227.

§ 292. Demurrer or Answer and Subsequent Pleadings. — The attorney against whom disbarment proceedings are instituted may test the sufficiency of the accusation against him by motion or demurrer and may thereafter answer,[2] but there are no subsequent pleadings. A reply or replication to the answer to the rule to show cause is unknown to such proceeding. Upon the coming in of such answer, the motion of the movant is to make the rule absolute, that of the respondent to discharge the rule, and the introduction of testimony is proper without a replication.[3] The fact that the accused in disbarment proceedings makes a sworn denial of the accusation does not entitle him to have the proceedings dismissed, leaving him to meet a prosecution for perjury; it merely raises an issue for the determination of the court.[4]

§ 293. Evidence — Presumptions. — Generally, the ordinary rules of evidence[5] apply in disbarment proceedings; the accused is entitled to a trial upon evidence taken according to the established rules of law.[6]

In a proceeding for the disbarment or suspension of an attorney, under the general rule, the attorney is presumed to be innocent[7] and to have performed his duty as an officer of the court in accordance with his oath,[8] although there is some authority to the contrary.[9]

§ 294. —Admissibility of Evidence.—The general rules which govern the admissibility of evidence in other judicial proceedings[10] control in the determination of the admissibility of evidence offered in support of disputed questons in disbarment proceedings.[11] The attorney may give evidence which

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[20] Ex parte Bradley, 7 Wall. (U. S.) 364, 19 L. ed. 214; State v. Finley, 30 Fla. 325, 11 So. 674, 18 L.R.A. 401; State v. Kirke, 12 Fla. 278, 95 Am. Dec. 314; People v. Amos, 246 Ill. 299, 92 N. E. 857, 138 Am. St. Rep. 239; Re Keenan, 287 Mass. 577, 192 N. E. 65, 96 A.L.R. 679.

Annotation: 2 Am. St. Rep. 859; 138 Am. St. Rep. 243.

A complaint is sufficient if it is intelligible and informing enough to advise the court of the matters complained of, so that it can determine whether or not to institute an inquiry, and to inform the attorney of the accusations so as to enable him to prepare a defense. State v. Peck, 88 Conn. 447, 91 A. 274, L.R.A.1915A, 663, Ann. Cas. 1917B, 227.

[1] Randall v. Brigham, 7 Wall. (U. S.) 523, 19 L. ed. 285.

[2] State v. Mosher, 128 Iowa, 82, 103 N. W. 105, 5 Ann. Cas. 984.

[3] Annotation: 95 Am. Dec. 342.

[4] State v. Mosher, 128 Iowa, 82, 103 N. W. 105, 5 Ann. Cas. 984.

[5] See Evidence [Also 10 R. C. L. p. 847].

[6] People v. Amos, 246 Ill. 299, 92 N. E. 857, 138 Am. St. Rep. 239.

Where the evidence in disbarment proceedings is taken down in shorthand, certified by the judge and the reporter, filed with the clerk, and transcribed pursuant to an order duly entered, and the transcript is also filed with the clerk, there is a sufficient compliance with a statute requiring all the evidence to be reduced to writing, filed and preserved. State v. Mosher, 128 Iowa, 82, 103 N. W. 105, 5 Ann. Cas. 984.

[7] Re Reily, 75 Okla. 192, 183 P. 728, 7 A.L.R. 89.

Annotation: 7 A.L.R. 93.

[8] Re Reily, 75 Okla. 192, 183 P. 728, 7 A.L.R. 89.

[9] Annotation: 7 A.L.R. 95.

[10] See Evidence [Also 10 R. C. L. p. 847].

[11] People v. Amos, 246 Ill. 299, 92 N. E. 857, 138 Am. St. Rep. 239; Re Keenan, 287 Mass. 577, 192 N. E. 65, 96 A.L.R. 679 (holding that a statute forbidding the exclusion as hearsay evidence of declarations made by a deceased person of his own personal knowledge and in good faith before the commencement of the action applies to a disbarment proceeding); Re Eldridge, 82 N. Y. 161, 37 Am. Rep. 558; Re O'Brien, 95 Vt. 167, 113 A. 527, 14 A.L.R. 859.

Annotation: 19 L. ed. 214; 138 Am. St. Rep. 243.

On the question whether or not an attorney attempted to mislead the court in making an affidavit that his client was under quarantine for the purpose of securing an extension of time to file a supersedeas bond, evidence that the house was tends to show his previous good reputation, not in order to justify or excuse the offense, but to support his evidence in denial of the charge and to mitigate the gravity and consequences of the offense.[12] It has been held, however, that the judgment of acquittal in a prosecution for perjury in giving false testimony in a specified case is not admissible in a proceeding to disbar an attorney for the same act.[13]

§ 295. —**Weight and Sufficiency.**—There is some difference of opinion as to the amount of proof necessary to sustain the charges in disbarment proceedings. The rule, as stated in some jurisdictions, is that a clear preponderance of the evidence is necessary.[14] Other courts require that the guilt of the attorney be clearly and satisfactorily established,[15] or that the evidence in support of the charges satisfy the court to a reasonable certainty that the charges are true and warrant a judgment of disbarment.[16] But proof beyond a reasonable doubt, as in criminal cases, is not required.[17] In some jurisdictions the record of an attorney's conviction of a crime, at least where the offense involves moral turpitude, is made conclusive evidence thereof, so that the production of such record establishes his guilt in the disbarment proceedings and his unfitness to continue the practice of law,[18] even though such conviction is not made an independent ground for disbarment,[19] although the court may go behind the record for the purpose of determining the extent or severity of the punishment to be administered.[20] In other jurisdictions it is held that where conviction of a crime is not made by statute an independent ground for disbarment, a showing of an unreversed conviction of a crime in a disbarment proceeding only prima facie establishes the guilt of the convicted attorney and his unfitness to continue in the legal profession.[1] The United States Supreme Court has regarded the findings of a state court in disbarment proceedings establishing the want of professional character as conclusive, unless, from an intrinsic consideration of the state record, it appears, that the state procedure, from want of notice or opportunity to be heard, was wanting in due process, that there was such an infirmity of proof as to facts as to give rise to a clear conviction that the conclusion of the state court cannot be accepted as final, or that some other grave reason exists leading to the conclusion that to follow the decision of

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watched is immaterial if the client was at large and in communication with his attorney. Re Vaughan, 189 Cal. 491, 209 P. 353, 24 A.L.R. 858.

[12] Lenihan v. Com. 165 Ky. 93, 176 S. W. 948, L.R.A.1917B, 1132.

[13] Re O'Brien, 95 Vt. 167, 113 A. 527, 14 A.L.R. 859.

[14] Re Reily, 75 Okla. 192, 183 P. 728, 7 A.L.R. 89; Re Sherin, 27 S. D. 232, 130 N. W. 761, 40 L.R.A.(N.S.) 801, Ann. Cas. 1913D, 446.

Not only the act charged, but the bad or fraudulent motive, must be proved by a preponderance of the evidence. Gould v. State, 99 Fla. 662, 127 So. 309, 69 A.L.R. 699.

[15] People v. Baker, 311 Ill. 66, 142 N. E. 554, 31 A.L.R. 737; Re Evans, 22 Utah, 366, 62 P. 913, 53 L.R.A. 952, 83 Am. St. Rep. 794.

[16] Re Reily, 75 Okla. 192, 183 P. 728, 7 A.L.R. 89.

[17] Star Bar Commission ex rel. Williams v. Sullivan, 35 Okla. 745, 131 P. 703, L.R.A. 1915D, 1218.

[18] Re Collins, 188 Cal. 701, 206 P. 990, 32 A.L.R. 1062; Re Kerl, 32 Idaho, 737, 188 P. 40, 8 A.L.R. 1259; Re Ebbs, 150 N. C. 44, 63 S. E. 190, 19 L.R.A.(N.S.) 892, 17 Ann. Cas. 592; Ex parte Mason, 29 Or. 18, 43 P. 651, 54 Am. St. Rep. 772.

Annotation: 21 Ann. Cas. 1190.

[19] Ex parte Wall, 107 U. S. 265, 27 L. ed. 552, 2 S. Ct. 569; People ex rel. Deneen v. Gilmore, 214 Ill. 569, 73 N. E. 737, 69 L.R.A. 701; Re Sutton, 50 Mont. 88, 145 P. 6, Ann. Cas. 1917A, 1223.

Annotation: 81 A.L.R. 1198.

[20] Ex parte Mason, 29 Or. 18, 43 P. 651, 54 Am. St. Rep. 772.

[1] People ex rel. Bar. Asso. v. Burton, 39 Colo. 164, 88 P. 1063, 121 Am. St. Rep. 165 (so holding, in effect, although expressly reserving decision on the particular point); State v. O'Leary, 207 Wis. 297, 241 N. W. 621, 81 A.L.R. 1193.

Annotation: 81 A.L.R. 1196.

the state court would conflict with the duty not to disbar unless necessary under the principles of right and justice.[2]

§ 296. Trial or Hearing.—In many jurisdictions there are special statutory provisions regulating the trial in disbarment proceedings which, of course, must be observed. In general, however, the hearing of an application for the disbarment of an attorney, being judicial, must be governed by the same rules as those which govern other trials of questions of fact.[3] Formal proceedings may, however, be waived by the attorney;[4] and where he has had due notice of the proceedings for his disbarment, appears therein, and neither makes any objection to the mode of procedure nor asks for any other, he cannot object on appeal that it was not the one he had a right to demand.[5]

It has been held that he is not to be tried upon affidavits, but is entitled to confront the witnesses and subject them to cross-examination and to invoke the other well-settled rules of evidence.[6] In some jurisdictions, however, where disbarment proceedings are deemed to be civil, and not criminal, in their nature, it is held that the accused does not have a constitutional right to be confronted by the witnesses against him and that depositions against him may therefore be read in evidence.[7]

It has been held that a proceeding to disbar an attorney is not criminal within the contemplation of the constitutional provision that one shall not be required to give evidence against himself; the attorney may be called and examined for the information of the court so long as his right to refuse to answer questions tending to incriminate him is not infringed.[8] For this reason an attorney at law who has been legally called upon to give testimony or produce evidence tending to establish that he received a bribe is not granted immunity from disbarment therefor by a constitutional provision that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may so testify, or produce evidence."[9]

In the trial of a proceeding for disbarment by the court, the judge, being the arbiter of both the law and the facts, should not delegate the taking of evidence therein to a master, commissioner, or anyone else, but should personally hear the evidence of the witnesses for and against the accused, so that in lending or withholding credence to it, he may be governed by the same rules and reasons that influence juries when sitting as triers of facts, such as an observance of the manners and deportment of the witnesses.[10] In some jurisdictions, however, the court has authority to appoint a referee or committee to take the evidence for and against the attorney and make recommendations to the court as to the appropriate action to be taken.[11]

[2] Selling v. Radford, 243 U. S. 46, 61 L. ed. 585, 37 S. Ct. 377, Ann. Cas. 1917D, 569.

[3] People ex rel. Chicago Bar Asso. v. Amos, 246 Ill. 299, 92 N. E. 857, 138 Am. St. Rep. 239; Re O'Brien, 95 Vt. 167, 113 A. 527, 14 A.L.R. 859.
Annotation: 138 Am. St. Rep. 243.

[4] Annotation: 2 Am. St. Rep. 859.

[5] Annotation: 95 Am. Dec. 342.

[6] Lenihan v. Com. 165 Ky. 93, 176 S. W. 948, L.R.A.1917B, 1132; Re Eldridge, 82 N. Y. 161, 37 Am. Rep. 558. And see Re Durant, 80 Conn. 140, 67 A. 497, 10 Ann. Cas. 539.
Annotation: 19 L. ed. 214; 13 L.R.A. 767.

[7] State v. McRae, 49 Fla. 389, 38 So. 605, 6 Ann. Cas. 580; State v. Mosher, 128 Iowa, 82, 103 N. W. 105, 5 Ann. Cas. 984.
Annotation: 6 Ann. Cas. 582.

[8] Re Vaughan, 189 Cal. 491, 209 P. 353, 24 A.L.R. 858.
Annotation: 24 A.L.R. 863.

[9] Re Biggers, 24 Okla. 842, 104 P. 1083, 25 L.R.A.(N.S.) 622.

[10] State v. Finley, 30 Fla. 325, 11 So. 674, 18 L.R.A. 401.

[11] A commissioner appointed to take and report proofs in a proceeding to disbar an attorney has no authority to permit the filing of amended counts in the information to make them correspond with the proof.

§ 297. —Right to Jury Trial.—In the absence of statutory provision, it is the usual practice for the judge or judges of a court to dispose of disbarment or suspension proceedings against an attorney, and it seems well settled that the attorney is not entitled to a jury trial.[12] Sometimes, the right to jury trial is precluded by express statutory provisions for the trial of all questions of fact by the court,[13] the constitutionality of which is beyond question.[14] In some jurisdictions it has been held that an attorney against whom disbarment proceedings have been instituted may demand that the issues raised be tried by a jury,[15] and express provisions to this effect are sometimes made by statute,[16] the constitutionality of which has been upheld.[17] Under such a statute, the jury's verdict is not merely advisory, but has the same effect in settling issues of fact as a verdict in a civil action at law.[18] Under such statutes, however, where the evidence adduced is uncontroverted, an accused attorney is deprived of no right of which he can complain where the case is tried by the court without a jury.[19]

In those jurisdictions where disbarment proceedings are considered as civil in their nature, the court has the power to direct the return of a specific verdict, even if a jury has been impaneled to try the charge made against the attorney, in the event the evidence adduced upon such trial is uncontroverted.[20]

§ 298. —Continuance.—The granting of a continuance in a disbarment proceeding is governed by the general rules governing applications for continuances in other judicial proceedings.[1] An attorney is entitled to an adjournment or continuance to obtain an affidavit out of the county or the testimony of a material and necessary witness out of the county.[2] Such a proceeding will not be continued, however, because of the possibility of material witnesses, who are charged with a criminal offense, claiming their

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People ex rel. Black v. Smith, 290 Ill. 241, 124 N. E. 807, 9 A.L.R. 183.

In some jurisdictions the board of bar governors or examiners has the power, after careful and thorough examination of the facts, to recommend disbarment or suspension, which action may then be taken only by the highest court in the state. Goldstone v. State Bar, 214 Cal. 490, 6 P. (2d) 513, 80 A.L.R. 701.

A referee in a disbarment proceeding is an officer of the court, and the court has full authority to supervise and control his report by setting it aside or confirming or modifying it as the facts and the law require. Re Reily, 75 Okla. 192, 183 P. 728, 7 A.L.R. 89.

[12] Ex parte Wall, 107 U. S. 265, 27 L. ed. 552, 2 S. Ct. 569; Re Wharton, 114 Cal. 367, 46 P. 172, 55 Am. St. Rep. 72; Gould v. State, 99 Fla. 662, 127 So. 309, 69 A.L.R. 699; State v. McRae, 49 Fla. 389, 38 So. 605, 6 Ann. Cas. 580; Ex parte Cashin, 128 Miss. 224, 90 So. 850, citing R. C. L.; Balogh v. Jackson, 272 Pa. 482, 116 A. 377, 22 A.L.R. 1497; State v. Rossman, 53 Wash. 1, 101 P. 357, 21 L.R.A.(N.S.) 821, 17 Ann. Cas. 625; State Law Examiners v. Phelan, 43 Wyo. 481, 5 P. (2d) 263, 78 A.L.R. 1317.

Annotation: Ann. Cas. 1913D, 1162.

In Balogh v. Jackson, 272 Pa. 482, 116 A. 377, 22 A.L.R. 1497, it was held that an attorney accused of withholding money from his client was not entitled to a jury trial in a proceeding to disbar him for withholding it, unless there was an honest dispute between the attorney and his client as to the amount due for fees.

[13] State Bar Commission ex rel. Williams v. Sullivan, 35 Okla. 745, 131 P. 703, L.R.A.1915D, 1218.

[14] Re Wharton, 114 Cal. 367, 46 P. 172, 55 Am. St. Rep. 72; State Bar Commission v. Sullivan, 35 Okla. 745, 131 P. 703, L.R.A.1915D, 1218.

Annotation: 44 L.R.A.(N.S.) 1196.

[15] Annotation: 95 Am. Dec. 342. See also 78 A.L.R. 1324.

[16] Wernimont v. State, 101 Ark. 210, 142 S. W. 194, Ann. Cas. 1913D, 1156; State Law Examiners v. Phelan, 43 Wyo. 481, 5 P. (2d) 263, 78 A.L.R. 1317.

[17] State ex rel. Mackintosh v. Rossman, 53 Wash. 1, 101 P. 357, 21 L.R.A.(N.S.) 821; State Law Examiners v. Phelan, 43 Wyo. 481, 5 P. (2d) 263, 78 A.L.R. 1317.

Annotation: 78 A.L.R. 1323.

[18] State Law Examiners v. Phelan, 43 Wyo. 481, 5 P. (2d) 263, 78 A.L.R. 1317.

[19] Wernimont v. State, 101 Ark. 210, 142 S. W. 194, Ann. Cas. 1913D, 1156. And see Neel v. State, 9 Ark. 259, 50 Am. Dec. 209.

[20] Wernimont v. State, 101 Ark. 210, 142 S. W. 194, Ann. Cas. 1913D, 1156.

[1] See CONTINUANCES [Also 6 R. C. L. p. 542].

[2] Annotation: 2 Am. St. Rep. 860; 95 Am. Dec. 342.

privilege and refusing to testify,[3] or because of the inability of the accused to participate in it on account of illness, without proof of that fact to the full satisfaction of the court.[4]

§ 299. Judgment and Enforcement Thereof.—Where the charges preferred against an attorney in disbarment proceedings are sustained, a judgment of disbarment or suspension must be entered specifying the particular charges upon which the attorney's guilt was pronounced;[5] and if this is not done, another court will not disbar an attorney upon an affidavit merely stating that he was disbarred in the original court, without stating the cause thereof.[6] If an order of disbarment is made, it is a final judgment, subject to all statutes and rules touching that subject.[7] Such a judgment is an adjudication that material charges in the information against him were established by truthful evidence, and so long as it stands he cannot recover for an alleged conspiracy to bring about the entry of the judgment.[8] Nor can a judgment striking an attorney from the rolls be impeached in a collateral proceeding.[9]

Members of the bar who are under suspension will be required to comply with the terms of the decree suspending them in such a manner that there may be no ground for suspicion on the part of other members of the bar or of the public that the decrees of the court are not being exactly observed in their letter and their spirit. A failure so to act will be a cause for further punishment.[10] For disobedience to a judgment of suspension or disbarment by holding himself out as entitled to or continuing to practice law—as, for instance, by any advice given to clients or action taken for them in matters connected with the law—an attorney may be punished as for contempt of court,[11] but in such case the court, in fixing his punishment, will consider his disclaimer of any intended disobedience of the order of disbarment.[12]

§ 300. Review.—In most jurisdictions an appeal is now allowed from a judgment disbarring or suspending an attorney.[13] Such an appeal is governed by the general rules of appellate practice discussed elsewhere in this work.[14] If, for example, the evidence lends support to the findings of the court, such findings will not be disturbed upon appeal, even though that evidence is conflicting.[15] Moreover, it has been said that the character and purpose of the inquiry are such that unless it clearly appears that the attorney's rights have in some substantial way been denied him, the reviewing court will not set aside the action of the disbarring court.[16]

In some jurisdictions a writ of review will lie to review an order suspending an attorney from practice where it appears that the order was made without notice to the attorney and where he had no opportunity to make a defense.

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[3] Re O'Brien, 95 Vt. 167, 113 A. 527, 14 A.L.R. 859.

[4] Ibid.

[5] Annotation: 2 Am. St. Rep. 860; 95 Am. Dec. 342.

[6] Annotation: 95 Am. Dec. 342.

[7] Re Keenan, 287 Mass. 577, 192 N. E. 65, 96 A.L.R. 679.

[8] Keithley v. Stevens, 238 Ill. 199, 87 N. E. 375, 128 Am. St. Rep. 120.

[9] Annotation: 2 Am. St. Rep. 860.

[10] Re Lizotte, 32 R. I. 386, 79 A. 960, 35 L.R.A.(N.S.) 794.

[11] State v. Marron, 22 N. M. 632, 167 P. 9, L.R.A.1918B, 217; Re Lizotte, 32 R. I. 386, 79 A. 960, 35 L.R.A.(N.S.) 794; Re Duncan, 83 S. C. 186, 65 S. E. 210, 24 L.R.A.(N.S.) 750, 18 Ann. Cas. 657.

Annotation: 18 Ann. Cas. 658.

[12] State v. Marron, 22 N. M. 632, 167 P. 9, L.R.A.1918B, 217; Re Duncan, 83 S. C. 186, 65 S. E. 210, 24 L.R.A.(N.S.) 750, 18 Ann. Cas. 657.

Annotation: 18 Ann. Cas. 658.

[13] See Appeal and Error, Vol. 2, p. 917.

[14] See Appeal and Error, Vols. 2, 3.

[15] Re Wharton, 114 Cal. 367, 46 P. 172, 55 Am. St. Rep. 72; Re Wilson, 79 Kan. 674, 100 P. 635, 21 L.R.A.(N.S.) 517, 17 Ann. Cas. 690.

[16] Re Durant, 80 Conn. 140, 67 A. 497, 10 Ann. Cas. 539.

In others it has been held that a writ of prohibition may issue to prevent an order being entered in a lower court disbarring an attorney where it appears that such court has no power so to disbar him.[17]

Under proper circumstances mandamus may be an appropriate remedy to restore a disbarred attorney who has been wrongfully removed.[18] No action lies against the judge for damages, however, unless he had no jurisdiction in the matter.[19]

D. REINSTATEMENT OF ATTORNEY

§ 301. Generally.—The disbarment of an attorney is not necessarily a permanent disability; he may afterwards be reinstated on proper application or petition for that purpose,[20] addressed to the court by which he was disbarred,[1] usually by motion and on a proper showing.[2] Whether or not the applicant shall be reinstated rests to a great extent in the sound discretion of the court.[3] The court action will depend, generally speaking, on whether or not it decides that the public interest in the orderly and impartial administration of justice will be conserved by the applicant's participation therein in the capacity of an attorney and counselor at law.[4] The applicant must, like a candidate for admission to the bar, satisfy the court that he is a person of good moral character—a fit and proper person to practice law.[5] The court will take into consideration the applicant's character and standing prior to the disbarment, the nature and character of the charge for which he was disbarred, his conduct subsequent to the disbarment, and the time that has elapsed between the disbarment and the application for reinstatement.[6] The mere discovery of new evidence in a disbarment proceeding is no ground for granting a petition for reinstatement of a disbarred attorney.[7]

A disbarred attorney cannot be reinstated by special act of the legislature;[8] nor will a pardon of itself restore the right to practice to an attorney who has been disbarred by reason of a conviction.[9]

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[17] Annotation: 10 Ann. Cas. 546.

[18] See MANDAMUS.

[19] See JUDGES.

[20] Re Davies, 93 Pa. 122, 39 Am. Rep. 729.
Annotation: 19 L. ed. 214; 2 Am. St. Rep. 861.

[1] Annotation: 48 A.L.R. 1243; Ann. Cas. 1912A, 813.

[2] Re Thatcher, 83 Ohio St. 246, 93 N. E. 895, Ann. Cas. 1912A, 810.
Annotation: 2 Am. St. Rep. 861.

[3] Re Daugherty, 103 W. Va. 7, 136 S. E. 402, citing R. C. L.
Annotation: 95 Am. Dec. 344.

[4] Re Mills, 23 Haw. 224, citing R. C. L.; Re Thatcher, 83 Ohio St. 246, 93 N. E. 895, Ann. Cas. 1912A, 810.
Annotation: Ann. Cas. 1912A, 813.

[5] Re O'Connell, 199 Cal. 538, 250 P. 390. 48 A.L.R. 1232; Re Thatcher, 83 Ohio St. 246, 93 N. E. 895, Ann. Cas. 1912A, 810; Re Bruener, 178 Wash. 165, 34 P. (2d) 437, citing R. C. L.; Re Daugherty, 103 W. Va. 7, 136 S. E. 402, citing R. C. L.
Annotation: 48 A.L.R. 1239, 1243.

[6] Re Bruener, 178 Wash. 165, 34 P. (2d) 437, citing R. C. L.
Annotation: Ann. Cas. 1912A, 814.

A disbarred attorney will not be reinstated upon testimony of himself and others that he now possesses good moral character, where he continues to hold the same views upon the subject of his disbarment that he did when disbarred. Re O'Connell, 199 Cal. 538, 250 P. 390, 48 A.L.R. 1232.

[7] Re O'Brien, 95 Vt. 167, 113 A. 527, 14 A.L.R. 859.

[8] Annotation: 48 A.L.R. 1243.

[9] Annotation: 47 A.L.R. 543; 48 A.L.R. 1243.

ATTORNMENT

See Landlord and Tenant.

ATTRACTIVE NUISANCES

See Negligence.

AUCTIONS

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§ 60. *Liability to True Owner.*

I. INTRODUCTORY

§ 1. Scope of Article.—This article deals with the conduct and validity of sales at auction, their effect, operation, and enforcement; the licensing and regulation of auctioneers; the auctioneer's authority, and his rights and liabilities. Other and related branches of the law, such as sales,[1] agency,[2] the statute of frauds,[3] the rights and liabilities of vendor and purchaser,[4] and the subject of liens,[5] are touched upon in so far as they bear directly upon auctions or auctioneers. While judicial sales are usually made at auction, the principles applicable to that subject have very little in common with those applicable to other sales at auction and are therefore treated elsewhere.[6]

§ 2. Definition of Terms and Historical Summary.—An auction, as usually defined, is a public sale of property to the highest bidder,[7] although there is a form of auction commonly known as a "Dutch auction" where the property is put up at a price greater than its value and the price is then gradually lowered until someone closes the sale by accepting the offer and thus becoming the purchaser.[8] The custom of selling goods at auction is as old as the law of sale.[9]

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[1] See Sales [Also 24 R. C. L. p. 1].

[2] See Agency, Vol. 2, p. 1.

[3] See Statute of Frauds [Also 25 R. C. L. p. 422].

[4] See Vendor and Purchaser [Also 27 R. C. L. p. 297].

[5] See Liens [Also 17 R. C. L. p. 594].

[6] See Judicial Sales [Also 16 R. C. L. p. 1].

[7] Goshen v. Kern, 63 Ind. 468, 30 Am. Rep. 234; D'Arcy v. Rowley, 184 Mass. 550, 69 N. E. 325, 64 L.R.A. 190.

Annotation: 131 Am. St. Rep. 479.

Property may be sold at public auction to the highest bidder and for the maximum possible amount, although a like public auction under other conditions and at other times might bring a larger price. Pike v. State Bd. of Land Comrs. 19 Idaho, 268, 113 P. 447, Ann. Cas. 1912B, 1344.

The term "auction" ordinarily implies a sale made on the acceptance of an oral bid; the mere fact that the successful bid was submitted in writing, however, does not prevent the transaction from constituting an auction.[10] One who conducts an auction for another on commission or for recompense is termed an auctioneer [11] and is deemed primarily the agent of the seller of the goods, although for some purposes he is also deemed the agent of the purchaser.[12] One may act as auctioneer even though the goods disposed of are his own goods.[13]

II. LICENSING AND REGULATION OF AUCTIONEERS

§ 3. Generally.—The selling of property by auction is a lawful business,[14] and, in the absence of a statutory limitation, anyone may be an auctioneer, since an auctioneer's authority to conduct a particular sale is dependent solely on the nature and extent of the agency existing between him and the person for whom he purports to act.[15] However, the business is one that requires public supervision so that purchasers will not be imposed on or the owners of property sold at auction defrauded, and the state, in the exercise of its police power, may limit or qualify this right [16] by imposing reasonable regulations thereon.[17] Pursuant to this power, most states have enacted statutes requiring persons who exercise the business of auctioneer to have a license.[18] In many instances this power to regulate and license auctioneers has been delegated to municipalities, although in the absence of such a delegation of power municipalities do not ordinarily possess it.[19] A power given a municipality to license auctioneers includes the power to require the payment of a license fee from one who sells his own goods at auction.[20]

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[8] Anderson v. Wisconsin C. R. Co. 107 Minn. 296, 20 L.R.A.(N.S.) 1133, 120 N. W. 39, 131 Am. St. Rep. 462, 16 Ann. Cas. 379; Gulick v. Ward, 10 N. J. L. 87, 18 Am. Dec. 389.

Annotation: 31 A.L.R. 301; 131 Am. St. Rep. 480.

[9] Balesh v. Hot Springs, 173 Ark. 661, 293 S. W. 14, citing R. C. L.; Anderson v. Wisconsin C. R. Co., 107 Minn. 296, 120 N. W. 39, 20 L.R.A.(N.S.) 1133, 131 Am. St. Rep. 462, 16 Ann. Cas. 379.

[10] Tyree v. Williams, 3 Bibb. (Ky.) 365, 6 Am. Dec. 663.

[11] Thomas v. Kerr, 3 Bush (Ky.) 619, 96 Am. Dec. 262.

Annotation: 131 Am. St. Rep. 480.

[12] See infra, §§ 8 and 9.

[13] Chicago v. Ornstein, 323 Ill. 258, 154 N. E. 100, 52 A.L.R. 489; Goshen v. Kern, 63 Ind. 468, 30 Am. Rep. 234. The fact that an auctioneer who sells land belonging to a corporation is a stockholder and officer of the company does not invalidate the sale. Annotation: 131 Am. St. Rep. 483.

[14] Dornberg v. Spokane, 125 Wash. 72, 215 P. 518, 31 A.L.R. 295.

[15] Kennell v. Boyer, 144 Iowa, 303, 122 N. W. 941, 24 L.R.A.(N.S.) 488, Ann. Cas. 1912A, 1127.

The business of an auctioneer is one of common right. Miller v. Greenville, 134 S. C. 314, 132 S. E. 591, 46 A.L.R. 155.

[16] Chicago v. Ornstein, 323 Ill. 258, 154 N. E. 100, 52 A.L.R. 489; Minnesota v. Martin, 124 Minn. 498, 145 N. W. 383, 51 L.R.A.(N.S.) 40, Ann. Cas. 1915B, 812.

Annotation: 31 A.L.R. 299, s. 39 A.L.R. 773, 46 A.L.R. 157, and 52 A.L.R. 491; Ann. Cas. 1915B, 815.

The selling of property by auction is a business affected with a public interest and is subject to legislative restriction. Biddles v. Enright, 239 N. Y. 354, 146 N. E. 625, 39 A.L.R. 766.

[17] Biddles v. Enright, 239 N. Y. 354, 146 N. E. 625, 39 A.L.R. 766.

[18] Annotation: 31 A.L.R. 299, s. 39 A.L.R. 773, 46 A.L.R. 157, and 52 A.L.R. 491; Ann. Cas. 1915B, 815.

Statutes and ordinances of this character are designed not only for the purpose of raising revenue, but also to prevent the mischief arising from unlicensed auctioneers who facilitate the disposal of stolen goods. Girard v. Taggart, 5 Serg. & R. (Pa.) 19, 9 Am. Dec. 327.

Under an authority to license any "person," a corporation may be licensed as auctioneer. Annotation: 31 A.L.R. 305.

[19] Fowle v. Alexandria, 3 Pet. (U. S.) 398, 7 L. ed. 719; Miller v. Greenville, 134 S. C. 314, 132 S. E. 591, 46 A.L.R. 155.

Annotation: 31 A.L.R. 300, s. 39 A.L.R. 774, 46 A.L.R. 157, and 52 A.L.R. 491; Ann. Cas. 1915B, 815.

A statute authorizing a municipality to require a license for auctioneers selling goods, wares, merchandise, or effects does not authorize the requirement of a license from one selling lands at auction. Annotation: Ann. Cas. 1915B, 816.

§ 4. **Limitations upon Power to License and Regulate.**—Neither the state[1] nor a municipality under a delegated power from the state[2] can impose upon auctioneers regulations or license fees so unreasonable as actually to be prohibitive, or even oppressive and highly injurious to the business, although the fact that the state has issued a license to one as an auctioneer does not exempt such licensee from municipal taxation.[3]

A license regulation must not be discriminatory without reasonable ground.[4] Fees may be graduated according to the population of the places where the auctioneers do business,[5] and in some instances statutes providing that only voters resident in the county are eligible to be licensed as auctioneers have been sustained.[6] In other instances, however, discriminations in favor of residents as against nonresidents have been held unconstitutional and void.[7] Similarly, an ordinance which discriminates in favor of goods, wares, and merchandise in the city as against such as may be imported from other cities or places has been held invalid.[8]

A certain discretion may be conferred upon administrative officers in the granting of licenses to auctioneers,[9] and it is competent to confer authority upon the mayor or other officer to revoke a license for a violation of its terms[10] or upon the complaint under oath of any person defrauded after a hearing duly had, on notice to the licensee, in which the charge is fairly sustained.[11]

§ 5. **—Amount of License Fee.**—Where the legislature itself has exercised its discretion as to what is a reasonable license fee, the courts interfere reluctantly, and then only when it is clear that there has been an abuse of discretion.[12] As to the imposition of fees by municipalities, much depends upon the particular authority conferred upon the municipality by the legislature.[13] A power to license auctioneers for the purpose of revenue must be expressly conferred upon a municipal corporation by statute; mere authority to license and regulate auctioneers does not authorize the imposition of a tax,[14] although some courts have adopted the liberal rule that license fees imposed under the police power may be sustained even though a revenue is incidentally derived therefrom.[15] Also, the principle that a license fee in excess of the cost may be imposed upon occupations which, when too freely engaged in, are harmful to the public has been applied to auctioneers.[16] When a tax upon auctioneers is authorized, the necessity of the taxing power is the only limit, unless an unreasonable burden is imposed as compared with that placed on other callings.[17]

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[20] Chicago v. Ornstein, 323 Ill. 258, 154 N. E. 100, 52 A.L.R. 489; Goshen v. Kern, 63 Ind. 468, 30 Am. Rep. 234.
Annotation: 31 A.L.R. 307; 131 Am. St. Rep. 480; Ann. Cas. 1915B, 816.

[1] Clein v. Atlanta, 164 Ga. 529, 139 S. E. 46, 53 A.L.R. 933; Minneota v. Martin, 124 Minn. 498, 145 N. W. 383, 51 L.R.A.(N.S.) 40, Ann. Cas. 1915B, 812; Sipe v. Murphy, 49 Ohio St. 536, 31 N. E. 884, 17 L.R.A. 184; Dornberg v. Spokane, 125 Wash. 72, 215 P. 518, 31 A.L.R. 295.
While the business of an auctioneer is one that is subject to legislative regulation, the business is a lawful and useful one, and the right to regulate does not include the right to prohibit it. Wright v. May, 127 Minn. 150, 149 N. W. 9, L.R.A. 1915B, 151.

[2] Carrollton v. Bazzette, 159 Ill. 284, 42 N. E. 837, 31 L.R.A. 522.
The power conferred on a municipality to tax, license, and regulate auctioneers authorizes the adoption of any reasonable ordinance for that purpose, but does not authorize the imposition of unreasonable tax or license regulations. Annotation: 31 A.L.R. 306, s. 39 A.L.R. 773, 46 A.L.R. 157, and 52 A.L.R. 491; Ann. Cas. 1915B, 815.
Whether the amount of a license fee or tax is reasonable is a question of law for the court, and not one of fact for the jury. Annotation: 31 A.L.R. 306; Ann. Cas. 1915B, 815.

[3] Annotation: 31 A.L.R. 307; Ann. Cas. 1915B, 816.

[4] Wright v. May, 127 Minn. 150, 149 N. W. 9, L.R.A.1915B, 151.
Annotation: 31 A.L.R. 304, 307.

[5] See infra, § 5.

[6] Wright v. May, 127 Minn. 150, 149 N. W. 9, L.R.A.1915B, 151.
Annotation: 31 A.L.R. 304; 61 A.L.R. 346.

[7] Carrollton v. Bazzette, 159 Ill. 284, 42 N. E. 837, 31 L.R.A. 522 (ordinance requiring license fees of temporary residents and imposing none on permanent residents).
Annotation: 31 A.L.R. 307; 61 A.L.R. 346; 40 L.R.A.(N.S.) 290; Ann. Cas. 1915B. 815, 816.

[8] Sipe v. Murphy, 49 Ohio St. 536, 31 N. E. 884, 17 L.R.A. 184.
Annotation: 31 A.L.R. 310.

[9] Wright v. May, 127 Minn. 150, 149 N. W. 9, L.R.A. 1915B, 151.
Annotation: 31 A.L.R. 305; 20 L.R.A. 725.

[10] Annotation: 31 A.L.R. 305.

[11] Annotation: 31 A.L.R. 306.
The license of an auctioneer may not be forfeited, however, in a civil suit brought by a neighboring merchant. Gilly v. Hirsh, 122 La. 966, 48 So. 422, 20 L.R.A.(N.S.) 972. Annotation: 31 A.L.R. 305.

[12] Minneota v. Martin, 124 Minn. 498, 145 N. W. 383, 51 L.R.A.(N.S.) 40, Ann. Cas. 1915B, 812.

As regards the amount of the fee imposed, substantial fees have been upheld in some jurisdictions,[18] while similar fees in other jurisdictions have been held invalid.[19]

Statutes graduating the amount of fees payable by auctioneers according to the population of the places where they do business are not invalid as discriminatory.[20]

§ 6. Effect of Failure to Obtain License.—Under most license regulations, the act of selling property at auction without a license constitutes a misdemeanor.[1] Under some statutes or ordinances, the auctioneer may be precluded from recovering for his services; under others, his right to compensation is not affected.[2] The sale is not, however, vitiated by the fact that the auctioneer did not have the required license unless the statute or ordinance imposing it requires a different construction.[3]

[13] Stull v. De Mattos, 23 Wash. 71, 62 P. 451, 51 L.R.A. 892.

[14] Fowle v. Alexandria, 3 Pet. 398, 7 L. ed. 719; Minneota v. Martin, 124 Minn. 498, 145 N. W. 383, 51 L.R.A.(N.S.) 40, Ann. Cas. 1915B, 812.

Annotation: 31 A.L.R. 306, s. 39 A.L.R. 773, 46 A.L.R. 157, and 52 A.L.R. 491; Ann. Cas. 1915B, 815.

[15] Carrollton v. Bazzette, 159 Ill. 284, 42 N. E. 837, 31 L.R.A. 522.

Annotation: 31 A.L.R. 306, s. 39 A.L.R. 773, 46 A.L.R. 157, and 52 A.L.R. 491; Ann. Cas. 1915B, 815.

[16] Minneota v. Martin, 124 Minn. 498, 145 N. W. 383, 51 L.R.A.(N.S.) 40, Ann. Cas. 1915B, 812.

[17] Stull v. De Mattos, 23 Wash. 71, 62 P. 451, 51 L.R.A. 892 (holding that while a fee of $25 per day could not be sustained as a regulation, it could be sustained as a tax).

Annotation: 31 A.L.R. 306, s. 39 A.L.R. 773, 46 A.L.R. 157, and 52 A.L.R. 491; Ann. Cas. 1915B, 815 et seq.

Although a statute may authorize villages to license and tax auctioneers, where it is plain that an ordinance imposing a license fee made no attempt to tax, the legality of the fee must rest on its reasonableness within the scope of a proper exercise of the police power. Minneota v. Martin, 124 Minn. 498, 145 N. W. 383, 51 L.R.A.(N.S.) 40, Ann. Cas. 1915B, 812.

[18] Minneota v. Martin, 124 Minn. 498, 145 N. W. 383, 51 L.R.A.(N.S.) 40, Ann. Cas. 1915B, 812 (construing a statute authorizing a village council to require a license, and providing that $25 a day should be a reasonable fee for an auctioneer's license); Stull v. De Mattos, 23 Wash. 71, 62 P. 451, 51 L.R.A. 892 (holding that while a fee of $25 a day could not be sustained under the police power, yet it could be sustained as a tax).

Annotation: 31 A.L.R. 310, s. 39 A.L.R. 776, 46 A.L.R. 157, and 52 A.L.R. 491; 51 L.R.A.(N.S.) 40; Ann. Cas. 1915B, 816.

[19] Carrollton v. Bazzette, 159 Ill. 284, 42 N. E. 837, 31 L.R.A. 522 (fee of $10 per day imposed on "itinerant merchants" held plainly unreasonable and prohibitive); Sipe v. Murphy, 49 Ohio St. 536, 31 N. E. 884, 17 L.R.A. 184 (holding an ordinance requiring a license fee of $25 per day for selling at auction merchandise imported into the city invalid).

Annotation: 31 A.L.R. 310, s. 39 A.L.R. 776, 46 A.L.R. 157, and 52 A.L.R. 491; 51 L.R.A.(N.S.) 40; Ann. Cas. 1915B, 817.

[20] Toyota v. Hawaii, 226 U. S. 184, 57 L. ed. 180, 33 S. Ct. 47.

Annotation: Ann. Cas. 1915B, 815.

[1] Wright v. May, 127 Minn. 150, 149 N. W. 9, L.R.A.1915B, 151.

The fact that the auctioneer acted without compensation has been held to be no defense to a prosecution for selling at auction without a license. Annotation: 31 A.L.R. 304.

[2] Annotation: 30 A.L.R. 851, s. 42 A.L.R. 1228.

[3] Ley v. Babcock, 118 Cal. App. 525, 5 P. (2d) 620, citing R. C. L.; Sweeney v. Brow, 35 R. I. 227, 86 A. 115, Ann. Cas. 1915C, 1075.

That an auctioneer who conducted a land sale was not licensed does not affect the validity of a sale of land conducted by him as between the vendor and purchaser.

One employed by the auctioneer to use the hammer and make the outcry under the personal supervision and direction of the auctioneer is not ordinarily required to have an auctioneer's license;[4] nor will the auctioneer's occasional absence during the sale subject his substitute to the penalties of the statute or ordinance against selling by auction without a license.[5] However, an ostensible relationship of employer and employee, entered into as a subterfuge to evade payment of the auctioneer's license tax, is no defense to an action to recover the statutory penalty for carrying on the business without a license.[6]

§ 7. Regulation Other than Requirement of License.—In addition to prohibiting auctioneering except through licensed auctioneers, the state or municipality may, in the exercise of the police power, impose such other regulations on the conduct of the business as are reasonable and not wholly arbitrary.[7] On the other hand, regulations which unreasonably limit the right of an auctioneer to sell the goods of another, having no reasonable relation to the public health, comfort, morals, or welfare, are unenforceable.[8] Among the many and varied regulations which have been imposed upon the conduct of auctions are regulations with respect to the time[9] and place[10] of sale, the kind of goods to be sold,[11] as well as various miscellaneous regulations.[12] There is some difference of opinion as to the validity of a regulation which prohibits auction sales at night.[13] Some courts hold such a regulation to be unreasonable and invalid.[14] Others take the view that it is a valid police regulation,[15] particularly when directed toward auctions of jewelry.[16] Stat-

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Sweeney v. Brow, 35 R. I. 227, 86 A. 115, Ann. Cas. 1915C, 1075.

[4] **A statute expressly forbidding an auctioneer to authorize any person to act as his substitute** does not prevent him from employing a crier if he superintends the sale in person. Annotation: 50 Am. St. Rep. 115.

[5] Kimmins v. Montrose, 59 Colo. 578, 151 P. 434, Ann. Cas. 1917A, 407.

Annotation: 50 Am. St. Rep. 115.

[6] Kimmins v. Montrose, 59 Colo. 578, 151 P. 434, Ann. Cas. 1917A, 407 (under the facts of this case, the burden of proof was held to be on the defendant to show that he was acting as the assistant of another regularly licensed auctioneer).

[7] Clein v. Atlanta, 164 Ga. 529, 139 S. E. 46, 53 A.L.R. 933; People v. Gibbs, 186 Mich. 127, 152 N. W. 1053, Ann. Cas. 1917B, 830; Biddles v. Enright, 239 N. Y. 354, 146 N. E. 625, 39 A.L.R. 766; Holsman v. Thomas, 112 Ohio St. 397, 147 N. E. 750, 39 A.L.R. 760.

[8] People v. Gibbs, 186 Mich. 127, 152 N. W. 1053, Ann. Cas. 1917B, 830; Miller v. Greenville, 134 S. C. 314, 132 S. E. 591, 46 A.L.R. 155; Dornberg v. Spokane, 125 Wash. 72, 215 P. 518, 31 A.L.R. 295.

The courts will ordinarily presume that a legislative body acted reasonably and that the regulation adopted has some relation to the public health, safety, convenience, or welfare; yet, in the final analysis, the reasonableness thereof is a judicial question. Dornberg v. Spokane, 125 Wash. 72, 215 P. 518, 31 A.L.R. 295.

[9] Annotation: 31 A.L.R. 303, s. 39 A.L.R. 775, 46 A.L.R. 157, and 52 A.L.R. 491.

[10] Annotation: 31 A.L.R. 302, s. 39 A.L.R. 774, 46 A.L.R. 157, and 52 A.L.R. 491.

An ordinance forbidding public auctions within a prescribed portion of the business district of a city is invalid, the fact that crowds are attracted by an auction being insufficient to warrant such regulation. Dornberg v. Spokane, 125 Wash. 72, 215 P. 518, 31 A.L.R. 295.

[11] Annotation: 31 A.L.R. 302, s. 39 A.L.R. 775, 46 A.L.R. 157, and 52 A.L.R. 491.

An ordinance providing that no jewelry may be sold at auction for a period greater than sixty days in any one year and that the goods and the owner must be on the premises six months has been upheld as a valid police regulation. Holsman v. Thomas, 112 Ohio St. 397, 147 N. E. 750, 39 A.L.R. 760.

An ordinance that limits auctions of jewelry to six successive days in any calendar year has been held an unreasonable limitation on the right of the auctioneer to sell the goods of another. Miller v. Greenville, 134 S. C. 314, 132 S. E. 591, 46 A.L.R. 155.

[12] Annotation: 39 A.L.R. 775, s. 46 A.L.R. 157.

An application for a permit to hold an auction for the sale of jewelry may be required to be accompanied by an inventory of the articles to be sold. Holsman v. Thomas, 112 Ohio St. 397, 147 N. E. 750, 39 A.L.R. 760.

[13] Annotation: 31 A.L.R. 303, s. 39 A.L.R. 775, 46 A.L.R. 157, and 52 A.L.R. 491.

[14] People v. Gibbs, 186 Mich. 127, 152 N. W. 1053, Ann. Cas. 1917B, 830 (ordinance prohibiting auction sales between the hours of 6 o'clock P. M. and 8 o'clock A. M.).

[15] Biddles v. Enright, 239 N. Y. 354, 146 N. E. 625, 39 A.L.R. 766 (statute prohibit-

utes and ordinances sometimes require an auctioneer to post a bond, designed to protect the owner of the goods as regards payment of the proceeds as well as to protect purchasers from fraud and misrepresentation.[17]

III. AUTHORITY AND AGENCY OF AUCTIONEER

§ 8. Generally.—The mere fact that an auctioneer is sometimes required to take out a license in order to exercise his calling [18] does not constitute him a public officer. His business is essentially a private one.[19] His authority to conduct a particular sale is derived from the person whose property he undertakes to sell,[20] and he is primarily the agent of that person, being selected and remunerated by him, acting in his interests, and, in a measure, being subservient to his wishes.[1] However, upon the acceptance of a bid upon the property being sold,[2] the auctioneer becomes, for the purpose of drawing up and signing the memorandum that takes the transaction out of the operation of the statute of frauds, the agent of the purchaser as well as the agent of the seller. This dual agency is solely for the purpose of drawing up and signing such memorandum, and even as to this purpose, the auctioneer's agency in behalf of the buyer is generally more restricted than his agency in behalf of the seller. This authority must be exercised contemporaneously with the sale, and not thereafter.[3]

Ordinarily, an auctioneer's authority to sell either land or goods need not be evidenced by any written instrument,[4] even though the contract of sale must be in writing.[5] In many jurisdictions, however, statutes require that the auctioneer's authority to sell be evidenced by a writing signed by the owner.[6]

§ 9. Scope and Extent of Authority.—An auctioneer's authority is commensurate with the nature and extent of the agency thus conferred upon him, and when he exceeds the scope of his authority, he does not bind the owner of the property.[7] As to matters on which the express terms of his agency are silent, his authority is to be measured by the general usage of the business.[8] In general, the manner of conducting the sale lies wholly within

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ing the conduct of the business of auctioneering at night between sunset and sunrise).

Excepting books and prints, art work, animals, farm products, and goods sold in original packages from a statute forbidding auction sales at night is not such discrimination as to render the act unconstitutional. Ibid.

[16] Clein v. Atlanta, 164 Ga. 529, 139 S. E. 46, 53 A.L.R. 933.

[17] Clein v. Atlanta, 164 Ga. 529, 139 S. E. 46, 53 A.L.R. 933; Holsman v. Thomas, 112 Ohio St. 397, 147 N. E. 750, 39 A.L.R. 760.

Annotation: L.R.A.1917B, 1013.

[18] See supra, § 3.

[19] Seemuller v. Fuchs, 64 Md. 217, 1 A. 120, 54 Am. Rep. 766.

[20] Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195.

[1] Veazie v. Williams, 8 How. (U. S.) 134, 12 L. ed. 1018; McMillan v. Harris, 110 Ga. 72, 35 S. E. 334, 48 L.R.A. 345, 78 Am. St. Rep. 93; Thomas v. Kerr, 3 Bush (Ky.) 619, 96 Am. Dec. 262; Wright v. May, 127 Minn. 150, 149 N. W. 9, L.R.A.1915B, 151; Freeman v. Poole, 37 R. I. 489, 93 A. 786, L.R.A.1917A, 63, Ann. Cas. 1918A, 841; Sweeney v. Brow, 35 R. I. 227, 86 A. 115, Ann. Cas. 1915C, 1075.

Annotation: 131 Am. St. Rep. 480.

See Am. Law Inst. Restatement, Agency, p. 10.

As to whether an auctioneer acts in a "fiduciary capacity" under the Bankruptcy Act, see annotation: Ann. Cas. 1915A, 1297.

[2] See infra, § 17.

[3] See infra, §§ 30, 31.

[4] Doty v. Wilder, 15 Ill. 407, 60 Am. Dec. 756; Dawson v. Miller, 20 Tex. 171, 70 Am. Dec. 380.

Annotation: 131 Am. St. Rep. 482.

[5] See infra, § 33.

[6] Baham v. Bach, 13 La. 287, 33 Am. Dec. 561.

Annotation: 131 Am. St. Rep. 482.

[7] Broughton v. Silloway, 114 Mass. 71, 19 Am. Rep. 312; Upton v. Suffolk County Mills, 11 Cush. (Mass.) 586, 59 Am. Dec. 163; Bush v. Cole, 28 N. Y. 261, 84 Am. Dec. 343.

[8] Upton v. Suffolk County Mills, 11 Cush. (Mass.) 586, 59 Am. Dec. 163.

An auctioneer may assume that he has the authority usually exercised in such employment, or which has been exercised previously by him when representing the principal, unless restrictions are imposed. Am. Law Inst. Restatement, Agency, § 34b.

the auctioneer's discretion, and in the reasonable exercise of such discretion, he is justified in adjourning the sale to another day.[9] He also has implied authority to receive payment of the purchase price of merchandise sold for the principal, except where the latter has given notice to the purchaser to pay direct to him.[10] Usually, however, he has no authority to sell the goods on credit unless he has the owner's express direction or consent.[11] Likewise, where the terms of sale require payment in cash, the auctioneer has no authority, by virtue of his employment as such, to receive a check in payment, and the vendor is not bound by such an unauthorized act even in the absence of notification to the purchaser that he repudiates the transaction.[12] The auctioneer's authority is confined to making the sale, and he cannot rescind it even before the payment of the purchase money.[13]

The auctioneer's misrepresentation or other fraudulent conduct which deceives a purchaser to the latter's injury and inures to the benefit of the owner entitles the purchaser to redress in an action against the owner,[14] regardless of whether he authorized or was aware of the fraud.[15]

§ 10. —Power to Warrant.—The general rule is that in the absence of express authority, an auctioneer has no power to warrant the goods he offers at auction so as to bind the seller; his agency to sell does not carry with it, by implication, power to warrant,[16] although the vendor may, of course, ratify his statements and thus render the warranty binding upon himself.[17] Moreover, the auctioneer may bind himself personally by a warranty.[18] In some instances statutes have conferred on auctioneers authority to give particular warranties, except where such authority is specially restricted; and in such a case the buyer may rely on the auctioneer's warranty and obtain redress against the seller unless he has actual or constructive notice of such a restriction.[1]

§ 11. Duration of Agency; Right to Terminate.—Except where an auctioneer's authority as agent of the vendor is coupled with an interest in the goods to be sold, it is subject at any time to the revocation of his principal the same as all other relations of agency. Thus, at any time before the fall of the hammer, the vendor may withdraw the property offered for sale,[2] and, according to some authorities, he may revoke the auctioneer's authority to sign the memorandum of sale in his behalf, even after the fall of the hammer.[3] As to the vendor, on the other hand, it is to be noted that the agency of the auctioneer is far more extensive than in the case of the vendee. Being primarily the agent of the former, his authority usually commences prior to the date of sale, since he is ordinarily given charge of the proceedings and arrangements leading thereto, and continues for some time after the auction until the sale is actually consummated in all its details.[4] His authority in each case, however, would depend upon the particular facts and circumstances.[5]

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[9] Blossom v. Milwaukee & C. R. Co. 3 Wall. (U. S.) 196, 18 L. ed. 43; Roberts v. Roberts, 13 Gratt. (Va.) 639, 70 Am. Dec. 435; McPherson Bros. Co. v. Okanogan County, 45 Wash. 285, 88 P. 199, 9 L.R.A. (N.S.) 748.

Annotation: 9 Am. St. Rep. 882.

[10] Annotation: 8 A.L.R. 227.

After the sale is made and the goods have been delivered, the auctioneer has no implied authority subsequently to receive the purchase price. Annotation: 8 A.L.R. 227.

[11] Broughton v. Silloway, 114 Mass. 71, 19 Am. Rep. 312; Upton v. Suffolk County Mills, 11 Cush. (Mass.) 586, 59 Am. Dec. 163.

[12] Broughton v. Silloway, 114 Mass. 71, 19 Am. Rep. 312.

[13] Annotation: 18 L. ed. 43.

[14] Veazie v. Williams, 8 How. (U. S.) 134, 12 L. ed. 1018; Roberts v. French, 153 Mass. 60, 26 N. E. 416, 10 L.R.A. 656, 25 Am. St. Rep. 611 (misstatement as to dimensions of tract of land); Curtis v. Aspinwall, 114 Mass. 187, 19 Am. Rep. 332.

Annotation: Ann. Cas. 1915C, 581.

[15] Veazie v. Williams, 8 How. (U. S.) 134, 12 L. ed. 1018.

Where sham bids are employed by an auctioneer to enhance the price of property far beyond its true value, the defrauded purchaser may maintain an action against the vendor who has adopted the sale and received the benefits of it, however innocent the latter himself may have been of any intent to defraud. Veazie v. Williams, 8 How. (U. S.) 134, 12 L. ed. 1018.

[16] The Monte Allegre, 9 Wheat. (U. S.) 616, 6 L. ed. 174; Court v. Snyder, 2 Ind. App. 440, 28 N. E. 718, 50 Am. St. Rep. 247; Upton v. Suffolk County Mills, 11 Cush. (Mass.) 586, 59 Am. Dec. 163; Cysewski v. Fried, 24 N. D. 152, 139 N. W. 104, Ann. Cas. 1915C, 579.

Annotation: 131 Am. St. Rep. 496; Ann. Cas. 1915C, 581.

The principal may, of course, ratify the auctioneer's statements. Annotation: 96 Am. Dec. 264.

See also AGENCY, Vol. 2, p. 105, §§ 131 et seq.

[17] See annotation: 96 Am. Dec. 264.

[18] See infra, § 57.

[1] Cysewski v. Fried, 24 N. D. 152, 139 N. W. 104, Ann. Cas. 1915C, 579.

§ 12. **Delegation of Authority.**—Special trust and confidence are placed in an auctioneer which he cannot delegate in the absence of a direct authorization on the part of his principal. He may employ necessary clerks and servants, and, in the course of a protracted sale, employ others to make the outcry, use the hammer, enter the bids, and do other acts incident to the sale, when this is done under his immediate direction and supervision,[6] but he may not appoint deputies to make sales at different places in his absence.[7]

§ 13. **Interest of Auctioneer in Purchase.**[8]—The principle that an agent having the power to sell or convey the property of his principal cannot, directly or indirectly, purchase such property without the consent of his principal[9] precludes an auctioneer, without the consent of his employer, from becoming the purchaser or interested in the purchase of the property which he is employed to sell.[10] If re does so and the owner seeks to impeach the sale, no inquiry will be permitted into the fairness or unfairness of the transaction.[11] Such a sale, however, is voidable, not absolutely void; strangers to the property may not question it.[12]

IV. CONDUCT AND VALIDITY OF SALE

§ 14. **The Advertisement.**—The main purpose of the advertisement of an auction is to give notice of the sale; it may announce the terms and conditions and include a description of the property to be sold.[13] In the case of voluntary auctions, it is ordinarily purely optional with the owner whether the sale shall be preceded by an advertisement,[14] although an advertisement is a necessary prerequisite to a valid judicial sale.[15] There is some conflict of authority on the question as to whether or not representations as to goods to be sold at auction, contained in newspaper advertisements, catalogues, circulars, etc., become a part of the contract and constitute an express warranty for breach of which the seller will be liable in damages to a purchaser who relies thereon to his injury, or give rise to an action for fraud or misrepresentation. Some cases take the view that the advertisement is simply for the purpose of inducing the buyer to attend the sale, and that representations contained therein are not a part of the contract of sale unless such statements are expressly adopted at the time of the sale.[16] Others hold that a representation contained in an advertisement may amount to a warranty.[17] The effect of such a representation may be altered by declarations made by the seller or the auctioneer at the time of the sale.[18] In some instances, the advertisement may expressly negative a warranty of the goods to be sold.[19]

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[2] Tillman v. Dunman, 114 Ga. 406, 40 S. E. 244, 57 L.R.A. 784, 88 Am. St. Rep. 28.
Annotation: 57 L.R.A. 784.

[3] Annotation: 131 Am. St. Rep. 481.
See also infra, § 30.

[4] Annotation: 131 Am. St. Rep. 481.
And see infra, § 31.

[5] See infra, § 31.

[6] Annotation: 50 Am. St. Rep. 115; 131 Am. St. Rep. 482.

[7] Annotation: 131 Am. St. Rep. 482.

[8] As to whether an auctioneer may bid in behalf of a third person, see infra, § 21.

[9] See Agency, Vol. 2, p. 207, § 256.

[10] Kearney v. Taylor, 15 How. (U. S.) 494, 14 L. ed. 787; Veazie v. Williams, 8 How. (U. S.) 134, 12 L. ed. 1018; Mills v. Goodsell, 5 Conn. 475, 13 Am. Dec. 90; Arnold v. Brown, 24 Pick. (Mass.) 89, 35 Am. Dec. 296; Remick v. Butterfield, 31 N. H. 70, 64 Am. Dec. 316; Roberson v. Ramsey, 147 Tenn. 25, 245 S. W. 413, citing R. C. L.

Annotation: 20 L.R.A. 503; 131 Am. St. Rep. 482, 485; Ann. Cas. 1912A, 1175.

The rule does not prevent an auctioneer from being interested in a corporation which is selling the property, as an auctioneer may sell his own property. Annotation. 131 Am. St. Rep. 483.

In Swires v. Brotherline, 41 Pa. 135, 80 Am. Dec. 601, however, it is stated that if an auctioneer bids at his own sale fairly and openly, it tends to enhance the price and is no ground for treating the sale as fraudulent.

Generally, as to who may bid at an auction sale, see infra, § 21.

[11] Mills v. Goodsell, 5 Conn. 475, 13 Am. Dec. 90; Remick v. Butterfield, 31 N. H. 70, 64 Am. Dec. 316.

[12] Remick v. Butterfield, 31 N. H. 70, 64 Am Dec. 316. See also Veazie v. Williams, 8 How. (U. S.) 134, 12 L. ed. 1018.

[13] Annotation: 28 A.L.R. 1001, 1002.

[14] Annotation: 131 Am. St. Rep. 484.
As to advertisement and notice on re-

It is settled beyond dispute that an advertisement of an auction is not an offer to sell which becomes binding, even conditionally, on the owner when a bid is made. On principle and authority, the correct rule is that an announcement that a person will sell his property at public auction to the highest bidder is a mere declaration of intention to hold an auction at which bids will be received.[20]

§ 15. Terms and Conditions of Sale.—It is the right of the owner of property sold at auction to prescribe, within reasonable limits, the manner, conditions, and terms of sale.[1] Usually the auctioneer, at the time and place appointed for the auction, announces these terms and conditions.[2] The auctioneer should specifically announce the name of his principal; otherwise he may be personally liable as vendor.[3] Terms and conditions so announced generally are deemed to supersede all others and to bind the purchaser even though he did not hear or understand the announcement or was not present at the time of the announcement and such terms were not brought to his actual attention.[4] The conditions of sale may be incorporated in an advertisement of the auction;[5] in such case, a reference thereto at the time and place of sale is a sufficient announcement of the terms and conditions of the sale.[6]

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sale of property held to fix the seller's damages, see infra, § 45.

[15] See Judicial Sales [Also 16 R. C. L. p. 55, § 39].

[16] Annotation: 28 A.L.R. 1001, 1002.

[17] Henshaw v. Robins, 9 Met. (Mass.) 83, 43 Am. Dec. 367.
Annotation: 28 A.L.R. 1004.

[18] Hadley v. Clinton County Importing Co. 13 Ohio St. 502, 82 Am. Dec. 454.
Annotation: 28 A.L.R. 1001.

[19] Annotation: 28 A.L.R. 1001, 1005.
See also Mottram v. United States, 271 U. S. 15, 70 L. ed. 803, 46 S. Ct. 386 (through an error, a catalogue listed the quantity of an article at 100 times greater than the actual quantity, the catalogue stating that the supplies were sold subject to errors in description, the amount of the bid being subsequently refunded).

[20] Anderson v. Wisconsin C. R. Co. 107 Minn. 296, 120 N. W. 39, 20 L.R.A.(N.S.) 1133, 131 Am. St. Rep. 462, 16 Ann. Cas. 379.
See also infra, § 17.

[1] Kennell v. Boyer, 144 Iowa, 303, 122 N. W. 941, 24 L.R.A.(N.S.) 488, Ann. Cas. 1912A, 1127.
Annotation: Ann. Cas. 1912A, 1128.

[2] Kennell v Boyer, 144 Iowa, 303, 122 N. W. 941, 24 L.R.A.(N.S.) 488, Ann. Cas. 1912A, 1127; Ashcom v. Smith, 2 Penr. & W. (Pa.) 211, 21 Am. Dec. 437.
Annotation: 24 L.R.A.(N.S.) 488; Ann. Cas. 1912A, 1129.

[3] Annotation: 3 Eng. Rul. Cas. 586.
See infra, § 57.

[4] Kennell v. Boyer, 144 Iowa, 303, 122 N. W. 941, 24 L.R.A.(N.S.) 488, Ann. Cas. 1912A, 1127; Definite Contract Bldg. & L. Asso. v. Tumin, 158 Va. 771, 164 S. E. 562, citing R. C. L.; Keske v. Boeder, 168 Wis. 369, 170 N. W. 247, citing R. C. L.
Annotation: 28 A.L.R. 1003; 24 L.R.A. (N.S.) 488; 131 Am. St. Rep. 484; Ann. Cas. 1912A, 1131.

[5] Annotation: 28 A.L.R. 1002, 1003; 131 Am. St. Rep. 484.

[6] Morgan v. East, 126 Ind. 42, 25 N. E. 867, 9 L.R.A. 558; Ashcom v. Smith, 2 Penr. & W. (Pa.) 211, 21 Am. Dec. 437.
Annotation: Ann. Cas. 1912A, 1132.
The terms and conditions set forth in the advertisement of an auction sale of government property are binding alike up-

Particular care should be taken that the conditions announced and the representations made are perfectly complete and accurate.[7] If the vendor wishes to fix a minimum price below which the property will not be sold, or to reserve to himself the right to bid, in person or through another, he must make an express announcement thereof in order that no one will be misled, for otherwise the sale will be deemed to be without reserve.[8] The seller may waive the terms of the sale by not insisting upon a compliance therewith by the buyer.[9]

It has been held that the announced terms of sale may be varied as to the actual purchaser by a prior agreement with him.[10] This, however, would seem contrary to the principle that it is essential to every fair public auction that all the bidders shall stand upon an equal footing,[11] and the contrary view has been taken.[12]

§ 16. —Conflict between Printed and Oral Conditions.—The courts differ as to the effect of a parol modification by the auctioneer, at the time of the sale, of terms previously announced in a written or printed notice of sale. Some courts take the view that the advertisement or advance announcement has no special significance other than to give notice of the fact that a sale is intended,[13] so that the terms contained in such advertisements or notices may be modified or added to by the auctioneer at the beginning of the sale.[14] Others take the view that the printed terms may not be varied or contradicted by parol evidence of the verbal statements made by the auctioneer at the time of the sale,[15] although it is otherwise where the oral declarations are not repugnant to, or inconsistent with, the advertisements or notices, but are merely explanatory.[16] Some hold that the parol declarations of the auctioneer subsequent to and variant from the advertisements can not change the printed terms of sale unless such declarations are shown to have been made known to the purchaser.[17]

§ 17. The Bidding; Offer and Acceptance; Withdrawal of Property from Sale.—A sale at auction, like every other sale, must have the assent, express or implied, of both seller and buyer.[18] An announcement of an auction or the

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on the United States and the bidders. Erie Coal & Coke Corp. v. United States, 266 U. S. 518, 69 L. ed. 417, 45 S. Ct. 181.

[7] **It has been held that a notice at an auction of lots in a residence tract,** that the property is restricted as to buildings and against nuisances, does not give fair notice to bidders of a provision which, after restricting the property, character of buildings, and usage, empowers the grantor or his assignees to annul any restriction at pleasure in favor of any lot owner. Sohns v. Beavis, 200 N. Y. 268, 93 N. E. 935, 34 L.R.A.(N.S.) 927.

[8] Miller v. Baynard, 2 Houst. (Del.) 559, 83 Am. Dec. 168; Anderson v. Wisconsin C. R. Co. 107 Minn. 296, 120 N. W. 39, 20 L.R.A.(N.S.) 1133, 131 Am. St. Rep. 462, 16 Ann. Cas. 379; Davis v. Petway, 3 Head (Tenn.) 667, 75 Am. Dec. 789.

[9] Annotation: 131 Am. St. Rep. 484.

[10] Mitchell v. Zimmerman, 109 Pa. 183, 58 Am. Rep. 715.
Annotation: 24 L.R.A.(N.S.) 488, Ann. Cas. 1912A, 1132.

[11] Mott v. Pennsylvania R. Co. 30 Pa. 9, 72 Am. Dec. 664. See also Manhattan Taxi Serv. Corp. v. Checker Cab. Mfg. Co. 253 N. Y. 455, 171 N. E. 705, 69 A.L.R. 1190.

[12] Annotation: 24 L.R.A.(N.S.) 488; Ann. Cas. 1912A, 1132.

[13] Ashcom v. Smith, 2 Penr. & W. (Pa.) 211, 21 Am. Dec. 437.
Annotation: Ann. Cas. 1912A, 1131.
See supra, § 14.

[14] Kennell v. Boyer, 144 Iowa, 303, 122 N. W. 941, 24 L.R.A.(N.S.) 488, Ann. Cas. 1912A, 1127; Ashcom v. Smith, 2 Penr. & W. (Pa.) 211, 21 Am. Dec. 437.
Annotation: 28 A.L.R. 1002; 24 L.R.A. (N.S.) 488; 131 Am. St. Rep. 484; Ann. Cas. 1912A, 1131.

[15] Chouteau v. Goddin, 39 Mo. 229, 90 Am. Dec. 462.
Annotation: Ann. Cas. 1912A, 1130.
See also Lewis v. E. F. Schlichter Co. 137 Md. 217, 112 A. 282, citing R. C. L.
Parol evidence of the auctioneer's declarations is admissible, however, for the purpose of proving fraud. Chouteau v. Goddin, 39 Mo. 229, 90 Am. Dec. 462. Annotation: Ann. Cas. 1912A, 1131.

[16] Lewis v. E. F. Schlichter Co. 137 Md. 217, 112 A. 282, citing R. C. L.; Chouteau v. Goddin, 39 Mo. 229, 90 Am. Dec. 462.
Annotation: Ann. Cas. 1912A, 1130.

[17] Annotation: 28 A.L.R. 1003; 24 L.R.A. (N.S.) 488, Ann. Cas. 1912A, 1131.

[18] Blossom v. Milwaukee & C. R. Co. 3

act of putting property up for sale thereat does not constitute an offer to sell capable of acceptance by the making of a bid.[19] It is rather a mere invitation to those attending the sale to make offers by bids.[20] The contract becomes complete only when the bid is accepted, this being ordinarily denoted by the fall of the hammer.[1] The bidder may withdraw his bid at any time before its acceptance.[2] His right to do so cannot be curtailed by rules or conditions, prescribed by the auctioneer, forbidding the retraction of a bid once it is made.[3] On the other hand, the auctioneer, unless he has announced that the sale shall be "without reserve," may withdraw the goods from sale at any time before the fall of the hammer, in which case even the highest bidder has no claim to the property.[4] If the sale is expressly announced to be "without reserve," however, the owner may be held liable for a withdrawal of the property from the sale after a bid.[5] In that case after a bid has been made the auctioneer cannot

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Wall. (U. S.) 196, 18 L. ed. 43; McPherson Bros. Co. v. Okanogan County, 45 Wash. 285, 88 P. 199, 9 L.R.A.(N.S.) 748.

Annotation: 11 A.L.R. 543.

[19] Anderson v. Wisconsin C. R. Co. 107 Minn. 296, 120 N. W. 39, 20 L.R.A.(N.S.) 1133, 131 Am. St. Rep. 462, 16 Ann. Cas. 379.

Annotation: 131 Am. St. Rep. 492.

[20] Blossom v. Milwaukee & C. R. Co. 3 Wall. (U. S.) 196, 18 L. ed. 43; Anderson v. Wisconsin C. R. Co. 107 Minn. 296, 120 N. W. 39, 20 L.R.A.(N.S.) 1133, 131 Am. St. Rep. 462, 16 Ann. Cas. 379; Fisher v. Seltzer, 23 Pa. 308, 62 Am. Dec. 335; Freeman v. Poole, 37 R. I. 489, 93 A. 786, L.R.A. 1917A, 63, Ann. Cas. 1918A, 841 (under Uniform Sales Law).

Annotation: 18 L. ed. 43; L.R.A.1917A, 76; 131 Am. St. Rep. 492; Ann. Cas. 1918A, 851.

Am. Law Inst. Restatement, Contracts, § 27.

[1] Blossom v. Milwaukee & C. R. Co. 3 Wall. (U. S.) 196, 18 L. ed. 43; Tillman v. Dunman, 114 Ga. 406, 40 S. E. 244, 57 L.R.A. 784; Anderson v. Wisconsin C. R. Co. 107 Minn. 296, 120 N. W. 39, 20 L.R.A. (N.S.) 1133, 131 Am. St. Rep. 462, 16 Ann. Cas. 379; Fisher v. Seltzer, 23 Pa. 308, 62 Am. Dec. 335; Freeman v. Poole, 37 R. I. 489, 93 A. 786, L.R.A.1917A, 63, Ann. Cas. 1918A, 841 (under Uniform Sales Law); McPherson Bros. Co. v. Okanogan County, 54 Wash. 285, 88 P. 199, 9 L.R.A.(N.S.) 748.

Annotation: 18 L. ed. 43; L.R.A.1917A, 76; Ann. Cas. 1918A, 851.

As stated by the American Law Institute the auctioneer merely invites offers from successive bidders which he may accept or reject unless, by announcing that the sale is without reserve or by other means, he indicates that he is making an offer to sell at any price bid by the highest bidder. Restatement, Contracts, § 27.

The fall of the auctioneer's hammer in response to a fictitious bid by an agent of the property owner does not conclude a contract with the one who made the highest bona fide bid. Freeman v. Poole, 37 R. I. 489, 93 A. 786, L.R.A.1917A, 63.

[2] Blossom v. Milwaukee & C. R. Co. 3 Wall. (U. S.) 196, 18 L. ed. 43; Tillman v. Dunman, 114 Ga. 406, 40 S. E. 244, 57 L.R.A. 784, 88 Am. St. Rep. 28; Anderson v. Wisconsin C. R. Co. 107 Minn. 296, 120 N. W 39, 20 L.R.A.(N.S.) 1133, 131 Am. St. Rep. 462, 16 Ann. Cas. 379; Fisher v. Seltzer, 23 Pa. 308, 62 Am. Dec. 335; Freeman v. Poole, 37 R. I. 489, 93 A. 786, L.R.A.1917A, 63, Ann. Cas. 1918A, 841 (under Uniform Sales Law).

Annotation: 18 L. ed. 43; Ann. Cas. 1912A, 1129.

Even though the sale is announced to be without reserve any bidder may withdraw his bid until the auctioneer by fall of the hammer, or in other customary manner, announces that the sale is complete. Am. Law Inst. Restatement, Contracts, § 27.

[3] Fisher v. Seltzer, 23 Pa. 308, 62 Am. Dec. 335.

Annotation: Ann. Cas. 1912A, 1129.

[4] Blossom v. Milwaukee & C. R. Co. 3 Wall. (U. S.) 196, 18 L. ed. 43; Tillman v. Dunman, 114 Ga. 406, 40 S. E. 244, 57 L.R.A. 784, 88 Am. St. Rep. 28; Anderson v. Wisconsin C. R. Co. 107 Minn. 296, 120 N. W. 39, 20 L.R.A.(N.S.) 1133, 131 Am. St. Rep. 462, 16 Ann. Cas. 379; Freeman v. Poole, 37 R. I. 489, 93 A. 786, L.R.A.1917A, 63, Ann. Cas. 1918A, 841 (under Uniform Sales Law); McPherson Bros. Co. v. Okanogan County, 45 Wash. 285, 88 P. 199, 9 L.R.A. (N.S.) 748.

Annotation: 20 L.R.A.(N.S.) 1133; L.R.A. 1917A, 74; Ann. Cas. 1918A, 851; 16 Ann. Cas. 386.

Am. Law Inst. Restatement, Contracts, § 27.

The conflict and confusion in the earlier cases (annotation: 57 L.R.A. 784) generally has been resolved by the later decisions. See annotation: L.R.A.1917A, 74.

By withdrawing his property under such circumstances the owner does not infringe upon any right of the bidder, for the latter merely offers to purchase, and if his offer is declined, he has no remedy even though he may have lost a bargain and incurred expense and loss of time in attending the sale. Anderson v. Wisconsin C. R. Co. 107 Minn. 296, 120 N. W. 39, 20 L.R.A.(N.S.) 1133, 131 Am. St. Rep. 462, 16 Ann. Cas. 379.

Annotation: 57 L.R.A. 787.

[5] Freeman v. Poole, 37 R. I. 489, 93 A. 786, L.R.A.1917A, 63, Ann. Cas. 1918A, 841.

Annotation: L.R.A.1917A, 76.

Statutes which have provided that where an announcement that the sale will be without reserve is made, the highest bidder has an absolute right to the completion of the sale to him, have nevertheless provided also that bids may be withdrawn at any time before the hammer falls. Annotation: 57 L.R.A. 788, withdraw.[5a] These common-law principles are adopted by the Uniform Sales Act.[6]

Once a bid has been accepted, the parties occupy the same relation toward each other as exists between promisor and promisee in an executory contract of sale conventionally made. Thereafter, as a rule, the seller has no right to accept a higher bid, nor may the buyer withdraw his bid.[7] Where, however, the statute of frauds requires a memorandum in writing, the bidder, according to some authorities, has an opportunity, between the time of the fall of the hammer and the writing of his name in the memorandum, to revoke the authority of the auctioneer, as his agent, to sign such memorandum in his behalf, and thus, in this instance, indirectly accomplish a retraction of his bid.[8]

§ 18. **Mode of Making Bids.**—There is no formal or prescribed mode of bidding for property put up at auction.[9] A bid may be made by words spoken aloud or put in writing, by a wink or nod, or by any mode by which the bidder signifies his willingness and intention to give a particular price.[10] It is improper, however, for any bidder to have a secret arrangement with an auctioneer whereby he denotes his bids by means of a private signal, for the effect of this would be to give that bidder an advantage over others,[11] and it is of the essence of an auction that there shall be full and free opportunity for competition among bidders.[12] It is not essential to the validity of a bid at an auction that the bidder be personally present at the sale;[13] he may employ another person to bid for him.[14] Again, a bid at auction may be made by letter, and if it proves to be the highest made, the writer will be deemed the purchaser of the property put up for sale.[15] Ordinarily, the auctioneer has the right to prescribe the rules of bidding as a part of the terms and conditions of sale, and any bid not in conformity with the terms and conditions of sale as advertised and announced by the auctioneer is not entitled to consideration.[16]

§ 19. **Mode of Accepting Bids.**—The acceptance of a bid at auction is denoted by the fall of the hammer or by any other audible or visible means signifying to the bidder that he is entitled to the property on paying the amount of his bid according to the terms of the sale.[17] The most usual mode is by the fall of the hammer, and from this method are derived the expressions that the property is "struck off," or "knocked off," or "knocked down" to the bidder.[18]

[5a] Am. Law Inst. Restatement, Contracts, § 27.

[6] Freeman v. Poole, 37 R. I. 489, 93 A. 786, L.R.A.1917A, 63, Ann. Cas. 1918A, 841.
Annotation: 20 L.R.A.(N.S.) 1133.

[7] Osborn v. Apperson Lodge, 213 Ky. 533, 281 S. W. 500, 46 A.L.R. 117; State v. School Land Comrs. 27 Wyo. 54, 191 P. 1073, 11 A.L.R. 539.
Annotation: 11 A.L.R. 545; 131 Am. St. Rep. 491.
One to whom property offered for sale at auction is knocked down cannot avoid his bid because the auctioneer was signaled to accept it for the purpose of preventing an objectionable bidder from making a higher bid. Osborn v. Apperson Lodge, 213 Ky. 533, 281 S. W. 500, 46 A.L.R. 117.

[8] See infra, § 30.

[9] Annotation: 11 A.L.R. 543.

[10] Tyree v. Williams, 3 Bibb (Ky.) 365, 6 Am. Dec. 663; State ex rel. Fitch v. State Bd. of School Land Comrs. 27 Wyo. 54, 191 P. 1073, 11 A.L.R. 539.
Annotation: 11 A.L.R. 543; 131 Am. St. Rep. 484.
The bid may be made in words, uttered aloud in the hearing of the bystanders, or spoken privately to the auctioneer. State ex rel. Fitch v. State Bd. of School Land Comrs. 27 Wyo. 54, 191 P. 1073, 11 A.L.R. 539.

[11] Annotation: 131 Am. St. Rep. 484.

[12] Manhattan Taxi Serv. Corp. v. Checker Cab Mfg. Co. 253 N. Y. 455, 171 N. E. 705, 69 A.L.R. 1190.

[13] Farr v. John, 23 Iowa, 286, 92 Am. Dec. 426; Tyree v. Williams, 3 Bibb (Ky.) 365, 6 Am. Dec. 663; State ex rel. Fitch v. State Bd. of School Land Comrs. 27 Wyo. 54, 191 P. 1073, 11 A.L.R. 539.
Annotation: 11 A.L.R. 544.

[14] Annotation: 11 A.L.R. 544; 131 Am. St. Rep. 486.

[15] Tyree v. Williams, 3 Bibb (Ky.) 365, 6 Am. Dec. 663; State v. State Bd. of School Land Comrs. 27 Wyo. 54, 191 P. 1073, 11 A.L.R. 539.
Annotation: 11 A.L.R. 544.

[16] Farr v. John, 23 Iowa, 286, 92 Am. Dec. 426.
Annotation: 11 A.L.R. 545; 131 Am. St. Rep. 485; Ann. Cas. 1912A, 1129.
Where each successive bid is required to be a stipulated amount in advance of that of the previous bidder, the auctioneer may disregard a bid not conforming to such rule. Farr v. John, 23 Iowa, 286, 92 Am. Dec. 426. Annotation: 131 Am. St. Rep. 491; Ann. Cas. 1912A, 1128.

§ 20. **Discretion of Auctioneer as to Acceptance of Bids.**—An auctioneer is possessed of a large measure of discretion in the conduct of the sale.[19] He may refuse to accept a bid whenever, in his judgment, it is not made in good faith,[20] or whenever the bidder is irresponsible or is laboring under some incapacity.[1] Generally the auctioneer has the right to prescribe rules of bidding, such as a rule that successive bids be a stipulated amount in advance over the previous bid,[2] and irrespective of such a rule, he may refuse bids that are only trifling advances over those previously made.[3]

Where two or more persons each claim to have been the first to offer the highest bid reached, it is proper for the auctioneer to put the property up again at the price bid and as the bid of such one of the competitors as the auctioneer, in the exercise of his best judgment, believes entitled thereto.[4]

An auctioneer may, in the exercise of his discretion, refuse to accept a bid, when it would be a virtual sacrifice of the property to accept it, and either adjourn the auction[5] or withdraw the property from sale.[6] In fact, in such a case it would be his duty to withdraw the property.[7] However, all that can be required of him is that he exercise his best judgment, use due diligence in ascertaining the circumstances, and act in good faith.[8]

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[17] Blossom v. Milwaukee & C. R. Co. 3 Wall. (U. S.) 196, 18 L. ed. 43; Tillman v. Dunman, 114 Ga. 406, 40 S. E. 244, 57 L.R.A. 784, 88 Am. St. Rep. 28; Anderson v. Wisconsin C. R. Co. 107 Minn. 296, 120 N. W. 39, 20 L.R.A.(N.S.) 1133, 131 Am. St. Rep. 462, 16 Ann. Cas. 379; Fisher v. Seltzer, 23 Pa. 308, 62 Am. Dec. 335; State ex rel. Fitch v. State Bd. of School Land Comrs. 27 Wyo. 54, 191 P. 1073, 11 A.L.R. 539.

Annotation: 11 A.L.R. 545; 131 Am. St. Rep. 491.

Under the Uniform Sales Act a sale by auction is complete when the auctioneer announces its completion by the fall of the hammer or in some other customary manner. Freeman v. Poole, 37 R. I. 489, 93 A. 786, L.R.A.1917A, 63, Ann. Cas. 1918A, 841.

If an auctioneer passes to a second article after receiving a bid on the first, without the express assent of the bidder, this is equivalent to a rejection of the bid. Annotation: 18 L. ed. 43.

Certain expressions such as "going, going, gone," or "sold," are also used by the auctioneer to indicate his acceptance. Annotation: 11 A.L.R. 546.

[18] Annotation: 11 A.L.R. 545.

[19] Blossom v. Milwaukee & C. R. Co. 3 Wall. (U. S.) 196, 18 L. ed. 43; McPherson Bros. Co. v. Okanogan County, 45 Wash. 285, 88 P. 199, 9 L.R.A.(N.S.) 748.

Annotation: 57 L.R.A. 785, 787, 788; 20 L.R.A.(N.S.) 1133; 131 Am. St. Rep. 492; 96 Am. Dec. 265.

[20] McPherson Bros. Co. v. Okanogan County, 45 Wash. 285, 88 P. 199, 9 L.R.A. (N.S.) 748.

Annotation: 57 L.R.A. 788.

[1] See infra, § 21.

[2] Farr v. John, 23 Iowa, 286, 92 Am. Dec. 426.

[3] Anderson v. Wisconsin C. R. Co. 107 Minn. 296, 120 N. W. 39, 20 L.R.A.(N.S.) 1133, 131 Am. St. Rep. 462, 16 Ann. Cas. 379.

Annotation: 57 L.R.A. 788; 131 Am. St. Rep. 492.

[4] Annotation: 131 Am. St. Rep. 492.

[5] Blossom v. Milwaukee & C. R. Co. 3 Wall. (U. S.) 196, 18 L. ed. 43.

[6] McPherson Bros. Co. v. Okanogan County, 45 Wash. 285, 88 P. 199, 9 L.R.A. (N.S.) 748.

Annotation: 57 L.R.A. 787; 20 L.R.A. (N.S.) 1133.

It has been held, in an action to set aside a sale under a trust deed brought by the owner of the equity, that where, by the terms of the trust deed, the property must be sold for the "highest and best" price, this means the best price obtainable under the circumstances, and does not mean that where there is only one bidder, the auctioneer may not accept his offer. Lathrop v. Tracy, 24 Colo. 382, 51 P. 486, 65 Am. St. Rep. 229.

[7] Annotation: 57 L.R.A. 787; 20 L.R.A. (N.S.) 1133.

An auctioneer may be held liable to the owner where he has failed to exercise any discretion or caution whatever, so that the property was sold at a ruinous sacrifice, even though no minimum figure below which the property should not be sold had been stated to him. Annotation: 57 L.R.A. 787.

[8] Blossom v. Milwaukee & C. R. Co. 3 Wall. (U. S.) 196, 18 L. ed. 43; McPher-

§ 21. Who May Bid.—Inasmuch as an auction is an open sale, with few exceptions, anyone is qualified to become a bidder. There is no obligation upon an auctioneer, however, to receive the bid of an insolvent or irresponsible person,[9] nor should he give consideration to the bids of persons who labor under any incapacity, such as infants, lunatics, drunken persons, or persons standing in a fiduciary relation to the property sold.[10] One qualified to become a bidder may delegate an agent to act in his behalf. When property is struck off to one who is in fact the agent of another for that purpose, and such agency is disclosed by the memorandum of sale, the contract may be enforced against the principal when discovered.[11] Obviously if one bids without disclosing the name of his principal either to the auctioneer or to the vendor, he incurs a personal liability on his bid, as purchaser. Similarly, by virtue of estoppel, one who stands by and permits his name to be set down as purchaser by the direction of the bidder may be bound as purchaser, although the bidding was without his authority.[12]

The auctioneer may not, without the consent of the owner, bid on his own account, or, either directly or indirectly, have an interest in the purchase of the property he is engaged to sell.[13] And, although there is some authority to the contrary, it is generally held that the auctioneer may not act as agent for a third person in bidding for the property, without the seller's knowledge and consent.[14] He may, however, undertake an agency simply to bid a particular sum for a purchaser, amounting to no more than receiving from the purchaser, before the auction, a bid which is to be treated as if made there by the purchaser himself.[15] By the great weight of authority, the owner of the property, at whose instance the sale is held, may not engage in the bidding, either directly or indirectly, unless it is expressly announced that he reserves such privilege; he is not allowed to make secret bids with the design of enhancing the price of the property.[16] However, the rule that the seller himself may not bid does not apply to one who merely has a pecuniary interest in the property or in the proceeds of the sale, provided the sale is not under his control.[17] Thus, one joint owner of property may himself, or in

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son Bros. Co. v. Okanogan County, 45 Wash. 285, 88 P. 199, 9 L.R.A.(N.S.) 748.

[9] Annotation: 57 L.R.A. 785, 788; 131 Am. St. Rep. 492; 96 Am. Dec. 265.

[10] Annotation: 131 Am. St. Rep. 492; 96 Am. Dec. 265.

[11] Episcopal Church v. Wiley, 11 S. C. Eq. (2 Hill) 584, 30 Am. Dec. 386.

Annotation: 11 A.L.R. 544; 131 Am. St. Rep. 486.

[12] Annotation: 131 Am. St. Rep. 486.

[13] See supra, § 13.

[14] Annotation: 20 L.R.A. 508; 131 Am. St. Rep. 485.

It is impossible in good faith to combine the inconsistent capacities of crier and bidder in one and the same transaction. If the auctioneer faithfully discharges his duties, he will, of course, honestly obtain the best price he can for the property. On the other hand, if he undertakes to become the purchaser for another, his interest and his duty alike prompt him to obtain the property upon the most advantageous terms. Annotation: 131 Am. St. Rep. 486.

[15] Richards v. Holmes, 18 How. (U. S.) 143, 15 L. ed. 304; McMillan v. Harris, 110 Ga. 72, 35 S. E. 334, 48 L.R.A. 345, 78 Am. St. Rep. 93; James v. Kelley, 107 Ga. 446, 33 S. E. 425, 73 Am. St. Rep. 135; Harrison v. McHenry, 9 Ga. 164, 52 Am. Dec. 435.

[16] See, as to "puffing," §§ 22 et seq.

Where it is improper for the seller to bid for himself, it is equally improper for the auctioneer to bid in his behalf. Veazie v. Williams, 8 How. (U. S.) 134, 12 L. ed. 1018.

The act of knocking down the property to a sham bidder acting as agent for the owner must at least be given the effect of a withdrawal of the property from the sale; the highest bona fide bidder at the sale, whose bid was not accepted, has no claim to the property. Freeman v. Poole, 37 R. I. 489, 93 A. 786, L.R.A.1917A, 63, Ann. Cas. 1918A, 841.

[17] McMillan v. Harris, 110 Ga. 72, 35 S. E. 334, 48 L.R.A. 345, 78 Am. St. Rep. 93; Osborn v. Apperson Lodge, 213 Ky. 533, 281 S. W. 500, 46 A.L.R. 117; Manuel v. Haselden, 206 Ky. 796, 268 S. W. 554, citing R. C. L.; Rowley v. D'Arcy, 184 Mass. 550, 69 N. E. 325, 64 L.R.A. 190.

Annotation: 46 A.L.R. 128; 131 Am. St. Rep. 485.

Where the seller is a lodge, the mere fact of membership in the lodge does not deprive one of the right to bid for the property offered at the sale. Osborn v.

conjunction with a stranger, bid at the auction sale, where he was not authorized so to act by the other joint owners, and did not purport to act in their behalf.[18]

§ 22. **By-bidding or Puffing—In General.**—The presence at auction sales of persons who bid for the purpose of inflating the value of the property in behalf of those interested in the sale is a matter of very common occurrence, and has been from the time that auction sales were first known. A person of the character referred to is usually denominated a "puffer." Other terms used to designate such a person are "sham bidder," "by-bidder," "capper," "decoy duck," and "white bonnet."[19] A puffer, in the strictest meaning of the word, is a person who, without having any intention to purchase, is employed by the seller at an auction to raise the price by fictitious bids, thereby increasing competition among the bidders, while he himself is secured from risk by a secret understanding with the seller that he shall not be bound by his bids.[20] The criterion by which a puffer is to be determined is that he is acting for a person who has such control of the auction that the latter can of his own volition release a bidder from all responsibility for his bid. Accordingly, the mere fact that a person interested in the property to be sold or in the proceeds of such sale procures another to bid, either openly or secretly, in his behalf, under an agreement that such agent shall suffer no personal loss thereby, does not constitute such bidder a puffer if the one employing such bidder has not himself such control of the sale that he could absolutely release the bidder from all responsibility growing out of his having participated in the sale in that capacity. If, notwithstanding such agreement, the auctioneer can hold the bidder responsible for the amount of his bid, then such bidder would not be a puffer, within the meaning of the law.[1]

§ 23. **—Legal Effect of Puffing; Majority Rule.**—In the United States it is held by the great weight of authority that unless a right in the seller to bid is reserved, fictitious bidding by the auctioneer or by any other person acting on behalf of the seller is a fraud on legitimate bidders, entitling the successful bidder to rescind his contract,[2] even though the purchaser was

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Apperson Lodge, 213 Ky. 533, 281 S. W. 500, 46 A.L.R. 117.

And see infra, §§ 22, 24.

[18] Manuel v. Haselden, 206 Ky. 796, 268 S. W. 554, citing R. C. L.

Annotation: 46 A.L.R. 129.

[19] McMillan v. Harris, 110 Ga. 72, 35 S. E. 334, 48 L.R.A. 345, 78 Am. St. Rep. 93;

[20] McMillan v. Harris, 110 Ga. 72, 35 S. E. 334, 48 L.R.A. 345, 78 Am. St. Rep. 93; Osborn v. Apperson Lodge, 213 Ky. 533, 281 S. W. 500, 46 A.L.R. 117; Manuel v. Haselden, 206 Ky. 796, 268 S. W. 554, citing R. C. L.; Peck v. List, 23 W. Va. 338, 48 Am. Rep. 398.

Annotation: 12 L. ed. 1018; 131 Am. St. Rep. 490.

In Osborn v. Apperson Lodge, 213 Ky. 533, 281 S. W. 500, 46 A.L.R. 117, it is held that where there is a secret agreement between one conducting an auction and a bidder for property that the latter shall have the property at a specified price regardless of the price bid, such person is not technically a by-bidder, but it is suggested that one injuriously affected by such an arrangement might have equities arising out of it.

[1] McMillan v. Harris, 110 Ga. 72, 35 S. E. 334, 48 L.R.A. 345, 78 Am. St. Rep. 93; Osborn v. Apperson Lodge, 213 Ky. 533, 281 S. W. 500, 46 A.L.R. 117; Manuel v. Haselden, 206 Ky. 796, 268 S. W. 554, citing R. C. L.; D'Arcy v. Rowley, 184 Mass. 550, 69 N. E. 325, 64 L.R.A. 190.

Annotation: 46 A.L.R. 128; 131 Am. St. Rep. 489, 491.

See infra, § 24.

As to bidding by one joint owner of property, see supra, § 21.

[2] Veazie v. Williams, 8 How. (U. S.) 134, 12 L. ed. 1018; Miller v. Baynard, 2 Houst. (Del.) 559, 83 Am. Dec. 168; McMillan v. Harris, 110 Ga. 72, 35 S. E. 334, 48 L.R.A. 345, 78 Am. St. Rep. 93 (dictum); Bunts v. Cole, 7 Blackf. (Ind.) 265, 41 Am. Dec. 226; Osborn v. Apperson Lodge, 213 Ky. 533, 281 S. W. 500, 46 A.L.R. 117; Burdon v. Seitz, 206 Ky. 336, 267 S. W. 219, citing R. C. L.; Baham v. Bach, 13 La. 287, 33 Am. Dec. 561; Moncrieff v. Goldsborough, 4 Harr. & McH. (Md.) 281, 1 Am. Dec. 407; Curtis v. Aspinwall, 114 Mass. 187, 19 Am. Rep. 332; Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195; Bellows v. Russell, 20 N. H. 427, 51 Am. Dec. 238 (dictum); Mc-

contending with real bidders at the time the property was knocked down to him.[3] The Uniform Sales Act applies this rule in substance to sales of personalty at auction.[4] It is immaterial whether such fictitious bidding was employed merely to prevent a sacrifice of the property or whether the purpose was to enhance the price unduly.[5] Nor is the fact that the property was worth what was bid, in other words, that the price was reasonable, material according to the view expressed in several decisions.[6] It is also immaterial that the owner had no knowledge of the employment of puffers by the auctioneer or of by-bidding done by the auctioneer himself.[7]

Any secret arrangement having a tendency to mislead a bidder is a serious departure from fair dealing, and if the price is thereby enhanced, it amounts to a deception practiced by the seller upon the purchaser, advantageous to the former and injurious to the latter.[8] If the vendor, with a view to preventing a sacrifice of his property, desires to have any restrictions upon the right of the highest bona fide bidder to take the property, he should make such a provision as one of the conditions of the sale, or start the property at a certain price, or reserve a bid to himself. But if he puts the property up for sale without any reservation, then the purchaser is entitled to buy at an undervalue if he can fairly do so, and any secret contrivance by way of puffing which deprives him of this right vitiates the sale.[9]

Where a large tract of land is cut up into lots, and sales of the lots are made at the same time and as parts of the same transaction, there is a pre-

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Dowell v. Simms, 45 N. C. (Busbee, Eq.) 130, 57 Am. Dec. 595; Flannery v. Jones, 180 Pa. 338, 36 A. 856, 57 Am. St. Rep. 648; Staines v. Shore, 16 Pa. 200, 55 Am. Dec. 492; Pennock's Appeal, 14 Pa. 446, 53 Am. Dec. 561; Freeman v. Poole, 37 R. I. 489, 93 A. 786, L.R.A.1917A, 63, Ann. Cas. 1918A, 841; Edmunds v. Gwynn, 157 Va. 538, 161 S. E. 892, reversing on rehearing 157 Va. 528, 159 S. E. 205, citing R. C. L.; Peck v. List, 23 W. Va. 338, 48 Am. Rep. 398.

Annotation: 46 A.L.R. 123; 12 L. ed. 1018; 131 Am. St. Rep. 485.

In Veazie v. Williams, 8 How. (U. S.) 134, 12 L. ed. 1018, the court ordered that the sale be rescinded, with the proviso, however, that if the seller refunded to the purchaser the excess bid by him over and above the highest bona fide bid, the sale might stand.

As to when action to rescind should be taken, see infra, § 47.

[3] Annotation: 131 Am. St. Rep. 488.

[4] Freeman v. Poole, 37 R. I. 489, 93 A. 786, L.R.A.1917A, 63, Ann. Cas. 1918A, 841.

Annotation: 46 A.L.R. 128.

[5] Burdon v. Seitz, 206 Ky. 336, 267 S. W. 219, citing R. C. L.; Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195; Edmunds v. Gwynn, 157 Va. 538, 161 S. E. 892, reversing on rehearing 157 Va. 528, 159 S. E. 205, citing R. C. L.; Peck v. List, 23 W. Va. 338, 48 Am. Rep. 398.

Annotation: 46 A.L.R. 124.

The American courts have quite consistently refused to recognize the former English chancery rule that an owner may employ a by-bidder to prevent a sacrifice of his property, though not to enhance the price unduly. The owner's remedy is to fix publicly a minimum selling price. Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195. Annotation: 46 A.L.R. 124.

[6] Burdon v. Seitz, 206 Ky. 336, 267 S. W. 219, citing R. C. L.; Staines v. Shore, 16 Pa. 200, 55 Am. Dec. 492; Edmunds v. Gwynn, 157 Va. 538, 161 S. E. 892, reversing on rehearing, 157 Va. 528, 159 S. E. 205, citing R. C. L.; Peck v. List, 23 W. Va. 338, 48 Am. Rep. 398.

Annotation: 46 A.L.R. 125; 131 Am. St. Rep. 488.

Where there is only a single parcel offered at a sale held without reserve, if there is secret by-bidding, the purchaser has the absolute right to repudiate the contract, and the presumption that he has been imposed upon is absolute. Osborn v. Apperson Lodge, 213 Ky. 533, 281 S. W. 500, 46 A.L.R. 117.

[7] Veazie v. Williams, 8 How. (U. S.) 134, 12 L. ed. 1018; Curtis v. Aspinwall, 114 Mass. 187, 19 Am. Rep. 332.

Annotation: 46 A.L.R. 125.

[8] Miller v. Baynard, 2 Houst. (Del.) 559, 83 Am. Dec. 168; Curtis v. Aspinwall, 114 Mass. 187, 19 Am. Rep. 332; Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195; Flannery v. Jones, 180 Pa. 338, 36 A. 856, 57 Am. St. Rep. 648.

[9] Veazie v. Williams, 8 How. (U. S.) 134, 12 L. ed. 1018; Miller v. Baynard, 2 Houst. (Del.) 559, 83 Am. Dec. 168; McMillan v. Harris, 110 Ga. 72, 35 S. E. 334, 48 L.R.A. 345, 78 Am. St. Rep. 93; Baham v. Bach, 13 La. 287, 33 Am. Dec. 561; Moncrief v. Goldsborough, 4 Harr. & McH. (Md.) 281, 1 Am. Dec. 407; Curtis v. Aspinwall, 114 Mass. 187, 19 Am. Rep. 332; Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195; Doe ex dem. Smith v. Greenlee, 13 N. C. (2 Dev. L.) 126, 18 Am. Dec. 564; Pennock's Appeal, 14 Pa. 446, 53 Am. Dec. 561; Flannery v. Jones, 180 Pa. 338, 36 A. 856, 57 Am. St. Rep. 648; Peck v. List, 23 W. Va. 338, 48 Am. Rep. 398.

Annotation: 46 A.L.R. 124; 12 L. ed. 1018; 57 Am. St. Rep. 653; 78 Am. St. Rep. 105; 131 Am. St. Rep. 489.

sumption that the last bidders are influenced and injured by fictitious bids upon lots previously sold, and they may avoid the sale without further proof that they were influenced and injured, if there is no evidence tending to control or rebut such presumption.[10] This presumption may be rebutted by the facts and circumstances, and if it is shown that the by-bidding had no effect upon the purchaser's bid, the latter cannot avoid his contract.[11] While it has been held that in a bill to rescind a contract for land purchased at auction on the ground that the vendor employed puffers, it is necessary to allege that by reason of the bidding the plaintiff was induced to give more for the land than it was worth, or more than he had previously made up his mind to give,[12] the better view seems to be that the employment of a puffer is a legal fraud, and not merely a fraud in fact, so that prejudice is presumed.[13]

§ 24. **—When Rule Inapplicable.**—Obviously if the price is enhanced by bidders who are not puffers in the strict legal sense of the word,[14] the purchaser cannot avoid his contract. One is not a puffer unless the person employing him has such control of the sale that he could absolutely release the bidder from all responsibility.[15] The mere fact that the person employing the bidder is interested in the property or in the proceeds of the sale does not enable a purchaser to avoid the sale on the ground of puffing.[16] Thus, if, unknown to an auctioneer and an assignee in insolvency for whom he is conducting a sale, the creditors of the estate combine to enhance the price by fictitious bids, the sale is not rendered void.[17] And where the seller is a lodge, the fact that bids are made by one who is a member of the lodge will not be held to invalidate the sale.[18]

§ 25. **—Minority Rule.**—The English courts of equity, to guard against the seeming hardship of the rule of the law courts which gave the purchaser the option of avoiding an auction sale at which puffers or by-bidders were employed,[19] at an early date adopted the rule that a vendor might employ a by-bidder as a defensive precaution to prevent a sacrifice of his property, all that was required of him was that he act in good faith.[20] A few American jurisdictions have followed this rule of chancery, holding that where an auction has not been announced to be without reserve, the vendor of the property legally may employ a puffer to make fictitious biddings, provided such employment is for the bona fide purpose of preventing a sacrifice of the property, and not a mere pretext for enhancing the price above its true value.[1] In England, however, this doctrine of equity has been abrogated by statutory enactments with regard to sales of both real and personal property.[2] In this country the Uniform Sales Act[3] declares in effect that a buyer at an auction sale may treat the sale as a fraudulent one if the seller, without giving notice that he reserves a right to do so, bids at the sale on his own behalf or employs or induces others to make bids in his behalf.

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[10] Osborn v. Apperson Lodge, 213 Ky. 533, 281 S. W. 500, 46 A.L.R. 117; Curtis v. Aspinwall, 114 Mass. 187, 19 Am. Rep. 332.
Annotation: 46 A.L.R. 131.

Where several lots sold separately at auction are of the same general value, the employment of a puffer to enhance the price of the first lot sold invalidates the sale of the others, though there is no puffing therein. Annotation: 46 A.L.R. 131.

[11] Osborn v. Apperson Lodge, 213 Ky. 533, 281 S. W. 500, 46 A.L.R. 117; Curtis v. Aspinwall, 114 Mass. 187, 19 Am. Rep. 332.
Annotation: 46 A.L.R. 131.

An instruction to the jury that any by-bidding on any of the lots, without directing the jury to inquire whether or not the bids of the purchaser were influenced by such by-bids, is erroneous, as it requires them to find that the sale was avoided if there was any by-bidding, even if the evidence satisfied them that the purchase was in no way induced or influenced by the fraud. Curtis v. Aspinwall, 114 Mass. 187, 19 Am. Rep. 332.

[12] Annotation: 46 A.L.R. 125.

[13] Curtis v. Aspinwall, 114 Mass. 187, 19 Am. Rep. 332.
Annotation: 46 A.L.R. 130.

One who has shown that puffers or by-bidders are employed has made out a case, and he who seeks to uphold a contract so tainted has upon him the burden of showing that by-bidding did not actually affect the sale. Edmunds v. Gwynn, 157 Va. 538, 161 S. E. 892, citing R. C. L.

[14] See supra, § 22.

[15] McMillan v. Harris, 110 Ga. 72, 35 S. E. 334, 48 L.R.A. 345; Manuel v. Haselden, 206 Ky. 796, 268 S. W. 554, citing R. C. L.; D'Arcy v. Rowley, 184 Mass. 550, 69 N. E. 325, 64 L.R.A. 190. See also Osborn v. Apperson Lodge, 213 Ky. 533, 281 S. W. 500, 46 A.L.R. 117.
Annotation: 46 A.L.R. 128; 131 Am. St. Rep. 489, 491.

[16] McMillan v. Harris, 110 Ga. 72, 35 S. E. 334, 48 L.R.A. 345, 78 Am. St. Rep. 93; Osborn v. Apperson Lodge, 213 Ky. 533, 281 S. W. 500, 46 A.L.R. 117; Manuel v. Haselden, 206 Ky. 796, 268 S. W. 554, citing R. C. L.; D'Arcy v. Rowley, 184 Mass. 550, 69 N. E. 325, 64 L.R.A. 190.
Annotation: 46 A.L.R. 128, 130; 131 Am. St. Rep. 489, 490.

On a judicial sale of land by executors, the persons entitled to the proceeds of the sale may engage a third person to bid the property up to a specified price, with an agreement that if it is sold to such bidder, the persons employing him will take it off his hands. McMillan v. Harris, 110 Ga. 72, 35 S. E. 334, 48 L.R.A. 345, 78 Am. St. Rep. 93.

[17] D'Arcy v. Rowley, 184 Mass. 550, 69 N. E. 325, 64 L.R.A. 190.

As to right of joint owner to bid, see supra, § 21.

[18] Osborn v. Apperson Lodge, 213 Ky. 533, 281 S. W. 500, 46 A.L.R. 117.

§ 26. Stifling of Competition.—Auction sales should be fairly and openly conducted,[4] with full and free opportunity for competition among bidders.[5] It is the policy of the law that a fair price be received by the parties interested in the property sold and that this be not prevented by the stifling of competition among bidders.[6] Generally speaking, any conduct, artifice, agreement, or combination, the purpose and effect of which is to stifle fair competition and chill the bidding, is against public policy and will cause the sale to be set aside.[7] Furthermore, as an agreement to suppress bidding at a public

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[19] See supra, § 23.

[20] Annotation: 46 A.L.R. 132; 12 L. ed. 1019; 131 Am. St. Rep. 489.

[1] Reynolds v. Dechaums, 24 Tex. 174, 76 Am. Dec. 101; Peck v. List, 23 W. Va. 338, 48 Am. Rep. 398.

Annotation: 46 A.L.R. 132; 131 Am. St. Rep. 489.

It is a question of fact whether the employment of a by-bidder is with the bona fide intention of preventing a sacrifice of the property, and not for the purpose of enhancing the price above its true value. Reynolds v. Dechaums, 24 Tex. 174, 76 Am. Dec. 101. Annotation: 131 Am. St. Rep. 489.

In Tennessee, the rule of Davis v. Petway, 3 Head (Tenn.) 667, 75 Am. Dec. 789, has been abrogated by the adoption in that state in 1919 of the Uniform Sales Act. Annotation: 46 A.L.R. 132.

[2] **The Act of** 30 & 31 Vict. chap. 48 declares that "whenever a sale by auction of land would be invalid at law by reason of the employment of a puffer, the same shall be deemed invalid in equity as well as at law," and § 58 of the English Sale of Goods Act is substantially identical with § 21 of the Uniform Sales Act. Annotation: 46 A.L.R. 123.

[3] Uniform Sales Act, § 21 (4).

[4] Annotation: 131 Am. St. Rep. 486.

[5] Manhattan Taxi Serv. Corp. v. Checker Cab Mfg. Corp. 253 N. Y. 455, 171 N. E. 705, 69 A.L.R. 1190; Nash v. Elizabeth City Hospital Co. 180 N. C. 59, 104 S. E. 33, citing R. C. L.; Owens v. Wright, 161 N. C. 127, 76 S. E. 735, Ann. Cas. 1914D, 1021; Doe ex dem. Smith v. Greenlee, 13 N. C. (2 Dev. L.) 126, 18 Am. Dec. 564; Hamilton v. Hamilton, 19 S. C. Eq. (2 Rich.) 355, 46 Am. Dec. 58. See also Farr v. Sims, 9 S. C. Eq. (Rich. Cas.) 122, 24 Am. Dec. 396.

"A sale at auction is a sale to the best bidder; its object a fair price, its means competition. Any agreement, therefore, to stifle competition is a fraud upon the principles on which the sale is founded." Doe ex dem. Smith v. Greenlee, 13 N. C. (2 Dev. L.) 126, 18 Am. Dec. 564.

[6] Bunts v. Cole, 7 Blackf. (Ind.) 265, 41 Am. Dec. 226; Nash v. Elizabeth City Hospital Co. 180 N. C. 59, 104 S. E. 33, citing R. C. L.; Doe ex dem. Smith v. Greenlee, 13 N. C. (2 Dev. L.) 126, 18 Am. Dec. 564; James v. Fulcrod, 5 Tex. 512, 55 Am. Dec. 743.

[7] Konen v. Konen, 165 La. 288, 115 So. 490, citing R. C. L.; First Nat. Bank v. Hebert, 162 La. 703, 111 So. 66, citing R. C. L.; Swain v. Kirkpatrick Lumber Co. 143 La. 30, 78 So. 140, 20 A.L.R. 665; McLane v. McLane, 145 Md. 186, 125 A. 588, citing R. C. L.; Stewart v. Severance, 43 Mo. 322, 97 Am. Dec. 392; Manhattan Taxi Serv. Corp. v. Checker Cab Mfg. Co. 253 N. Y. 455, 171 N. E. 705, 69 A.L.R. 1190; Hopkins v. Ensign, 122 N. Y. 144, 25 N. E. 306, 9 L.R.A. 731; Nash v. Elizabeth City Hospital Co. 180 N. C. 59, 104 S. E. 33, citing R. C. L.; Blythe v. Lovinggood, 24 N. C. (2 Ired. L.) 20, 37 Am. Dec. 402; Doe ex dem. Smith v. Greenlee, 13 N. C. (2 Dev. L.) 126, 18 Am. Dec. 564; Hamilton v. Hamilton, 19 S. C. Eq. (2 Rich.) 355, 46 Am. Dec. 58; Farr v. Sims, 9 S. C. Eq. (Rich. Cas.) 122, 24 Am. Dec. 396.

Annotation: 20 L.R.A. 545.

An unsuccessful attempt by a purchaser to prevent another from bidding does not sale is contra bonos mores, the law will not assist either party to enforce it.[8]

§ 27. —Agreements Not to Bid.—Agreements not to bid at an auction, if made for the purpose of stifling competition and to enable a person to purchase the property at an advantageous price, are generally held to be invalid as against public policy,[9] and a sale under such circumstances may be set aside upon the application of the seller or anyone else interested in the proceeds of the sale.[10] This rule, however, extends only to combinations having for their object the stifling of fair competition, with the desire of obtaining the property at a price less than the fair value.[11] Agreements to buy jointly property at a public sale are not invalid where made for the legitimate purpose of combining the parties' resources, and not to chill or suppress bidding.[12] The English courts have held that an agreement between intending bidders at an auction, made to keep down the price, that they will not bid against each other, but that only one shall bid and the goods shall be shared between them, is valid and enforceable.[13] In every association formed to bid at a sale, whereby one is designated to bid in behalf of the rest, there is an agreement, express or implied, that no other member will participate in the bidding, and hence in one sense it may be said to have the effect of preventing competition. However, it does not necessarily follow that if the association had not been formed, and if each member had been left to bid on his own account, the competition at the sale would be as strong and efficient as it would by reason of the joint bid for the benefit and upon the responsibility of all.[14] This is especially true in the case of a union of several persons formed on account of the magnitude of the sale, or where the quantity offered to a single bidder exceeds the amount which an individual might wish to purchase on his own account.[15] The courts will look to the intention of the parties, and if that is fair and honest, and the primary purpose is not to suppress competition, but to protect their own rights or advance their own interests, and there is no fraudulent purpose to injure or defraud

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vitiate the sale. Annotation: 131 Am. St. Rep. 486.

In Nash v. Elizabeth City Hospital Co. 180 N. C. 59, 104 S. E. 33, citing R. C. L., where one purchased property at an auction sale at less than its value by secretly bidding through another individual who was understood by those present to be bidding for a charitable organization, other bidders being deterred by the belief that the property was being purchased for the public benefit, it was held that the sale should be set aside.

See Judicial Sales [Also 16 R. C. L. p. 1].

[8] Owens v. Wright, 161 N. C. 127, 76 S. E. 735, Ann. Cas. 1914D, 1021; Blythe v. Lovinggood, 24 N. C. (2 Ired. L.) 20, 37 Am. Dec. 402 (holding that a note given in consideration of an agreement stifling bidding is unenforceable if not in the hands of a bona fide purchaser); Doe ex dem. Smith v. Greenlee, 13 N. C. (2 Dev. L.) 126, 18 Am. Dec. 564; James v. Fulcrod, 5 Tex. 512, 55 Am. Dec. 743.

[9] Drury v. Cross (Drury v. Milwaukee & S. R. Co.) 7 Wall. (U. S.) 299, 19 L. ed. 40; Fletcher v. Johnson, 139 Mich. 51, 102 N. W. 278, 111 Am. St. Rep. 401; Pike v. Balch, 38 Me. 302, 61 Am. Dec. 248; Dudley v. Odom, 5 S. C. 131, 22 Am. Rep. 6.

Annotation: 20 L.R.A. 547; 10 B. R. C. 296, 297.

Am. Law Inst. Restatement, Contracts, § 517.

[10] United States v. Addyston Pipe Steel Co. (C. C. A. 6th) 85 F. 271, 46 L.R.A. 122, modified in 175 U. S. 211, 44 L. ed. 136, 20 S. Ct. 96; Mills v. Rogers, 2 Litt. (Ky.) 217, 13 Am. Dec. 263; First Nat. Bank v. Hebert, 162 La. 703, 111 So. 66, citing R. C. L.; Doe ex dem. Smith v. Greenlee, 13 N. C. 126, 18 Am. Dec. 564; Walter v. Gernant, 13 Pa. 515, 53 Am. Dec. 491; James v. Fulcrod, 5 Tex. 512, 55 Am. Dec. 743.

Annotation: 20 L.R.A. 547.

[11] James v. Fulcrod, 5 Tex. 512, 55 Am. Dec. 743.

[12] Kearney v. Taylor, 15 How. (U. S.) 494, 14 L. ed. 787; Stack v. Roth Bros. Co. 162 Wis. 281, 156 N. W. 148, Ann. Cas. 1918C, 741.

[13] Rawlings v. General Trading Co. [1921] 1 K. B. (Eng.) 635, 10 B. R. C. 278.

Annotation: 10 B. R. C. 295.

[14] Kearney v. Taylor, 15 How. (U. S.) 494, 14 L. ed. 787.

Annotation: 20 L.R.A. 551; 131 Am. St. Rep. 487.

[15] Leland v. Ford, 245 Mich. 599, 223 N. W. 218, citing R. C. L.; Smith v. Ullman, 58 Md. 183, 42 Am. Rep. 329; Doe ex dem. Smith v. Greenlee, 13 N. C. (2 Dev. L.) 126, 18 Am. Dec. 564.

Annotation: 131 Am. St. Rep. 486.

others interested in the result of the sale, the agreement is not unlawful.[16] The intention with which the parties enter into such an agreement is a question of fact for the determination of the jury.[17]

V. STATUTE OF FRAUDS

§ 28. Generally.—Present-day authorities universally agree that sales by auction, unless expressly exempted, are within the provisions of the statute of frauds.[18] Thus, a sale of land at auction is within the statute to the same extent as any other sale or contract of sale relating to land,[19] and an auction sale of chattels is within the operation of the provision relating to the sale of chattels.[20] An auction sale made by a trustee, acting solely under a

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[16] Kearney v. Taylor, 15 How. (U. S.) 494, 14 L. ed. 787; Pike v. Balch, 38 Me. 302, 61 Am. Dec. 248; Smith v. Ullman, 58 Md. 183, 42 Am. Rep. 329; James v. Fulcrod, 5 Tex. 512, 55 Am. Dec. 743.

See also Hopkins v. Ensign, 122 N. Y. 144, 25 N. E. 306, 9 L.R.A. 731; Henderson v. Henrie, 61 W. Va. 183, 56 S. E. 369, 11 Ann. Cas. 741.

Annotation: 20 L.R.A. 552; 131 Am. St. Rep. 486.

[17] Pike v. Balch, 38 Me. 302, 61 Am. Dec. 248.

[18] Sachs v. Blewett, 206 Ind. 151, 185 N. E. 856, 188 N. E. 674, 91 A.L.R. 1285; O'Donnell v. Leeman, 43 Me. 158, 69 Am. Dec. 54; Pike v. Balch, 38 Me. 302, 61 Am. Dec. 248; Davis v. Rowell, 2 Pick. (Mass.) 64, 13 Am. Dec. 398; Jenness v. Wendell, 51 N. H. 63, 12 Am. Rep. 48; Johnson v. Buck, 35 N. J. L. 338, 10 Am. Rep. 243; Love v. Harris, 156 N. C. 88, 72 S. E. 150, 36 L.R.A. (N.S.) 927, Ann. Cas. 1912D, 1065; Sweeney v. Brow, 35 R. I. 227, 86 A. 115, Ann. Cas. 1915C, 1075; Parrott v. Dickson, 151 S. C. 114, 148 S. E. 704, 63 A.L.R. 965; Davis v. Robertson, 8 S. C. L. (1 Mill, Const.) 71, 12 Am. Dec. 611; Meadows v. Meadows, 14 S. C. L. (3 M'Cord) 457, 15 Am. Dec. 645; Walker v. Herring, 21 Gratt. (Va.) 678, 8 Am. Rep. 616.

Chaney v. Maclow [1929] 1 Ch. (Eng.) 461, 15 B. R. C. 710—C. A.

See also Kennell v. Boyer, 144 Iowa, 303, 122 N. W. 941, 24 L.R.A.(N.S.) 488, Ann. Cas. 1912A, 1127.

Annotation: 131 Am. St. Rep. 492.

Although in the absence of an express exception there is no more reason for exempting such sales than for exempting those effected in any other manner, some of the earlier cases took the view that they were impliedly exempted from the operation of the statute for the reason that the latter could never have been intended to apply to sales at auction, since the publicity and solemnity incident to auction sales removed the dangers from perjury to which private sales were subject. See Johnson v. Buck, 35 N. J. L. 338, 10 Am. Rep. 243; Davis v. Robertson, 8 S. C. L. (1 Mill, Const.) 71, 12 Am. Dec. 611; Meadows v. Meadows, 14 S. C. L. (3 M'Cord) 457, 15 Am. Dec. 645.

[19] Robinson v. Garth, 6 Ala. 204, 41 Am. Dec. 47; Craig v. Godfroy, 1 Cal. 415, 54 Am. Dec. 299; Seymour v. National Bldg. & L. Asso. 116 Ga. 285, 42 S. E. 518, 94 Am. St. Rep. 131; Sachs v. Blewett, 206 Ind. 151, 185 N. E. 856, 188 N. E. 674, 91 A.L.R. 1285; Maher v. Ætna L. Ins. Co. 116 Ind. 486, 9 Am. St. Rep. 880; Thomas v. Harrodsburg, 3 A. K. Marsh. (Ky.) 298, 13 Am. Dec. 165; O'Donnell v. Leeman, 43 Me. 158, 69 Am. Dec. 54; Singstack v. Harding, 4 Harr. & J. (Md.) 186, 7 Am. Dec. 669; McGovern v. Hern, 153 Mass. 308, 26 N. E. 861, 10 L.R.A. 815, 25 Am. St. Rep. 632; Bent v. Cobb, 9 Gray (Mass.) 397, 69 Am. Dec. 295; Tull v. David, 45 Mo. 444, 100 Am. Dec. 385; Love v. Harris, 156 N. C. 88, 72 S. E. 150, 36 L.R.A.(N.S.) 927, Ann. Cas. 1912D, 1065; Gwathney v. Cason, 74 N. C. 5, 21 Am. Rep. 484; Sweeney v. Brow, 35 R. I. 227, 86 A. 115, Ann. Cas. 1915C, 1075; Meadows v. Meadows, 14 S. C. L. (3 M'Cord) 457, 15 Am. Dec. 645; Episcopal Church v. Wiley, 11 S. C. Eq. (2 Hill) 584, 30 Am. Dec. 386; Adams v. Scales, 1 Baxt. (Tenn.) 337, 25 Am. Rep. 772; Dawson v. Miller, 20 Tex. 171, 70 Am. Dec. 380; Walker v. Herring, 21 Gratt. (Va.) 678, 8 Am. Rep. 616; Bamber v. Savage, 52 Wis. 110, 8 N. W. 609, 38 Am. Rep. 723.

Chaney v. Maclow [1929] 1 Ch. (Eng.) 461, 15 B. R. C. 710—C. A.

Annotation: 102 Am. St. Rep. 241; 131 Am. St. Rep. 492.

[20] Craig v. Godfroy, 1 Cal. 415, 54 Am. Dec. 299; Kennell v. Boyer, 144 Iowa, 303, 122 N. W. 941, 24 L.R.A.(N.S.) 488, Ann. Cas. 1912A, 1127; Pike v. Balch, 38 Me. 302, 61 Am. Dec. 248; Davis v. Rowell, 2 Pick. (Mass.) 64, 13 Am. Dec. 398; Meyer v. Redmond, 205 N. Y. 478, 98 N. E. 906, 41 L.R.A.(N.S.) 675; Davis v. Robertson, 8 S. C. L. (1 Mill, Const.) 71, 12 Am. Dec. 611; Bamber v. Savage, 52 Wis. 110, 8 N. W. 609, 38 Am. Rep. 723.

It has been said that there are special reasons for so holding. The persons present frequently constitute a tumultuous crowd; the sales are generally conducted in a manner that affords the least possible opportunity for deliberation; the crier passes rapidly from one article to another; no person present takes an interest in anything except what regards himself, and that no longer than while the article is immediately under the hammer; and although many persons might be present, one probably could not be found, not even the auctioneer himself, who could recollect the price or purchaser of any particular article, shortly after it was knocked off. Davis v. Robertson, 8 S. C. L. (1 Mill, Const.) 71, 12 Am. Dec. 611.

The payment or part payment of the price will take such sales out of the operation of the statute as in case of ordinary power of sale contained in the deed of trust, is within the statute; such a sale is to be distinguished from a judicial sale made by a chancery court acting through its commissioner.[21]

§ 29. Entire and Divisible Contracts.—In applying the statute of frauds to auction sales, it frequently becomes important to determine whether several purchases made by one bidder constitute so many separate and distinct contracts, or are to be considered as but one entire contract.[22] The solution of this question depends on the surrounding circumstances of each individual case, the manner in which the transactions between the parties were concluded, and their understanding and intentions in the matter, rather than on the fact that the various items were sold at auction and were struck off to the same party at the same sale. This is equally true, whether the subject-matter of the sale is realty or personalty, though of course the nature of the property sold may have a bearing on the intention of parties.[23] It is immaterial whether the auction continues one day or several days, or whether the bids are made on different days or not, provided it is one and the same auction and the terms of sale are the same upon the whole.[1]

§ 30. Authority of Auctioneer to Make Memorandum—In General.—Obviously, to meet the requirements of the statute of frauds, it is essential that the memorandum of sale be signed by the party to be charged. So far as the vendor is concerned, it is manifest that the auctioneer, as his authorized agent to conduct the sale, has authority to sign the memorandum thereof in his behalf,[2] and the authorities are practically unanimous in holding that upon the acceptance of a bid the auctioneer becomes the agent of the purchaser as well as of the seller for the purpose of drawing up and signing the memorandum that takes the transaction out of the operation of the statute of frauds, the rule applying to sales both of realty and of personalty.[3] In some

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sales. Meyer v. Redmond, 205 N. Y. 478, 98 N. E. 906, 41 L.R.A.(N.S.) 675.

See Statute of Frauds [Also 25 R. C. L. p. 617, §§ 232 et seq.].

[21] Seymour v. National Bldg. & L. Asso. 116 Ga. 285, 42 S. E. 518, 94 Am. St. Rep. 131; Dunham v. Hartman, 153 Mo. 625, 55 S. W. 233, 77 Am. St. Rep. 741; Tull v. David, 45 Mo. 444, 100 Am. Dec. 385; Adams v. Scales, 1 Baxt. (Tenn.) 337, 25 Am. Rep. 772.

Annotation: 102 Am. St. Rep. 243.

A sale by a sheriff acting as substituted trustee under a power contained in a mortgage or deed of trust, such substitution being provided for by the terms of the mortgage or deed of trust, is within the statute. Dunham v. Hartman, 153 Mo. 625, 55 S. W. 233, 77 Am. St. Rep. 741.

[22] **A delivery and acceptance of part of the goods** take the entire transaction out of the operation of the statute of frauds where the separate purchases are construed to constitute but one entire contract. See Statute of Frauds [Also 25 R. C. L. p. 632, § 256].

[23] Traiman v. Rappaport (C. C. A. 3d) 41 F. (2d) 336, 71 A.L.R. 475; Jenness v. Wendell, 51 N. H. 63, 12 Am. Rep. 48; Messer v. Woodman, 22 N. H. 172, 53 Am. Dec. 241; Coffman v. Hampton, 2 Watts & S. (Pa.) 377, 37 Am. Dec. 511.

For discussion of divisible and indivisible contracts, see Contracts [Also 6 R. C. L. p. 858, § 246].

[1] Jenness v. Wendell, 51 N. H. 63, 12 Am. Rep. 48.

[2] Craig v. Godfroy, 1 Cal. 415, 54 Am. Dec. 299; Doty v. Wilder, 15 Ill. 407, 60 Am. Dec. 756; Garth v. Davis, 120 Ky. 106, 85 S. W. 692, 117 Am. St. Rep. 571; O'Donnell v. Leeman, 43 Me. 158, 69 Am. Dec. 54; Brown v. Doherty, 185 N. Y. 383, 78 N. E. 147, 113 Am. St. Rep. 915; Love v. Harris, 156 N. C. 88, 72 S. E. 150, 36 L.R.A.(N.S.) 927; Sweeney v. Brow, 35 R. I. 227, 86 A. 115, Ann. Cas. 1915C, 1075; Parrott v. Dickson, 151 S. C. 114, 148 S. E. 704, 63 A.L.R. 965 (partition sale); Walker v. Herring, 21 Gratt. (Va.) 678, 8 Am. Rep. 616; Bamber v. Savage, 52 Wis. 110, 8 N. W. 609, 38 Am. Rep. 723.

Annotation: Ann. Cas. 1912D, 1071; 15 B. R. C. 735.

Am. Law Inst. Restatement, Contracts, § 212 (1).

It is one of the duties of the auctioneer to his principal to see that a proper memorandum is made so as to comply with the statute, and if he neglects to do so, he may be held answerable to his principal. See infra, § 56.

As to the necessity that such authority be evidenced in writing, see infra, § 33.

[3] Robinson v. Garth, 6 Ala. 204, 41 Am. Dec. 47; Craig v. Godfroy, 1 Cal. 415, 54 Am. Dec. 299; Doty v. Wilder, 15 Ill. 407, 60 Am. Dec. 756; Kennell v. Boyer, 144 Iowa, 303, 122 N. W. 941, 24 L.R.A.(N.S.) 488, Ann. Cas. 1912A, 1127; Garth v. Davis,

jurisdictions, the rule is expressly recognized by statute.[4] Theoretically, the purchaser, by the act of bidding, calls on the auctioneer to put down his name as purchaser, and the entry, being made in his presence, is presumed to be made with his sanction and to indicate his approval of the terms written down.[5]

The majority of the courts which have passed on the question hold or assume that between the fall of the hammer and the signing of the memorandum, the auctioneer's authority to sign a memorandum may be revoked, by either the seller [6] or the purchaser.[7] This view accords with the rule adopted by the American Law Institute to the effect that the power of the auctioneer and of his clerk to sign a memorandum may be revoked by a buyer or seller at any time before the power is exercised.[7a] The view is taken by some courts, however, that the auctioneer's authority cannot be revoked by either the vendor or the purchaser after the fall of the hammer.[8] In cases of this kind, the length of time which has elapsed between the close of the sale and the actual signing of the memorandum may be of considerable importance.[9]

The rule as to the agency of the auctioneer to bind the purchaser is not

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120 Ky. 106, 85 S. W. 692, 117 Am. St. Rep. 571; Thomas v. Kerr, 3 Bush (Ky.) 619, 96 Am. Dec. 262; O'Donnell v. Leeman, 43 Me. 158, 69 Am. Dec. 54; Pike v. Balch, 38 Me. 302, 61 Am. Dec. 248; Batturs v. Sellers, 5 Harr. & J. (Md.) 117, 9 Am. Dec. 492; Singstack v. Harding, 4 Harr. & J. (Md.) 186, 7 Am. Dec. 669; Bent v. Cobb, 9 Gray (Mass.) 397, 69 Am. Dec. 295; Wright v. May, 127 Minn. 150, 149 N. W. 9, L.R.A. 1915B, 151; Anderson v. Wisconsin C. R. Co. 107 Minn. 296, 120 N. W. 39, 131 Am. St. Rep. 462, 20 L.R.A.(N.S.) 1133, 16 Ann. Cas. 379; Johnson v. Buck, 35 N. J. L. 338, 10 Am. Rep. 243; Brown v. Doherty, 185 N. Y. 383, 78 N. E. 147, 113 Am. St. Rep. 915; Woodruff v. Piedmont Trust Co. 173 N. C. 546, 92 S. E. 496, L.R.A.1917E, 897; Love v. Harris, 156 N. C. 88, 72 S. E. 150, 36 L.R.A.(N.S.) 927, Ann. Cas. 1912D, 1065; Gwathney v. Cason, 74 N. C. 5, 21 Am. Rep. 484; Pugh v. Chesseldine, 11 Ohio, 109, 37 Am. Dec. 414; Freeman v. Poole, 37 R. I. 489, 93 A. 786, L.R.A.1917A, 63, Ann. Cas. 1918A, 841; Sweeney v. Brow, 35 R. I. 227, 86 A. 115, Ann. Cas. 1915C, 1075; Parrott v. Dickson, 151 S. C. 114, 148 S. E. 704, 63 A.L.R. 965 (partition sale); Episcopal Church v. Wiley, 11 S. C. Eq. (2 Hill) 584, 30 Am. Dec. 386; Gordon v. Saunders, 7 S. C. Eq. (2 M'Cord) 151; Meadows v. Meadows, 14 S. C. L. (3 M'Cord) 457, 15 Am. Dec. 645; Davis v. Robertson, 8 S. C. L. (1 Mill, Const.) 71, 12 Am. Dec. 611; Adams v. Scales, 1 Baxt. (Tenn.) 337, 25 Am. Rep. 772; Dawson v. Miller, 20 Tex. 171, 70 Am. Dec. 380; Walker v. Herring, 21 Gratt. (Va.) 678, 8 Am. Rep. 616; Smith v. Jones, 7 Leigh (Va.) 165, 30 Am. Dec. 498; Bamber v. Savage, 52 Wis. 110, 8 N. W. 609, 38 Am. Rep. 723.

Chaney v. Maclow [1929] 1 Ch. (Eng.) 461, 15 B. R. C. 710—C. A.

Annotation: 131 Am. St. Rep. 492; Ann. Cas. 1912D, 1069; 15 B. R. C. 731.

As stated by the American Law Institute in a sale and in a contract to sell at auction the auctioneer or his clerk, if not interested in the subject-matter of the sale otherwise than in his functions as auctioneer or auctioneer's clerk, is authorized to make and sign a memorandum on behalf of both the buyer and seller, immediately after the sale. Restatement, Contracts, § 212 (1).

The recognition of this principle is one of those judicial encroachments on the terms of the statute inherited with the statute itself from England, and grew out of what the courts considered a necessity. Dunham v. Hartman, 153 Mo. 625, 55 S. W. 233, 77 Am. St. Rep. 741.

Some of the early English cases drew a distinction between a sale of personalty and a sale of realty, recognizing the auctioneer's power to sign in behalf of the purchaser in the former, but denying it in the latter; this rule, however, was departed from at an early date. Meadows v. Meadows, 14 S. C. L. (3 M'Cord) 457, 15 Am. Dec. 645; Episcopal Church v. Wiley, 11 S. C. Eq. (2 Hill) 584, 30 Am. Dec. 386. Annotation: Ann. Cas. 1912D, 1072.

[4] Howell v. Shewell, 96 Ga. 454, 23 S. E. 310, 51 Am. St. Rep. 148.

[5] Bent v. Cobb, 9 Gray (Mass.) 397, 69 Am. Dec. 295; Love v. Harris, 156 N. C. 88, 72 S. E. 150, 36 L.R.A.(N.S.) 927, Ann. Cas. 1912D, 1065; Sweeney v. Brow, 35 R. I. 227, 86 A. 115, Ann. Cas. 1915C, 1075; Walker v. Herring, 21 Gratt. (Va.) 678, 8 Am. Rep. 616.

Annotation: Ann. Cas. 1912D, 1069.

[6] Annotation: Ann. Cas. 1912D, 1075, 1076.

[7] Dunham v. Hartman, 153 Mo. 625, 55 S. W. 233, 77 Am. St. Rep. 741; Gwathney v. Cason, 74 N. C. 5, 21 Am. Rep. 484.

Annotation: 131 Am. St. Rep. 492; Ann. Cas. 1912D, 1070.

[7a] Am. Law Inst. Restatement, Contracts, § 212 (2).

[8] Chaney v. Maclow [1929] 1 Ch. (Eng.) 461, 15 B. R. C. 710—C. A.

[9] Chaney v. Maclow [1929] 1 Ch. (Eng.) 461, 15 B. R. C. 710—C. A.

Annotation: Ann. Cas. 1912D, 1075, 1076. And see infra, § 31.

applicable to bind one who called upon the auctioneer the day following an auction sale and agreed to purchase some of the unsold property.[10]

It must, of course, appear with reasonable certainty that the auctioneer's memorandum refers to the particular individual sought to be charged.[11] The auctioneer is the mutual agent of both parties solely for the purpose of drawing up and signing such memorandum of sale.[12] He is a mere special agent, having no general authority from the purchaser to prepare and execute a contract, but merely to sign a contract conforming to the sale as made. Consequently, if he signs a memorandum that does not conform to the terms of the sale, his act is unauthorized, null, and void.[13]

§ 31. —When Memorandum Must Be Made; Termination of Auctioneer's Authority to Sign.—The law, in allowing the auctioneer to act in the nearly unprecedented relation of agent for both parties, imposes a qualification not applied to the usual cases of agency, and requires that the single act which, almost from necessity, he is authorized to perform for the buyer, shall be done at the time of the sale and before the termination of the proceedings. The dual character of his agency ceases at that time and an entry by him in his sales book at a subsequent period does not bind the purchaser.[14]

A distinction, however, is taken between the agency of the auctioneer for the buyer and his agency for the seller. As to the seller, the auctioneer's authority may continue after the sale, being determined in each case by the scope and duration of his agency.[15] He may bind the vendor by a memorandum signed within a reasonable time after the sale,[16] but a vendor may not be bound by a memorandum signed by the auctioneer some time after the sale and after his authority has been expressly revoked by the vendor, to the knowledge of the vendee.[17]

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[10] Annotation: 15 B. R. C. 748.

[11] Dunham v. Hartman, 153 Mo. 625, 55 S. W. 233, 77 Am. St. Rep. 741.

[12] Curtis v. Aspinwall, 114 Mass. 187, 19 Am. Rep. 332; Sweeney v. Brow, 35 R. I. 227, 86 A. 115, Ann. Cas. 1915C, 1075.

Annotation: Ann. Cas. 1912D, 1070.

See also Wright v. May, 127 Minn. 150, 149 N. W. 9, L.R.A.1915B, 151; Freeman v. Poole, 37 R. I. 489, 93 A. 786, L.R.A.1917A, 63, Ann. Cas. 1918A, 841.

[13] Annotation: Ann. Cas. 1912D, 1072; 15 B. R. C. 737.

[14] Craig v. Godfroy, 1 Cal. 415, 54 Am. Dec. 299; Dunham v. Hartman, 153 Mo. 625, 55 S. W. 233, 77 Am. St. Rep. 741; Gwathney v. Cason, 74 N. C. 5, 21 Am. Rep. 484; Sweeney v. Brow, 35 R. I. 227, 86 A. 115, Ann. Cas. 1915C, 1075; Walker v. Herring, 21 Gratt. (Va.) 678, 8 Am. Rep. 616; Bamber v. Savage, 52 Wis. 110, 8 N. W. 609, 38 Am. Rep. 723.

Annotation: 131 Am. St. Rep. 492; Ann. Cas. 1912D, 1074; 15 B. R. C. 744 et seq.

A memorandum made on the day following the sale by a member of the firm of auctioneers who was not present at the sale and who was not authorized to make such memorandum is not binding. Walker v. Herring, 21 Gratt. (Va.) 678, 8 Am. Rep. 616.

Under a statute requiring that the auctioneer enter in a sale book a memorandum, "at the time of sale," it has been held that an entry made after the sale, although at a later hour of the same day, would not bind the purchaser. Craig v. Godfroy, 1 Cal. 415. 54 Am. Dec. 299.

In England the view has been taken that the signing of a memorandum by the auctioneer at his office within two hours after the sale formed a part of the transaction of the sale and was binding on the purchaser. Chaney v. Maclow [1929] 1 Ch. (Eng.) 461, 15 B. R. C. 710—C. A. See also Episcopal Church v. Wiley, 11 S. C. Eq. (2 Hill) 584, 30 Am. Dec. 386 (the auctioneer at the sale simply entered the purchaser's name on a loose slip of paper, and upon his return to his office entered the sale in his sales book; the court, in upholding the memorandum, said: "The entry in the auctioneer's book was made as early as practicable"). Annotation: 15 B. R. C. 737.

[15] Sweeney v. Brow, 35 R. I. 227, 86 A. 115, Ann. Cas. 1915C, 1075; Walker v. Herring, 21 Gratt. (Va.) 678, 8 Am. Rep. 616.

Annotation: Ann. Cas. 1912D, 1075; 15 B. R. C. 735.

[16] Annotation: Ann. Cas. 1912D, 1075; 15 B. R. C. 736, 749.

The signing of a memorandum of sale by the auctioneer on the day following the sale has been held to be within the scope of his agency for the seller, and binding on the seller. Sweeney v. Brow, 35 R. I. 227, 86 A. 115, Ann. Cas. 1915C, 1075.

A memorandum made a month after the sale has been held not to be binding upon the seller. Annotation: Ann. Cas. 1912D, 1075; 15 B. R. C. 749.

[17] Annotation: Ann. Cas. 1912D, 1075; 15 B. R. C. 749, 750.

§ 32. —Qualification of Rule as to Authority of Auctioneer.—The rule that the auctioneer may bind the purchaser in making the memorandum of sale does not apply where the auctioneer himself is the owner of the goods being sold. The chief reason in support of the rule that he may be the agent of the purchaser to bind him by his memorandum is that he is supposed to be a disinterested person, having no motive to mistake the bargain and entitled equally to the confidence of the purchaser. This reason fails when he is the party to the contract and the party in interest also; the rule accordingly is that where the auctioneer himself is the owner of the goods being sold, he has no implied authority to make the memorandum of sale on behalf of the purchaser.[18] This latter rule applies to an auctioneer who acts as vendor in a fiduciary character, such as executor, administrator, guardian, or trustee.[19] Again, it has been held that a person acting as an auctioneer who did not exercise the public business of an auctioneer is not authorized to sign the memorandum so as to bind the purchaser.[20] Another qualification has been imposed upon the rule allowing the auctioneer to bind the purchaser by a memorandum of the sale where the auctioneer himself seeks to enforce the sale by an action in his own name.[1]

§ 33. —Necessity that Auctioneer Have Written Authority to Sign Contract.—The general rule is that although a contract for the sale of property must be in writing, an agent may be authorized by parol to make the contract unless the statute expressly requires his authority to be in writing.[2] Hence, where the statute merely requires that a contract be signed by the party to be charged or his duly authorized agent and does not expressly provide that the latter shall be authorized in writing, it is not necessary that the authority of an auctioneer be conferred by writing to render his memorandum effective.[3] Where, however, the statute expressly requires that a contract for the sale of lands be signed by the party to be charged or by his agent duly authorized in writing, an auctioneer's memorandum will be binding upon a party to the contract only when he is authorized in writing to make the memorandum[4] or when his unauthorized act in making the memorandum is subsequently ratified in writing.[5]

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[18] Bent v. Cobb, 9 Gray (Mass.) 397, 69 Am. Dec. 295; Dunham v. Hartman, 153 Mo. 625, 55 S. W. 233, 77 Am. St. Rep. 741; Adams v. Scales, 1 Baxt. (Tenn.) 337, 25 Am. Rep. 772; Bamber v. Savage, 52 Wis. 110, 8 N. W. 669, 38 Am. Rep. 723.

Annotation: 131 Am. St. Rep. 480; Ann. Cas. 1912D, 1071; 15 B. R. C. 739 et seq.

In Adams v. Scales, 1 Baxt. (Tenn.) 337, 25 Am. Rep. 772 (cited in Annotation 15 B. R. C. 740), it was stated that when the seller is himself present, directing and controlling the sale, and engages a crier simply to cry the property and knock it off to the best bidder, the seller himself standing by and doing everything else except simply crying the bids, this is not such a sale by an auctioneer as would give to his memorandum the effect of constituting a contract.

[19] Bent v. Cobb, 9 Gray (Mass.) 397, 69 Am. Dec. 295 (wherein a guardian acted as auctioneer in selling his ward's realty); Dunham v. Hartman, 153 Mo. 625, 55 S. W. 233, 77 Am. St. Rep. 741 (wherein a sheriff, as substituted trustee, acted as auctioneer); Tull v. David, 45 Mo. 444, 100 Am. Dec. 385 (wherein the trustee in a deed of trust with power of sale acted as auctioneer).

Annotation: Ann. Cas. 1912D, 1072; 15 B. R. C. 740.

As to whether the sale applies to a sale by an executor or administrator, see STATUTE OF FRAUDS [Also 25 R. C. L. p. 600, § 207].

[20] Annotation: Ann. Cas. 1912D, 1070.

[1] Johnson v. Buck, 35 N. J. L. 338, 10 Am. Rep. 243.

Annotation: Ann. Cas. 1912D, 1071; 15 B. R. C. 741.

See, however, Bent v. Cobb, 9 Gray (Mass.) 397, 69 Am. Dec. 295.

This disqualification, however, has been held not to apply to the auctioneer's clerk. See infra, § 34.

[2] And see STATUTE OF FRAUDS [Also 25 R. C. L. p. 534, § 122; p. 685, § 324].

[3] Doty v. Wilder, 15 Ill. 407, 60 Am. Dec. 756.

Annotation: 131 Am. St. Rep. 482; Ann. Cas. 1912B, 1296; Ann. Cas. 1912D, 1071.

[4] Dunham v. Hartman, 153 Mo. 625, 55 S. W. 233, 77 Am. St. Rep. 741 (action against purchaser).

§ 34. Authority of Auctioneer's Clerk to Sign Memorandum.—The purchaser may, of course, expressly authorize the auctioneer's clerk to sign the memorandum of sale in his behalf or may subsequently ratify the clerk's act in doing so,[6] but as a general rule, his authority to do so is not dependent upon express authorization. According to the weight of authority, the clerk of the auctioneer, acting under the auctioneer's immediate direction, may sign a memorandum of sale as agent for both seller and purchaser. His entry of the purchaser's name on a memorandum at the time of the sale is a sufficient signing by the purchaser under the statute of frauds, assuming, of course, that the statute does not require the agent's authority to be in writing.[7] Some courts, however, take the view that the mere position as clerk to the auctioneer does not carry implied authority to sign the memorandum of sale on behalf of the purchaser.[8] There is also some difference of opinion as to the authority of a clerk or agent of the vendor, who also acts as the auctioneer's clerk at the sale, to sign a memorandum so as to bind the purchaser. Some courts hold that the agent of the seller may not act as clerk of the auctioneer for the purpose of making a memorandum good under the statute of frauds,[9] but there is contrary authority also.[10] In any event, the memorandum prepared by the auctioneer's clerk must be one which the auctioneer has expressly or impliedly authorized the clerk to make.[11] The reason for holding that an auctioneer is disqualified for the purpose of signing in behalf of the purchaser if he subsequently seeks to bring suit upon the contract in person[12] does not apply to the clerk of the auctioneer. Consequently, it has been held that in a suit in the name of an auctioneer against a purchaser to recover the price of the goods, the signing of the purchaser's name by the clerk of the auctioneer, upon the successful bid being announced, is a sufficient signing within the statute.[13]

Annotation: 15 B. R. C. 743.

On an auction sale of homestead property, a memorandum made by the auctioneer is insufficient to bind the seller, under the statute of frauds relating to realty and requiring an agent's authority to be in writing, the auctioneer not being so authorized, even though the owner and his wife were present at the sale. Annotation: 15 B. R. C. 743.

[5] See STATUTE OF FRAUDS [Also 25 R. C. L. p. 687, § 327].

Under the general rule of agency, the act of ratification must be of the same nature as that which would be required for conferring the authority in the first instance. See AGENCY, Vol. 2, p. 172, § 215.

[6] Annotation: Ann. Cas. 1912D, 1074.

[7] Doty v. Wilder, 15 Ill. 407, 60 Am. Dec. 756; Norris v. Blair, 39 Ind. 90, 10 Am. Rep. 135; Kennell v. Boyer, 144 Iowa, 303, 122 N. W. 941, 24 L.R.A.(N.S.) 488, Ann. Cas. 1912A, 1127; Johnson v. Buck, 35 N. J. L. 338, 10 Am. Rep. 243; Burton v. Jones, 147 Tenn. 624, 250 S. W. 548, 28 A.L.R. 1111; Smith v. Jones, 7 Leigh (Va.) 165, 30 Am. Dec. 498.

Annotation: 28 A.L.R. 1118; Ann. Cas. 1912D, 1072.

No reason for the disability of the clerk to act as agent for the purpose of making the signature of the purchaser can be adduced which will not operate equally to exclude the auctioneer, where the litigation is directly between the vendor and purchaser. The question, in every case, is one of fact, whether the person by whom the signature has been made was an agent lawfully authorized to make the same. Auctioneers, by virtue of their business, by the usages of trade, are assumed to have such authority; and where the auctioneer's clerk, or a volunteer, acts openly at a sale in entering the successful bids, as they are publicly announced, his authority to act for the purchaser in the premises is established. Johnson v. Buck, 35 N. J. L. 338, 10 Am. Rep. 243.

Where a statute provides in effect that certain entries by the auctioneer in a sales book made at the time of the sale fulfil the requirements of the statute of frauds, and the sales book is kept by the auctioneer's clerk, who makes entries in the book in the presence of the auctioneer and the bidder the moment the bid is accepted, such a sales book must be regarded as if kept by the auctioneer personally. Annotation: 28 A.L.R. 1120.

[8] Meadows v. Meadows, 14 S. C. L. (3 M'Cord) 458, 15 Am. Dec. 645.

Annotation: 28 A.L.R. 1120; 51 Am. St. Rep. 148; Ann. Cas. 1912D, 1073.

[9] Howell v. Shewell, 96 Ga. 454, 23 S. E. 310, 51 Am. St. Rep. 148.

Annotation: 28 A.L.R. 1122; Ann. Cas. 1912D, 1074.

[10] Annotation: 28 A.L.R. 1121, 1123.

[11] Burton v. Jones, 147 Tenn. 624, 250 S. W. 548, 28 A.L.R. 1111.

[12] See supra, § 32.

[13] Johnson v. Buck, 35 N. J. L. 338, 10 Am. Rep. 243.

§ 35. Form and Contents of Memorandum.—In order to satisfy the statute of frauds, the memorandum of an auction sale should contain everything necessary to show the contract between the vendor and the purchaser.[14] No particular form is necessary, however, so long as the essential facts are stated.[15] It may be in the form of mere entries in the auctioneer's sales book.[16] The memorandum should contain a description of the property sold, a statement of the price, the terms of credit, any conditions upon which the sale was made,[17] the name of the vendee or purchaser,[18] and, according to the great weight of authority, when made by the auctioneer in behalf of the vendor or seller, the name of the vendor or seller or a description by which he or she can be identified.[19] Some authorities, however, take the view that a memorandum signed by the auctioneer in behalf of the vendor or seller is sufficient although the latter is not named or described.[20] The necessity for the signatures of both parties may be affected by different forms of statutes, some of which require the signing by the "party" to be charged, and others the signing by the "parties" to be charged.[1] Under a form of statute which requires that the memorandum be signed by the party to be charged, the signature of the purchaser at an auction is sufficient.[2] Generally speaking, in order to constitute a signing of a contract, it is not necessary that the name of the party be subscribed.[3] Accordingly, the memorandum of an action is sufficient if the name of the party to be charged appears in the body of the instrument and the intention is manifested thereby to bind him by the instrument.[4]

Annotation: 28 A.L.R. 1121; Ann. Cas. 1912D, 1073.

If the auctioneer's clerk is the owner himself or an agent of the owner, the rule, of course, is otherwise. Howell v. Shewell, 96 Ga. 454, 23 S. E. 310, 51 Am. St. Rep. 148.

[14] Johnson v. Buck, 35 N. J. L. 338, 10 Am. Rep. 243.
Annotation: Ann. Cas. 1912D, 1076.

[15] Sherburne v. Shaw, 1 N. H. 157, 8 Am. Dec. 47.
Annotation: 6 Eng. Rul. Cas. 254.
See Statute of Frauds [Also 25 R. C. L. p. 643, § 273].

[16] Sherburne v. Shaw, 1 N. H. 157, 8 Am. Dec. 47; Parrott v. Dickson, 151 S. C. 114, 148 S. E. 704, 63 A.L.R. 965 (partition sale); Davis v. Robertson, 8 S. C. L. (1 Mill, Const.) 71, 12 Am. Dec. 611.

[17] Grafton v. Cummings, 99 U. S. 100, 25 L. ed. 366; Doty v. Wilder, 15 Ill. 407, 60 Am. Dec. 756; Norris v. Blair, 39 Ind. 90, 10 Am. Rep. 135; O'Donnell v. Leeman, 43 Me. 158, 69 Am. Dec. 54; Davis v. Rowell, 2 Pick. (Mass.) 64, 13 Am. Dec. 398; Johnson v. Buck, 35 N. J. L. 338, 10 Am. Rep. 243; Meadows v. Meadows, 14 S. C. L. (3 M'Cord) 458, 15 Am. Dec. 645.
Annotation: 77 Am. St. Rep. 746; Ann. Cas. 1912D, 1076; 13 Am. Dec. 398; 15 B. R. C. 736.

A book entry made by an auctioneer employed to conduct a partition sale of the number of lots sold, the amount of the bid, the terms of the sale, and the name of the purchaser satisfies the requirements of the statute of frauds. Parrott v. Dickson, 151 S. C. 114, 148 S. E. 704, 63 A.L.R. 965.

[18] Grafton v. Cummings, 99 U. S. 100, 25 L. ed. 366; Doty v. Wilder, 15 Ill. 407, 60 Am. Dec. 756; Meadows v. Meadows, 14 S. C. L. (3 M'Cord) 458, 15 Am. Dec. 645.
Annotation: Ann. Cas. 1912D, 1076; 15 B. R. C. 736.

[19] Grafton v. Cummings, 99 U. S. 100, 25 L. ed. 366; Dunham v. Hartman, 153 Mo. 625, 55 S. W. 233, 77 Am. St. Rep. 741; Sherburne v. Shaw, 1 N. H. 157, 8 Am. Dec. 47; Mentz v. Newwitter, 122 N. Y. 491, 25 N. E. 1044, 11 L.R.A. 97, 19 Am. St. Rep. 514; Meadows v. Meadows, 14 S. C. L. (3 M'Cord) 458, 15 Am. Dec. 645.
Annotation: 8 L.R.A.(N.S.) 733; 12 Ann. Cas. 487; Ann. Cas. 1912D, 1076; 15 B. R. C. 743.

The seller need not be specified by name if he is otherwise sufficiently identified. Annotation: Ann. Cas. 1912D, 1076. See also Mentz v. Newwitter, 122 N. Y. 491, 25 N. E. 1044, 11 L.R.A. 97, 19 Am. St. Rep. 514.

Generally, as to the necessity and sufficiency of the designation of the parties, see Statute of Frauds [Also 25 R. C. L. pp. 655 et seq., §§ 288, 290, 292].

[20] Annotation: 8 L.R.A.(N.S.) 735; 12 Ann. Cas. 488; Ann. Cas. 1912D, 1071, 1076; 15 B. R. C. 739.

[1] See Statute of Frauds [Also 25 R. C. L. pp. 670 et seq., §§ 306–309].

[2] Laythoarp v. Bryant, 2 Bing. N. C. 735, 132 Eng. Reprint, 283, 6 Eng. Rul. Cas. 239.

[3] See Statute of Frauds [Also 25 R. C. L. p. 667, § 303].

[4] Love v. Harris, 156 N. C. 88, 72 S. E. 150, 36 L.R.A.(N.S.) 927, Ann. Cas. 1912D, 1065.

A mistake in the auctioneer's memorandum may be corrected by a court of equity under its general power to reform instruments.[5]

§ 36. —Inclusion, by Reference, of Terms in Separate Writings.—The memorandum of an auction sale may, by reference to other papers, supply what otherwise would be deficiencies;[6] parol testimony may be received to aid in identifying additional papers that are made a part of the signed memorandum by a reference therein,[7] but in the absence of such a reference, other writings may not be connected with the memorandum by resort to parol testimony.[8] Handbills and newspaper notices of the sale not referred to in the memorandum [9] or conditions of sale read before the bidding commenced, but not signed by the purchaser or referred to in the memorandum in a sales book,[10] are not admissible to supply essential terms and conditions omitted from the memorandum of sale. Where the auctioneer signed the name of the purchaser and the price bid on the margin of the advertisement of the sale, which contained the full terms, and was signed by the seller, the memorandum was held to be sufficient to bind the purchaser.[11] Similarly, where the memorandum was indorsed on the back of the notice of sale, the two may, according to some authorities, be read together.[12] The contrary has been held, however, upon the ground that an indorsement of that character does not refer to the contents of the paper upon which it is written.[13]

§ 37. Evidence; Proof of Memorandum.—Where the memorandum of the sale is an entry in the auctioneer's sales book, the original entry is the best evidence of the memorandum and should ordinarily be produced; under the general rule as to best evidence, its place cannot be supplied by a copy or oral evidence of its contents until the nonproduction of the original has been satisfactorily accounted for.[14] Where, however, the entry of a sale has been lost, its existence and loss may be proved by the person who made the sale.[15]

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[5] Pugh v. Chesseldine, 11 Ohio, 109, 37 Am. Dec. 414.

Annotation: 131 Am. St. Rep. 493.

As to the effect of the statute of frauds on the general jurisdiction of a court of equity to reform instruments, see STATUTE OF FRAUDS [Also 25 R. C. L. p. 713, § 358].

[6] Atwood v. Cobb, 16 Pick. (Mass.) 227, 26 Am. Dec. 657; Johnson v. Buck, 35 N. J. L. 338, 10 Am. Rep. 243.

Annotation: 13 Am. Dec. 399; Ann. Cas. 1912D, 1076.

[7] Johnson v. Buck, 35 N. J. L. 338, 10 Am. Rep. 243.

[8] Doty v. Wilder, 15 Ill. 407, 60 Am. Dec. 756; Ridgway v. Ingram, 50 Ind. 145, 19 Am. Rep. 706; O'Donnell v. Leeman, 43 Me. 158, 69 Am. Dec. 54; Johnson v. Buck, 35 N. J. L. 338, 10 Am. Rep. 243.

Annotation: 13 Am. Dec. 399; Ann. Cas. 1912D, 1076.

"**The memorandum of the auctioneer** must, however, on its face or in connection with some other writing, contain everything necessary to show the contract between the parties, so that there be no need of parol proof to ascertain the terms of sale or the intention of the parties." Doty v. Wilder, 15 Ill. 407, 60 Am. Dec. 756.

[9] O'Donnell v. Leeman, 43 Me. 158, 69 Am. Dec. 54; Johnson v. Buck, 35 N. J. L. 338, 10 Am. Rep. 243; Dickerson v. Simmons, 141 N. C. 325, 53 S. E. 850, 8 Ann. Cas. 361.

The printed advertisement of an auction sale of land is not sufficient for the purpose of satisfying the statute of frauds where it neither contains nor is connected with any writing showing the price bid and the purchaser. Dickerson v. Simmons, 141 N. C. 325, 53 S. E. 850, 8 Ann. Cas. 361.

[10] Johnson v. Buck, 35 N. J. L. 338, 10 Am. Rep. 243.

Annotation: 13 Am. Dec. 399.

[11] Annotation: Ann. Cas. 1912D, 1076; 15 B. R. C. 742.

[12] Love v. Harris, 156 N. C. 88, 72 S. E. 150, 36 L.R.A.(N.S.) 927, Ann. Cas. 1912D, 1065.

See also Laythoarp v. Bryant, 2 Bing. N. C. 735, 132 Eng. Reprint, 283, 6 Eng. Rul. Cas. 239 (memorandum signed by purchaser).

Annotation: Ann. Cas. 1912D, 1076; 15 B. R. C. 742.

A memorandum made by the auctioneer on the back of the notice of a sale of land signed by the seller, and stating the price and the purchaser's name has been held binding on the purchaser. Love v. Harris, 156 N. C. 88, 72 S. E. 150, 36 L.R.A.(N.S.) 927, Ann. Cas. 1912D, 1065.

[13] Ridgway v. Ingram, 50 Ind. 145, 19 Am. Rep. 706.

Annotation: Ann. Cas. 1912D, 1077.

[14] Davis v. Robertson, 8 S. C. L. (1 Mill, Const.) 71, 12 Am. Dec. 611.

See EVIDENCE [Also 10 R. C. L. pp. 903 et seq.].

VI. EFFECT, OPERATION, AND ENFORCEMENT OF SALE

§ 38. Deposit or Earnest Money.—The successful bidder at an auction is usually required to make a deposit as security for compliance with his bid. Payment thereof need not necessarily be made in cash; a check, if satisfactory to the seller or auctioneer, may fairly be said to be a "deposit" within the general understanding of that term as used in sales by auction,[16] although it has been held that in the absence of the seller's sanction, the auctioneer possesses no authority, by virtue of his employment as such, to accept a check as a deposit where it is drawn on a bank in which the drawer had at the time no funds.[17] Although the printed conditions of the sale require that the deposit be made on the day of the sale, payment on that day is not essential in the absence of some further provision; and unless prohibited by the seller, the auctioneer's authority to receive the deposit continues after the day of the sale.[18] If the vendee refuses to make the deposit of earnest money required by the terms of the sale, it being provided therein that such sum shall be forfeited upon the buyer's default, such amount may be recovered in an action against him even though the property is subsequently sold for more than it brought at the first sale.[19]

§ 39. —Disposition upon Failure to Consummate Sale.—In the event of the noncompletion of the sale by reason of the vendor's default[20] or in case of its rescission by the vendee upon the ground that he was induced to purchase by means of fraudulent representations[1] or by reasons of puffing,[2] then the vendee is entitled to a return of his deposit. Similarly, where the vendee returns his purchase to the vendor for not being as warranted, he may recover his deposit from the auctioneer if it is in the hands of the latter, for, upon rescission, the auctioneer holds it for the benefit of the vendee.[3] On the other hand, it is well settled that where the vendee defaults, he is not entitled to the return of his deposit, made under an agreement that it will be forfeited to the seller in the event the vendee fails to perform.[4] According to some decisions, this is true even in the absence of a clause of forfeiture, especially where it has been designated "an earnest" by the terms of sale.[5] It has been asserted, however, that the default of the vendee does not work a forfeiture of his deposit in the absence of an express agreement to that effect, the vendor merely being entitled to deduct therefrom the actual damages he may have sustained.[6]

[15] Parrott v. Dickson, 151 S. C. 114, 148 S. E. 704, 63 A.L.R. 965.

The uncontradicted and corroborated statement of the auctioneer as to the fact that entries were made in a book and as to the contents of such entries must be accepted as conclusive. Parrott v. Dickson, 151 S. C. 114, 148 S. E. 704, 63 A.L.R. 965.

See Evidence [Also 10 R. C. L. pp. 914 et seq.].

[16] Annotation: 131 Am. St. Rep. 495; Ann. Cas. 1912A, 1133.

[17] Broughton v. Silloway, 114 Mass. 71, 19 Am. Rep. 312.

[18] Annotation: Ann. Cas. 1912A, 1133.

[19] Thompson v. Kelly, 101 Mass. 291, 3 Am. Rep. 353.

[20] Annotation: 131 Am. St. Rep. 495.

[1] Roberts v. French, 153 Mass. 60, 26 N. E. 416, 10 L.R.A. 656, 25 Am. St. Rep. 611; Sohns v. Beavis, 200 N. Y. 268, 93 N. E. 935, 34 L.R.A.(N.S.) 927.

Annotation: 131 Am. St. Rep. 479.

[2] Annotation: 35 L.R.A.(N.S.) 482.

[3] Annotation: 35 L.R.A.(N.S.) 481.

Generally as to the liability of the auctioneer in reference to the custody and disbursement of earnest money, see infra, § 55.

[4] Donahue v. Parkman, 161 Mass. 412, 37 N. E. 205, 42 Am. St. Rep. 415.

Annotation: 131 Am. St. Rep. 495.

[5] Donahue v. Parkman, 161 Mass. 412, 37 N. E. 205, 42 Am. St. Rep. 415 (dictum).

Annotation: 131 Am. St. Rep. 494.

[6] Annotation: 131 Am. St. Rep. 495.

§ 40. **Payment of Purchase Price; Vendor's Lien; Sale on Credit.**—Payment of the purchase price of property sold at auction ordinarily is made to the auctioneer, whose general agency authorizes him to receive it in behalf of the vendor, except where the subject of the sale is realty, in which case payment should be made to the vendor himself unless the terms of sale provide to the contrary.[7] An auctioneer's authority to receive payment, however, does not warrant his acceptance of a check drawn upon a bank wherein the drawer has no funds, and his act in doing so has no binding effect.[8] Where the terms of sale are cash on delivery, the vendor is entitled to a lien on the property to secure the payment of the purchase price, and may retain possession to secure its payment even though title has passed to the vendee.[9] If by the terms of the sale credit is extended to the vendee upon condition that he furnish approved security, he must comply with such requirement within a reasonable time, or within the time stipulated, in order to be entitled to the subject of his purchase. If, therefore, the goods are delivered to the purchaser and he refuses to give such security, then the seller may either reclaim the goods or treat the sale as an absolute one, without credit, and sue immediately for the purchase money.[10] The relinquishment of the vendor's lien for the purchase price is not a necessary prerequisite to the institution of such a suit, where delivery of the property has not been made.[11] Where the purchaser attempts to furnish security as required, the seller is not obliged to accept it unless he knows or has the means of knowing that it is perfectly good. Neither the vendor nor his auctioneer may arbitrarily refuse to accept the security tendered, however,[12] for by "approved security" is meant such security as ought to be approved.[13] The burden of showing that a tender of security has been wrongfully declined rests upon the purchaser.[14] Although it has been held that a provision in the terms of sale that, on sums over a certain amount, credit "will be given on notes bearing interest with approved security," would be construed to give the purchaser the option of paying the purchase money in cash or of taking the credit,[15] on the other hand, where a sale was made on a credit of six months, the purchaser being required to give his note, drawing interest, with good security, it was held that if the purchaser elected to pay the purchase money in cash, he must add thereto the interest for six months, and that a tender of the amount of the price without interest was not sufficient.[16] The determination of such a question would seem to depend upon the intention of the parties as indicated by the particular circumstances of each case.

§ 41. **Passing of Title.**—The vendor and vendee, upon the acceptance of the latter's bid at an auction, occupy the same relation towards each other as exists between the promisor and promisee of an executory contract of sale conventionally made. The acceptance of the bid upon the fall of the hammer

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As to recovery of damages, see infra, § 50.

[7] Annotation: 131 Am. St. Rep. 498.

[8] Broughton v. Silloway, 114 Mass. 71, 19 Am. Rep. 312.

Annotation: 131 Am. St. Rep. 495.

[9] Wade v. Moffett, 21 Ill. 110, 74 Am. Dec. 79; Jenness v. Wendell, 51 N. H. 63, 12 Am. Rep. 48.

Annotation: 131 Am. St. Rep. 494; Ann. Cas. 1912A, 1133.

[10] Annotation: Ann. Cas. 1912A, 1133.

Delivery of the goods sold to the purchaser, however, without insistence upon the terms of sale as to security for the purchase money, may constitute a waiver of such terms. Annotation: Ann. Cas. 1912A, 1133.

[11] Wade v. Moffett, 21 Ill. 110, 74 Am. Dec. 79.

[12] Annotation: 131 Am. St. Rep. 495.

[13] Annotation: Ann. Cas. 1912A, 1133.

[14] Annotation: 131 Am. St. Rep. 495.

[15] Annotation: Ann. Cas. 1912A, 1133.

[16] Annotation: Ann. Cas. 1912A, 1133.

gives rise to contract rights which may be enforced, but does not necessarily convey the property.[17] The general rules with regard to the passing of title in the case of ordinary sales[18] are applicable. Many cases hold that in an auction sale of chattels, when the sale is without condition and where nothing remains to be done to the property before its delivery, either to separate it from other property or to put it in condition ready for delivery, the title, as between the parties, passes to the purchaser upon the acceptance of his bid, without payment of the price, even though the right to possession does not pass until the price is paid or arranged for to the satisfaction of the seller.[19] According to some decisions, however, the title does not pass, when there is no agreement for credit, until the price is paid.[20] The intention of the parties derived from the terms of the contract and the circumstances of the case primarily determines the question as to when title passes.[1] The fact that there have been a delivery and acceptance of the subject-matter of the sale would ordinarily indicate either that payment was not a condition to the transfer of title or that the condition has been waived.[2] Generally where the notice of sale provides that the sale shall be upon certain terms and conditions, a bidder may not acquire title to the property unless there is a compliance with such terms.[3] Ordinarily, an actual delivery is not necessary to vest title in the buyer where goods are ascertained and in a deliverable state and it is the intention of the parties that title pass.[4] Where, however, anything remains to be done by the vendor to render the property fit for delivery, title thereto does not vest in the vendee prior to a valid tender of the property and acceptance thereof by the purchaser.[5]

§ 42. Delivery.[6]—As the vendor of property sold for cash at an auction is entitled to a lien thereon to secure the payment of the purchase price,[7] the vendee acquires no right to the possession of the object of his purchase until such payment is made.[8] Just as a tender of payment of the purchase price is a necessary prerequisite to the vendee's right to demand a delivery of property sold for cash, similarly, compliance with the terms of the auction is essential where the sale was one upon conditions of a different nature.[9] Once the vendee has complied with the terms of the sale, however, he is entitled to have the property delivered to him, and a refusal of delivery is a breach of contract.[10] On the other hand, where the seller has the goods ready for delivery upon payment of the price, and the buyer fails to pay for them and take them away, the latter is in default and may be held liable on his contract.[11] Again, where the vendee neglects to pay or to fulfil the conditions of the contract within the time specified, and the vendor retains possession of the goods, asserting his purchase money lien thereon, delivery has been held not to be a condition precedent to the institution of a suit for the recovery of the price bid.[12] It has been held, however, that an action for goods sold and delivered, as distinguished from an action for damages for breach of contract, may not be maintained against the purchaser unless the property in a deliverable state is not only offered to him but accepted by him as well.[13] Where the terms of sale require the removal of the goods by the purchaser within a specified time thereafter, the vendee does not lose his right to remove them merely by failing to call for the goods until the day following the expiration of such period, unless such condition is of the essence of the contract.[14]

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[17] Annotation: 131 Am. St. Rep. 494.

[18] See Sales [Also 24 R. C. L. p. 15, §§ 274 et seq.]; Vendor and Purchaser [Also 27 R. C. L. p. 463, § 177].

[19] Wade v. Moffett, 21 Ill. 110, 74 Am. Dec. 79; Richardson v. Landreth (Mo. App.) 260 S. W. 128, citing R. C. L.; Jenness v. Wendell, 51 N. H. 63, 12 Am. Rep. 48.
Annotation: 131 Am. St. Rep. 494; 16 Ann. Cas. 386.
See Sales [Also 24 R. C. L. p. 23, § 284].

[20] Hardesty v. Wilson, 2 Gill (Md.) 481, 41 Am. Dec. 439.
Annotation: 9 L.R.A. 558; 9 Am. St. Rep. 882; 131 Am. St. Rep. 494.

[1] Jenness v. Wendell, 51 N. H. 63, 12 Am. Rep. 48.

[2] Jenness v. Wendell, 51 N. H. 63, 12 Am. Rep. 48.
Annotation: 23 Eng. Rul. Cas. 526.

[3] Morgan v. East, 126 Ind. 42, 25 N. E. 867, 9 L.R.A. 558.
Annotation: 131 Am. St. Rep. 494.
Where the conditions of sale, verbally announced by the auctioneer before the sale began, were a "sixty days' note, with security, or 6 per cent off for cash, satisfaction to be given before stock is removed," title does not pass until the terms are complied with. Mitchell v. Zimmerman, 109 Pa. 183, 58 Am. Rep. 715.

[4] **Even where the property is not cumbrous** and may be readily delivered, actual delivery is not a necessary prerequisite to the vesting of title in the purchaser. Annotation: 74 Am. Dec. 83.
See Sales [Also 24 R. C. L. p. 35, § 298].

[5] Messer v. Woodman, 22 N. H. 172, 53 Am. Dec. 241.

[6] As to necessity and effect of delivery as regards the passing of title, see supra, § 41.

[7] See supra, § 40.

[8] Coffman v. Hampton, 2 Watts & S. (Pa.) 377, 37 Am. Dec. 511.
Annotation: 9 L.R.A. 558.

[9] Morgan v. East, 126 Ind. 42, 25 N. E. 867, 9 L.R.A. 558.
Annotation: 131 Am. St. Rep. 494.

§ 43. Enforcing the Sale Generally.—As the acceptance of a bid at an auction sale gives rise to an executory contract, the same as the acceptance of any other offer, either party may enforce the rights he thereby acquires by a civil suit for breach of contract.[15] Accordingly, where the vendee neglects to comply with the terms of the contract[16] or, prior to the expiration of his time to perform, announces his intention not to be bound by the sale,[17] the vendor may bring an action for damages in his own name, though where credit has been given he cannot sue for the purchase price as such until the expiration of the time allowed for payment.[18] Where the allowance of credit, however, is conditioned upon the furnishing of security, and the vendee neglects to fulfil the condition, the vendor may consider the sale an absolute one for cash and sue immediately for the purchase price.[19] Delivery is not a necessary prerequisite to the institution of such a suit, for the vendor is not obliged to relinquish his lien until the purchase price is paid.[20] Moreover, where the vendor brings an action for the recovery of damages rather than the purchase price, it is not necessary, as a rule, that he should have resold the property previously in order to fix the amount of his loss.[1] But where the terms of sale expressly provide for such a contingency by authorizing a resale of the property in the event of the vendee's default, then a resale is absolutely essential to the vendor's right to maintain an action against the vendee for the latter's failure to comply with his contract.[2] Where the subject of the sale is land, either the vendor or vendee may obtain the specific performance of the contract, in a proper case, by invoking the aid of a court of equity.[3] The right to specific performance in a particular case is governed by the ordinary principles of equity. Thus, it will not be denied, on the petition of the vendor, where the sale is made in good faith, the title is good, and the quantity of the land is the same, even though the description may vary in a slight degree.[4] This is so even where a statute affords another means of relief, for in the absence of express provision to the contrary, such a statutory method is deemed to be cumulative, and not exclusive of the old common-law and equitable remedies.[5] Here, as elsewhere, laches on the part of the applicant seeking specific performance may bar his right thereto.[6]

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[10] Annotation: 131 Am. St. Rep. 494.

[11] Coffman v. Hampton, 2 Watts & S. (Pa.) 377, 37 Am. Dec. 511.

[12] Wade v. Moffett, 21 Ill. 110, 74 Am. Dec. 79.
See supra, § 40.

[13] Messer v. Woodman, 22 N. H. 172, 53 Am. Dec. 241.

[14] Annotation: Ann. Cas. 1912A, 1134.

[15] Richardson v. Landreth (Mo. App.) 260 S. W. 128, citing R. C. L.

[16] Coffman v. Hampton, 2 Watts & S. (Pa.) 377, 37 Am. Dec. 511.
Annotation: 131 Am. St. Rep. 497.

[17] Curtis v. Aspinwall, 114 Mass. 187, 19 Am. Rep. 332; Girard v. Taggart, 5 Serg. & R. (Pa.) 19, 9 Am. Dec. 327.

[18] Girard v. Taggart, 5 Serg. & R. (Pa.) 19, 9 Am. Dec. 327.
The written record of an auction sale is admissible in evidence in an action to recover damages for failure to comply with the bid. Kennell v. Boyer, 144 Iowa, 303, 122 N. W. 941, 24 L.R.A.(N.S.) 488, Ann. Cas. 1912A, 1127.

[19] Annotation: Ann. Cas. 1912A, 1133.
See supra, § 40.

[20] Wade v. Moffett, 21 Ill. 110, 74 Am. Dec. 79.
See supra, § 40.

[1] See infra, § 45.

[2] Webster v. Hoban, 7 Cranch (U. S.) 399, 3 L. ed. 384.
Annotation: 131 Am. St. Rep. 497; Ann. Cas. 1912A, 1133.

§ 44. Suit by Auctioneer in Own Name.—With respect to auctions of personal property, the general rule is that the auctioneer may maintain an action in his own name against the purchaser for either the price or the property itself[7] unless the principal or real owner elects to bring the action.[8] This doctrine stands upon a special property or interest in the auctioneer in the goods intrusted to him for sale, including the possession of the goods and a lien thereon for his charges and commissions.[9] It is not necessary that the existence of this special property or interest be proved, for it flows as a matter of course from his position as an auctioneer.[10] But even where the auctioneer sues upon the contract in his own name, the purchaser may set off a debt due him from the seller.[11] With respect to auctions of real estate, however, the auctioneer has no such special property or interest as will enable him to enforce the contract.[12] Ordinarily, he would not be entitled to receive the price.[13]

[3] Love v. Harris, 156 N. C. 88, 72 S. E. 150, 36 L.R.A.(N.S.) 927, Ann. Cas. 1912D, 1065; Pugh v. Chesseldine, 11 Ohio, 109, 37 Am. Dec. 414; Sweeney v. Brow, 35 R. I. 227, 86 A. 115, Ann. Cas. 1915C, 1075; Smith v. Jones, 7 Leigh (Va.) 165, 30 Am. Dec. 498.

Annotation: 131 Am. St. Rep. 497.

An auctioneer holding the deposit on a purchase may be made a defendant in an action for specific performance. It is proper to make him a party where the deposit is large, unless he has paid it into court before action brought, but as a general rule it is not good practice to make him a defendant when the deposit is of small amount. Annotation: 23 A.L.R. 125.

While it has been held that a vendor seeking specific performance could not introduce evidence of a verbal statement by the auctioneer to remove an apparent discrepancy between the particulars and the conditions of sale, in a subsequent suit by the purchaser to enforce the same contract, the vendor was allowed, by way of defense, to introduce such evidence in order to avoid a contract being forced on him by mistake or surprise. Annotation: 2 Eng. Rul. Cas. 714.

[4] King v. Bardeau, 6 Johns. Ch. (N. Y.) 38, 10 Am. Dec. 312.

And see SPECIFIC PERFORMANCE [Also 25 R. C. L. p. 197].

[5] Dawson v. Miller, 20 Tex. 171, 70 Am. Dec. 380.

[6] Annotation: 57 Am. Dec. 598.

[7] Robinson v. Garth, 6 Ala. 204, 41 Am. Dec. 47; Thompson v. Kelly, 101 Mass. 291, 3 Am. Rep. 353; Girard v. Taggart, 5 Serg. & R. (Pa.) 19, 9 Am. Dec. 327.

Annotation: 131 Am. St. Rep. 498; 3 Eng. Rul. Cas. 586.

Am. Law Inst. Restatement, Agency, § 364.

If the purchaser, by artifice, obtains possession of the goods without paying the price in full, and the auctioneer is thereby obliged to make good the shortage to his principal, he may sue the purchaser in his own name as for goods sold and delivered and recover the balance. Williams v. Millington, 1 H. Bl. 81, 126 Eng. Reprint, 49, 3 Eng. Rul. Cas. 583.

[8] Girard v. Taggart, 5 Serg. & R. (Pa.) 19, 9 Am. Dec. 327.

Annotation: 3 Eng. Rul. Cas. 586.

[9] Thompson v. Kelly, 101 Mass. 291, 3 Am. Rep. 353.

Annotation: 131 Am. St. Rep. 498; 3 Eng. Rul. Cas. 586.

The auctioneer may maintain an action for the price of merchandise sold, although he has previously received his advances and commissions from the owner, where the purchaser is estopped to deny that he has contracted directly with the auctioneer. Annotation: 131 Am. St. Rep. 498.

[10] Annotation: 3 Eng. Rul. Cas. 586.

[11] Annotation: 131 Am. St. Rep. 498.

[12] Thompson v. Kelly, 101 Mass. 291, 3 Am. Rep. 353; Gibson Land Auction Co. v. Brittain, 182 N. C. 676, 110 S. E. 82, 20 A.L.R. 211.

Annotation: 20 A.L.R. 214, s. 97 A.L.R. 858.

[13] Thompson v. Kelly, 101 Mass. 291, 3 Am. Rep. 353.

Annotation: 131 Am. St. Rep. 498.

As to the auctioneer's right to maintain an action against the purchaser for the loss of his commissions as a result

However, when the terms of the auctioneer's employment, and of the authorized sale, contemplate the payment of a deposit into his hands at the time of the auction and before the completion of the sale by the delivery of the deed, he stands, in relation to such deposit, in the same position as he does to the price of personal property sold and delivered by him. He may receive and receipt for the deposit, his lien for commissions will attach to it, and he may sue for it in his own name whenever an action for the deposit, separate from the other purchase money, may become necessary.[14]

§ 45. Resale of Property on Default of Buyer.—When the successful bidder at an auction fails to perform his contract after the property has been knocked down to him, the vendor may order the property to be resold at the vendee's risk and hold him responsible for the resulting loss.[15] Ordinarily it is purely optional with the vendee whether or not he shall adopt this method of determining the extent of his damages, but where the terms of sale expressly provide for such a contingency by authorizing him to resell the property at the vendee's risk in case of the latter's default, compliance with such provision has been held to be a necessary prerequisite to the vendor's right to maintain an action against the vendee to recoup his loss.[16] Where the vendor does undertake to resell the property, whether of his own volition or not, such resale must be fairly conducted with a view to securing the highest possible price.[17] The second sale must be upon the same terms as the first, or at least not upon conditions of a more onerous character.[18] The property may be sold without being readvertised where the second sale takes place immediately upon the conclusion of, or during the progress of, the auction and before the bidders depart, but if it takes place after the bidders at the first sale have dispersed, the resale must be advertised anew.[19] Furthermore, in the absence of a statutory provision to the contrary, a notice to the defaulting buyer that the sale is to be at his risk has been held necessary.[20] Where, however,

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of the purchaser's failure to comply with his agreement, see infra, § 53.

[14] Thompson v. Kelly, 101 Mass. 291, 3 Am. Rep. 353.

Annotation: 131 Am. St. Rep. 498.

[15] Robinson v. Garth, 6 Ala. 204, 41 Am. Dec. 47; Hendrick v. Davis, 27 Ga. 167, 73 Am. Dec. 726; Hardesty v. Wilson, 2 Gill (Md.) 481, 41 Am. Dec. 439; Coffman v. Hampton, 2 Watts & S. (Pa.) 377, 37 Am. Dec. 511.

Annotation: 36 L.R.A.(N.S.) 927; 9 Am. St. Rep. 882; 131 Am. St. Rep. 493.

See also Uniform Sales Act, § 60 (1).

[16] Webster v. Hoban, 7 Cranch (U. S.) 399, 3 L. ed. 384.

Annotation: Ann. Cas. 1912A, 1133.

[17] Annotation: 131 Am. St. Rep. 493; 96 Am. Dec. 266.

In order to conclude the defaulting vendee in this manner, it must appear that the resale was made without unreasonable delay, with the same publicity and as far as possible under the same conditions as the first, and with an honest effort to get the best price obtainable. Green v. Ansley, 92 Ga. 647, 19 S. E. 53, 44 Am. St. Rep. 110.

The seller is bound to exercise reasonable care and judgment in making a resale. Uniform Sales Act, § 60 (5).

[18] Annotation: 131 Am. St. Rep. 493; 96 Am. Dec. 266.

[19] Love v. Harris, 156 N. C. 88, 72 S. E. 150, 36 L.R.A.(N.S.) 927, Ann. Cas. 1912D, 1065.

Annotation: 36 L.R.A.(N.S.) 927.

[20] Green v. Ansley, 92 Ga. 647, 19 S. E. 53, 44 Am. St. Rep. 110.

Annotation: 44 Am. St. Rep. 113; 131 Am. St. Rep. 493.

The property resold at the risk of the defaulting buyer is regarded as in some sense his own, and the result of the resale is in the nature of an adjudication against him; consequently, before he is charged with the deficiency, he should be afforded an opportunity to protect his interest and prevent a sacrifice of the property. Unless notice is given him of an intention to resell the property at his risk, he may assume that the vendor elected to retain and deal with the property as his own. The resale price may not be taken to indicate the measure of damages; the vendor must establish the difference between the contract price and the market value at the time the contract was broken. Green v. Ansley, 92 Ga. 647, 19 S. E. 53, 44 Am. St. Rep. 110.

And see infra, § 50.

While in some cases, notice of the time and place of the resale has also been required, other authorities adopt the view that where there is notice of the election to resell and hold the other party bound for the deficiency, no further notice is necessary, and it has been held that such the Uniform Sales Act is applicable, it is not essential to the validity of a resale that notice of an intention to resell the goods or of the time and place of sale be given by the seller to the original buyer, though the giving of or failure to give such notice is relevant on the question whether the buyer had been in default an unreasonable time before the resale was made.[1] Where the vendor wantonly delays the resale or is guilty of negligence or grossly improper conduct in disposing of the property upon a second sale, the loss occasioned thereby falls upon him.[2] On the other hand, mere unskilfulness or slight carelessness on the part of the vendor in reselling the property will not render him responsible for the loss where he has acted in good faith.[3] In order further to protect the interests of the vendee, it has been held that the vendor may not bid at the second sale for the purpose of charging the purchaser with the difference in prices,[4] though the contrary has been held where the second sale was fairly conducted by a licensed auctioneer.[5]

§ 46. **Warranties; Claims Based on Defects in Property Sold.**—In accordance with the prevailing rule that a vendor of personal property in possession thereof impliedly warrants his title thereto,[6] it is generally held that the seller of chattels disposed of at auction impliedly warrants that he has good title to the property sold.[7] Warranty of title, however, is the only warranty that is implied on the part of the vendor,[8] for the maxim of caveat emptor applies not only to the ordinary sale of chattels[9] but to sales of goods at auction as well.[10] Consequently, in the absence of fraud, the vendor is responsible for neither the quality nor the goodness of property sold unless there is an express warranty upon his part.[11] He will not be bound by a warranty made by the auctioneer unless he expressly authorized the auctioneer to make the warranty or subsequently ratified it.[12] However, aside from any warranty, the buyer may be entitled to rescind because of misrepresentations made by either the seller or the auctioneer.[13] Where the description of property is substantially true, even though it may vary in a slight degree, the purchaser is not entitled to be relieved from his purchase, though the variance may be such as to warrant an allowance on the price bid.[14] The

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additional notice may at least be dispensed with where the second sale, as well as the first, is at public auction, duly advertised in the same locality. See Green v. Ansley, 92 Ga. 647, 19 S. E. 53, 44 Am. St. Rep. 110, wherein the court stated: "In such case the party sought to be charged with the deficiency is sufficiently protected by the requirement already referred to, that the second sale shall take place within a reasonable time and be given equal publicity with the first. If this is done, one who has been notified of the intention to resell at his risk need have no difficulty in ascertaining the time and place of the sale." Annotation: 131 Am. St. Rep. 493.

[1] Uniform Sales Act, § 60 (3), (4).

[2] Ashcom v. Smith, 2 Penr. & W. (Pa.) 211, 21 Am. Dec. 437.

[3] Ibid.

[4] Annotation: 131 Am. St. Rep. 493.

[5] Ackerman v. Rubens, 167 N. Y. 405, 60 N. E. 750, 53 L.R.A. 867, 82 Am. St. Rep. 728.
Annotation: 42 L.R.A.(N.S.) 676.
And see SALES [Also 24 R. C. L. p. 113, § 381].

[6] See SALES [Also 24 R. C. L. p. 182, § 454].

[7] Jenness v. Wendell, 51 N. H. 63, 12 Am. Rep. 48.
Annotation: 131 Am. St. Rep. 496.

[8] Swett v. Colgate, 20 Johns. (N. Y.) 196, 11 Am. Dec. 266.

[9] See SALES [Also 24 R. C. L. p. 179, § 452].

[10] Court v. Snyder, 2 Ind App. 440, 28 N. E. 718, 50 Am. St. Rep. 247.
Annotation: 131 Am. St. Rep. 496.

[11] Swett v. Colgate, 20 Johns. (N. Y.) 196, 11 Am. Dec. 266.
As to what will constitute an express warranty, see SALES [Also 24 R. C. L. p. 164, §§ 437 et seq.].

[12] See supra, § 10.

[13] And see infra, § 47.

[14] King v. Bardeau, 6 Johns. Ch. (N. Y.) 38, 10 Am. Dec. 312; Ashcom v. Smith, 2 Penr. & W. (Pa.) 211, 21 Am. Dec. 437.
See also infra, § 47.
A provision in the conditions of sale that mistakes in the description of the property, or any other material error in the particulars of sale, shall not annul the sale, but that compensation shall be

vendee claiming that he is entitled to such a reduction should be prompt in making his complaint, for it is frequently provided by the terms of sale that all complaints must be made within a specified time after the sale. Such a provision is perfectly valid and binding even though the matter complained of was not discovered until after the expiration of that time. This method of limiting the liability of the vendor is not unreasonable, for the vendee, by purchasing under and acceding to such conditions, precludes himself from objecting to them.[15]

§ 47. Rescission of Contract—By Vendor.—Contracts of sale entered into at an auction may be rescinded by either the vendor or the vendee where proper grounds exist.[16] Thus, where bidding has been stifled,[17] or where the purchaser fails or refuses to comply with the terms and conditions of his purchase,[18] the seller may elect to rescind the sale. Ordinarily, such election must be made by the vendor personally, for the auctioneer possesses no authority to rescind a sale; his agency is limited to selling the property.[19] A right to a rescission may be expressly provided for in the terms and conditions of the sale as an equivalent for a reservation of the right to reject bids.[20]

Where the property is knocked down to a by-bidder who fraudulently agreed with the owner to run up the price of the property, the owner cannot avoid the sale by reason of such fraudulent agreement.[1]

§ 48. —By Vendee.—The vendee at an auction sale may withdraw from his contract to purchase where he was influenced in his bidding by fraudulent bids made at the instigation of the vendor,[2] as indicated in the previous discussion of "by-bidding" or "puffing."[3] Obviously the failure or inability of the vendor to give good title to the property justifies the vendee in refusing to complete the purchase.[4] Likewise, where the article purchased does not comply with the seller's warranty, the purchaser may rescind.[5] Aside from a warranty, a misrepresentation as to a material matter, whether made

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made, is valid and effective unless the misdescription complained of is the result of fraud. Annotation: Ann. Cas. 1912A, 1129.

It has been held that such a provision has no application where the thing sold turns out to be of a different nature from that contracted to be sold, as where the sale was of copyhold and the title turns out to be freehold. Annotation: Ann. Cas. 1912A, 1132.

[15] Annotation: Ann. Cas. 1912A, 1129.

[16] Welcome State Bank v. Martens, 153 Minn. 264, 190 N. W. 185, citing R. C. L.

[17] Pike v. Balch, 38 Me. 302, 61 Am. Dec. 248.

[18] Annotation: 131 Am. St. Rep. 497.

[19] Annotation: 131 Am. St. Rep. 497.

[20] Erie Coal & Coke Corp. v. United States, 266 U. S. 518, 69 L. ed. 417, 45 S. Ct. 181, holding that where an auction of United States government property was advertised under terms and conditions providing that the government might rescind the sale at any time before a date mentioned, the highest bidder at the sale, to whom the property was knocked down, has no cause of action against the government in the event the latter, within the time specified, refuses to confirm the sale.

[1] Troughton v. Johnston, 3 N. C. (2 Hayw.) 328, 2 Am. Dec. 626.
Annotation: 46 A.L.R. 128.

[2] Flannery v. Jones, 180 Pa. 338, 36 A. 856, 57 Am. St. Rep. 648; Davis v. Petway, 3 Head (Tenn.) 667, 75 Am. Dec. 789.

A secret agreement between one conducting an auction sale and a bidder for property that he shall have the property at a specified price regardless of the price bid does not avoid a sale to another of other property for which there was bona fide competitive bidding, where there is nothing to show that such person was influenced in his action by the bidding for the property to which the understanding related, at least where the owner has reserved the right to reject any and all bids. Osborn v. Apperson Lodge, 213 Ky. 533, 281 S. W. 500, 46 A.L.R. 117.

[3] See supra, §§ 22 et seq.

[4] Annotation: 131 Am. St. Rep. 496.

However, an erroneous opinion of counsel, though of admitted standing and ability, that the title of the vendor is invalid will not justify a purchaser in receding from the contract when the title is in fact perfect and a conveyance is tendered. Montgomery v. Pacific Coast Land Bureau, 94 Cal. 284, 29 P. 640, 28 Am. St. Rep. 122.

[5] McClean v. Stansberry, 151 Iowa, 312, 131 N. W. 15, 35 L.R.A.(N.S.) 481.

by the seller or the auctioneer, is a good cause for rescission, especially where it is of such a nature or was made under such circumstances that it was out of the question for the vendee to verify it before making his bid.[6] Many cases are to be found also in which the purchaser at an auction sale has sought rescission on the ground of mistake; such cases are decided largely upon their own particular facts.[7] Ground for rescission exists in the case of a purchase made while laboring under a mistake as to the identity of the property bid upon,[8] or in the case of a serious mistake as to the quantity, character, or quality of the property purchased.[9] However, where land is sold by the acre, whether the quantity is more or less than the estimate, the vendee is not entitled to rescind simply because the excess is larger than he calculated.[10] A mistake as to restrictive covenants which is of slight consequence does not constitute sufficient ground for avoidance,[11] but failure, in making an announcement that property is restricted, to state that the original grantor and his assignees reserved the privilege of annulling any restriction in favor of a lot owner at pleasure, entitles the vendee to rescind.[12] A vendee is also entitled to repudiate his purchase where the property, though sold with the true owner's consent, was put up by the auctioneer as belonging to another.[13] Where, however, the matter complained of is an error in the advertisement which was corrected by announcement at the beginning of the sale, the vendee is not entitled to rescind.[14] Moreover, as a general rule a vendee cannot be relieved from a purchase made in reliance upon a mistaken view as to the law,[15] nor can a bidder rescind his contract on the ground that he has refused to pay the auction duty pursuant to the conditions of the sale, notwithstanding the statute provides that in case of such refusal the bidding shall be null and void to all intents and purposes, for under such circumstances he cannot avail himself of his own wrongdoing.[16] Where valid grounds for rescission exist, a provision for compensation in case of error or mistake has no application where the property turns out to be of a different nature.[17]

§ 49. **—Time within Which to Rescind; Return or Tender of Property.**—If the vendee desires to rescind, he should elect to do so within a reasonable time after discovery of the ground upon which his right to rescission is based.[18] Thus, if he desires to rescind because the price was enhanced by puffing, he must act with reasonable promptness on discovering the fraud, and if he is guilty of laches, relief will be denied.[19] He should also tender a return of the property if it is in his possession, since by retaining it he becomes responsible for the price.[20] In other words, he should put the seller in statu quo so far as is possible.[1] However, if he does not discover his right to rescind until it is impossible to return the property, his defense in an action on his note given for the property may be complete without an offer to return.[2]

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[6] Roberts v. French, 153 Mass. 60, 26 N. E. 416, 10 L.R.A. 656, 25 Am. St. Rep. 611; Welcome State Bank v. Martens, 153 Minn. 264, 190 N. W. 185, citing R. C. L.; Sohns v. Beavis, 200 N. Y. 268, 93 N. E. 935, 34 L.R.A.(N.S.) 927; McCall v. Davis, 56 Pa. 431, 94 Am. Dec. 92.

Annotation: 34 L.R.A.(N.S.) 928; 28 Am. St. Rep. 128; 131 Am. St. Rep. 496.

[7] Annotation: 34 L.R.A.(N.S.) 927.

[8] Annotation: 34 L.R.A.(N.S.) 927; 131 Am. St. Rep. 496.

[9] Annotation: 34 L.R.A.(N.S.) 928–932.

[10] Ashcom v. Smith, 2 Penr. & W. (Pa.) 211, 21 Am. Dec. 437.

[11] Annotation: 34 L.R.A.(N.S.) 930.

[12] Sohns v. Beavis, 200 N. Y. 268, 93 N. E. 935, 34 L.R.A.(N.S.) 937.

[13] Thomas v. Kerr, 3 Bush (Ky.) 619, 96 Am. Dec. 262.

[14] Kennell v. Boyer, 144 Iowa, 303, 122 N. W. 941, 24 L.R.A.(N.S.) 488, Ann. Cas. 1912A, 1127; Thompson v. Kelly, 101 Mass. 291, 3 Am. Rep. 353.

[15] Annotation: 34 L.R.A.(N.S.) 932.

[16] Annotation: 25 L.R.A. 569.

[17] Annotation: Ann. Cas. 1912A, 1132.

[18] McDowell v. Simms, 45 N. C. (Busbee, Eq.) 130, 57 Am. Dec. 595.

Annotation: 34 L.R.A.(N.S.) 930; 131 Am. St. Rep. 497.

[19] Veazie v. Williams, 8 How. (U. S.) 134, 12 L. ed. 1018; McDowell v. Simms, 45 N. C. (Busbee, Eq.) 130, 57 Am. Dec. 595; Backenstoss v. Stahler, 33 Pa. 251, 75 Am. Dec. 592.

Annotation: 46 A.L.R. 131; 131 Am. St. Rep. 488.

§ 50. **Damages.**—Where a vendee at an auction sale defaults in the performance of his contract to purchase, the vendor may treat the property as that of the purchaser, retain his lien thereon for the amount bid, and sue for the purchase price, or he may resell the property at the vendee's risk and hold him liable for the resulting loss.[3] If the seller adopts the former course, obviously his recovery is ordinarily measured by the amount of the bid together with interest thereon from the time payment became due. On the other hand, where he retains the property as his own or elects to sell it at the vendor's risk, the real damages are measured by the difference between the price contracted to have been paid and the value of the thing when it ought to have been accepted.[4] This difference is usualy determined by a resale of the goods,[5] but while the jury are at liberty to determine the amount of damages by taking the difference between the contract price and the price obtained upon a resale, they are not bound to do so if they can discover any other mode of estimation better calculated to arrive at the truth.[6] In the absence of a forfeiture agreement which may be construed as intending to treat the deposit made to bind the sale as liquidated damages, in the event of default on the part of the vendee, the vendor's damages will not be limited necessarily to the amount of the deposit.[7] Of course, the conditions of the original sale may expressly provide that the property may be resold upon the default of the buyer and that the latter shall be liable for any resulting deficiency, and in such case, the measure of damages would be determined by the resale price.[8] While the difference of price on a resale is a proper measure of damages where the vendor has acted bona fide and with reasonable care, his conduct may be so grossly improper as to cast a loss from it on himself, as where the resale is wantonly delayed while the property is notoriously falling in price, or the business is managed negligently; these and many other circumstances may properly be left to the jury. Mere unskilfulness, however, without mala fides, or even negligence, unless it is plain and palpable, will not be sufficient to charge him. The vendee ought not to cast the responsibility of the resale on the vendor and, by his own wrongful act, charge anyone else with the consequences.[9] The purchaser is likewise responsible for the costs of the resale, according to the better view,[10] although there is some authority to the contrary.[11] Furthermore, where, by reason of the vendee's default, the vendor is obliged to incur necessary expense in taking care of the articles or in removing them to a secure and proper place, the former is answerable for this expense.[12] Obviously, where the purchaser has made a deposit of earnest money, the forfeiture of the same should be taken into consideration in fixing the amount of damages.[13] Where the vendor is the defaulting party and the vendee is seeking to recover damages, the recovery is not limited to the amount of the purchase price actually paid, as the vendee's loss is measured by the real value of the goods and not by the amount bid.[14] If the purchaser proceeds directly against the auctioneer for the recovery of earnest money deposited with the latter, he is not entitled to interest thereon unless he demanded the return of the deposit prior to starting suit, in which case interest is recoverable only from the time the demand was made.[15]

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[20] Annotation: 131 Am. St. Rep. 497.

[1] Staines v. Shore, 16 Pa. 200, 55 Am. Dec. 492.
Annotation: 46 A.L.R. 132.

[2] Staines v. Shore, 16 Pa. 200, 5 Am. Dec. 492.
Annotation: 46 A.L.R. 132; 131 Am. St. Rep. 497.

[3] See supra, § 45.

[4] Annotation: 9 Am. Dec. 335.

[5] Ashcom v. Smith, 2 Penr. & W. (Pa.) 211, 21 Am. Dec. 437.
Annotation: 96 Am. Dec. 266.
See also Uniform Sales Act, § 60 (1).

[6] Girard v. Taggart, 5 Serg. & R. (Pa.) 19, 9 Am. Dec. 327; Coffman v. Hampton, 2 Watts & S. (Pa.) 377, 37 Am. Dec. 511.
And see Sales [Also 24 R. C. L. p. 114, § 382].

[7] Curtis v. Aspinwall, 114 Mass. 187, 19 Am. Rep. 332.
In certain cases a deposit with an agreement for forfeiture has been treated as liquidated damages. See Donahue v. Parkman, 161 Mass. 412, 37 N. E. 205, 42 Am. St. Rep. 415.

[8] Webster v. Hoban, 7 Cranch (U. S.) 399, 3 L. ed. 384; Robinson v. Garth, 6 Ala. 204, 41 Am. Dec. 47.
In such case a resale is a condition precedent to an action against the defaulting purchaser.
See supra, § 45.

[9] Ashcom v. Smith, 2 Penr. & W. (Pa.) 211, 21 Am. Dec. 437.

[10] Annotation: 96 Am. Dec. 266.

VII. RIGHTS AND LIABILITIES OF AUCTIONEER

§ 51. Generally.—An auctioneer, in selling property for another at auction, is the agent of the owner,[16] and his rights and liabilities with respect to the owner are governed by the general principles of the law of agency. He must exercise ordinary care and skill in the performance of the duties confided to him,[17] and good faith toward his employer with respect to the matters with which he has been intrusted.[18] If he assumes a position that is entirely inconsistent with that of his agency relationship, he may lose his right to compensation for his services,[19] and he may be held accountable to his principal for any secret profit received by him as a result of the sale, which he does not disclose to the principal.[20]

§ 52. Right to Compensation.—The compensation of an auctioneer is usually a matter of private agreement between him and his principal. In some jurisdictions, however, auctioneers' fees are a matter of statutory regulation where they have not been agreed upon in advance. In addition to such statutory commissions, auctioneers are usually entitled to an allowance for disbursements and incidental expenses made in connection with the sale,[1] including reasonable compensation for extraordinary services rendered prior or subsequent to the actual conduct of the sale. Commissions, however, do not accrue unless a sale is effected, nor may they be recovered on a bid not complied with. Thus, double fees cannot be recovered where the sale is adjourned, though they would possibly be allowed where a resale was ordered through no fault of the auctioneer. Commissions accrue upon each sale where lots are knocked down severally. It has been held, however, that where the contract provides for a specified fee for each "parcel" sold, only one fee is recoverable where several lots are sold in a single parcel.[2]

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[11] Annotation: 131 Am. St. Rep. 494.

[12] Coffman v. Hampton, 2 Watts & S. (Pa.) 377, 37 Am. Dec. 511.

[13] Curtis v. Aspinwall, 114 Mass. 187, 19 Am. Rep. 332.

[14] Annotation: 9 L.R.A. 558.

[15] Annotation: 35 L.R.A.(N.S.) 483.

[16] See supra, § 8.

[17] Annotation: 131 Am. St. Rep. 498.

[18] Hippisley v. Knee Bros. [1905] 1 K. B. (Eng.) 1, 5 B. R. C. 193—Div. Ct.

[19] See infra, § 52.

[20] See infra, § 56.

[1] Hippisley v. Knee Bros. [1905] 1 K. B. (Eng.) 1, 5 B. R. C. 193—Div. Ct.

Where, however, by the terms of the employment, such disbursements are limited to actual "out of pocket expenses," the employer may not be charged with the full amount of an advertising bill on which the auctioneer has received a trade discount not disclosed to the employer, even though such trade discounts to auctioneers on the part of newspaper proprietors may be customary. Ibid.

[2] Annotation: 131 Am. St. Rep. 501.

The faithful discharge of his duties is a condition precedent to any recovery upon the part of an auctioneer for the services he has rendered his principal; bad faith or fraudulent conduct on his part is a defense to an action for the recovery of his commissions. If, for example, an auctioneer accepts a secret profit or commission in a matter having a direct bearing on his main duty, so as to place him in a position wholly inconsistent with that of agent for his employer, he will lose his right to compensation.[3] But the mere acceptance of a secret trade discount on an advertising bill from a newspaper proprietor will not deprive the auctioneer of his right to his commission, in the absence of a fraudulent or dishonest intent,[4] although he may be required to account to his principal for the profit thus made.[5] In addition to the requirement of good faith toward his principal, the auctioneer is under a duty to exercise ordinary care and skill in the performance of his duties.[6] Thus, it has been held that an auctioneer who fails to make a sufficient memorandum to take a transaction without the operation of the statute of frauds may not recover his commissions from his employer unless, notwithstanding the insufficiency of the memorandum, the transaction between the owner and the bidder is consummated.[7]

§ 53. Right to a Lien; Recovery of Compensation from Purchaser.—An auctioneer employed to sell property of another has a lien for his charges and commissions on the property intrusted to him.[8] This lien upon the property depends upon possession and is lost by delivering it to the purchaser.[9] The auctioneer may, however, maintain an action against the purchaser for the purchase price of personal property which he has sold for another,[10] and he may retain his commissions from the amount recovered, as he has a lien upon all sums coming into his hands and may retain his fees and disbursements therefrom. In fact, it has been said that he may forbid payment to his principal so far as concerns duties and commissions.[11] Where, however, the subject of the auction is real estate, the auctioneer cannot bring suit in his own name to enforce the contract of sale,[12] nor can he recover damages against the purchaser for the loss of his commissions caused by the failure of the purchaser to comply with his contract with the owner of the land,[13] especially where the latter refused to comply with his bid because of a misunderstanding and was released from his contract by the owner.[14] Where, however, by the terms of sale the fees are payable by the purchaser directly to the auctioneer, the latter may sue in his own name to recover them.[15] Where, by the announced terms of the sale, a deposit is to be paid into the hands of the auctioneer at the time of the auction and before the completion of the sale by the delivery of the deed, the auctioneer may sue for it in his own name, whenever an action for the deposit, separate from the other purchase money, may become necessary, and his lien for commissions will attach to it.[16]

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[3] Hippisley v. Knee Bros. [1905] 1 K. B. (Eng.) 1, 5 B. R. C. 193—Div. Ct.

Annotation: 5 B. R. C. 188.

Where an auctioneer's remuneration is to be paid for the performance of several inseparable duties, if he is unfaithful in the performance of any of these duties by reason of his receiving a secret profit in connection with it, it may be that he will forfeit his compensation, but where the several duties to be performed are separable, the receipt of a secret profit in connection with one of these duties would not, in the absence of fraud, involve the loss of the compensation which has been fairly earned in the proper discharge of the other duties. Hippisley v. Knee Bros. [1905] 1 K. B. (Eng.) 1, 5 B. R. C. 193—Div. Ct.

[4] Hippisley v. Knee Bros. [1905] 1 K. B. (Eng.) 1, 5 B. R. C. 193—Div. Ct.

[5] See infra, § 56, note 17.

[6] Annotation: 131 Am. St. Rep. 498.

[7] Butler Cotton Oil Co. v. Millican, 216 Ala. 472, 113 So. 529, citing R. C. L.

[8] Thompson v. Kelly, 101 Mass. 291, 3 Am. Rep. 353; Williams v. Millington, 1 H. Bl. 81, 126 Eng. Reprint, 49, 3 Eng. Rul. Cas. 583.

Annotation: 131 Am. St. Rep. 501.

An auctioneer has a possession coupled with an interest in the goods which he is employed to sell. Williams v. Millington, 1 H. Bl. 81, 126 Eng. Reprint, 49, 3 Eng. Rul. Cas. 583.

But where he undertakes to sell in behalf of one having no title to the property, he is not entitled to a lien upon either the property or the proceeds thereof. Hone v. Henriquez, 13 Wend. (N. Y.) 240, 27 Am. Dec. 204. Annotation: 131 Am. St. Rep. 502.

[9] Annotation: 131 Am. St. Rep. 502.

[10] See supra, § 44.

[11] Girard v. Taggart, 5 Serg. & R. (Pa.) 19, 9 Am. Dec. 327.

[12] See supra, § 44.

[13] Gibson Land Auction Co. v. Brittain, 182 N. C. 676, 110 S. E. 82, 20 A.L.R. 211.

Annotation: 20 A.L.R. 214, s. 97 A.L.R. 858.

§ 54. Liability of Auctioneer Generally.—Except where an auctioneer infringes upon the rights of others, as where he sells at auction property to which his principal has no title,[17] his liability generally depends solely upon the contractual relations he may voluntarily assume.[18] Nevertheless, under certain circumstances, an auctioneer may be under a public duty as well. To illustrate, an auctioneer who is also a public warehouseman may not refuse to receive the product of any producer, or exclude from the warehouse any person desiring to become a bidder, especially where the producer and buyer almost of necessity are compelled to deal with him, such conduct being a violation of public duty as imposed by the rule of the common law. The rule is particularly applicable where several warehousemen within a city having a virtual monopoly over a product combine in an attempt to ban certain individuals from bidding at the sales.[19] But it is only by virtue of being engaged in an enterprise of a public service character that an auctioneer incurs liability for refusing to sell the goods of one or for declining to accept the offer of the highest bidder. Although there are numerous dicta to the effect that the highest bidder at an auction has a right of action against the auctioneer where the latter refuses to knock down to him the property bid for, such a doctrine has never been put into practice, as it is generally recognized that with the single exception noted above, an auctioneer does not incur any personal liability for refusing to accept the offer of the highest bidder.[20] It has been held that an auctioneer having a consignment of goods for sale may not be garnished in an execution suit against the owner of the goods.[21] Similarly, an auctioneer selling goods under orders of a sheriff and receiving the proceeds may not be held a trustee for persons who have claims against the sheriff for the proceeds, as he is accountable to the sheriff only.[1] Although an auction is not a nuisance per se if properly held in observance of the law, it may be conducted in such a manner as to constitute it either a public or a private nuisance, or both; and where such is the case, the auctioneer conducting it is liable accordingly.[2]

§ 55. Liability for Custody and Disbursement of Deposit Money.—The authorities are practically uniform in holding that upon an auction sale of real estate, the auctioneer receives a deposit of earnest money in the capacity of a stakeholder[3] and, in the interim before the sale is completed, should not pay the deposit money to either party without the consent of the other.[4] Thus, an auctioneer is liable to the vendor for wrongfully returning a deposit to the vendee, even though he did so under a mistaken belief that the vendor's title was defective.[5] On the other hand, in the event that the title proves bad,[6] or the vendor fails to complete the conveyance,[7] or there has been a misdescription in a material matter of real property sold under circumstances in which the purchaser was entitled to rely upon the description, especially in the case where the untrue description has been made fraudulently,[8] the auctioneer becomes responsible to the buyer for the return of the deposit. Of course, where the understanding of the parties contemplates the immediate payment by the auctioneer to his principal, before the close of the transaction, of money paid by the purchaser as a down payment, the auctioneer may not be considered a stakeholder as respects such payment.[9] In any event, it would seem that the auctioneer is liable to the purchaser for the return of the deposit money, although he has paid it over to his principal, where this was done after notice that the principal's title was defective[10] or where the auctioneer has bound himself personally by signing the memorandum of sale in his own name.[11]

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[14] Gibson Land Auction Co. v. Brittain, 182 N. C. 676, 110 S. E. 82, 20 A.L.R. 211.

[15] Johnson v. Buck, 35 N. J. L. 338, 10 Am. Rep. 243.
Annotation: 97 A.L.R. 860.

[16] Thompson v. Kelly, 101 Mass. 291, 3 Am. Rep. 353.
Annotation: 131 Am. St. Rep. 498.

[17] See infra, § 60.

[18] See infra, §§ 55–59.

[19] Nash v. Page, 80 Ky. 539, 44 Am. Rep. 490.
See WAREHOUSES [Also 27 R. C. L. p. 951, § 4].

[20] McPherson Bros. Co. v. Okanogan County, 45 Wash. 285, 88 P. 199, 9 L.R.A. (N.S.) 748.
Annotation: 16 Ann. Cas. 386.
See supra, § 20.

[21] Annotation: 131 Am. St. Rep. 500.

[1] Annotation: 131 Am. St. Rep. 500.

[2] Gilly v. Hirsch, 122 La. 966, 48 So. 422, 20 L.R.A.(N.S.) 972.
Annotation: 20 L.R.A.(N.S.) 972.

Where both the vendor and the vendee are adverse claimants to the deposit money, the auctioneer may file a bill of interpleader, except where he himself claims an interest therein.[12]

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[3] Cohn v. Valentine, 88 Cal. App. 430, 263 P. 846, citing R. C. L.; Montgomery v. Pacific Coast Land Bureau, 94 Cal. 284, 29 P. 640, 28 Am. St. Rep. 122; Gossage v. Waddle, 230 Ky. 148, 18 S. W. (2d) 975, citing R. C. L.; Noble v. Clarke, 214 Ky. 569, 283 S. W. 975, citing R. C. L.

Annotation: 23 A.L.R. 125; 35 L.R.A. (N.S.) 481; 131 Am. St. Rep. 499.

Where, however, a written agreement is entered into between the vendor and vendee immediately after the sale and the first payment required thereby is made by check payable to the vendor, which check is thereupon indorsed over by the vendor to the auctioneer in payment for his services, the auctioneer does not become a stakeholder as to the amount of such check. Noble v. Clarke, 214 Ky. 569, 283 S. W. 975, citing R. C. L.

[4] Montgomery v. Pacific Coast Land Bureau, 94 Cal. 284, 29 P. 640, 28 Am. St. Rep. 122.

Annotation: 35 L.R.A.(N.S.) 481; 131 Am. St. Rep. 499.

The auctioneer, pending the examination of the title, became a stakeholder for the parties. But when the title was shown to be perfect, the deposit then became, according to the terms of sale, a portion of the cash payment and the property of the vendor, less the charges and commissions of the auctioneer. Montgomery v. Pacific Coast Land Bureau, 94 Cal. 284, 29 P. 640, 28 Am. St. Rep. 122.

[5] Montgomery v. Pacific Coast Land Bureau, 94 Cal. 284, 29 P. 640, 28 Am. St. Rep. 122.

Annotation: Ann. Cas. 1912A, 1133.

[6] Noble v. Clarke, 214 Ky. 569, 283 S. W. 975, citing R. C. L.

Annotation: 23 A.L.R. 125; 35 L.R.A. (N.S.) 481; 131 Am. St. Rep. 499.

[7] Annotation: 23 A.L.R. 126; 35 L.R.A. (N.S.) 482.

The rule is not inflexible, however, and the purchaser may, by his conduct and delay, lose the right to hold the auctioneer for a deposit which he has paid over to the seller. Annotation: 23 A.L.R. 125; 131 Am. St. Rep. 499.

Where the terms of the agreement expressly provide that the deposit is to be paid to the vendor if good title shall be made, otherwise to be returned to the purchaser, notice of the rescission of the contract by the latter is not a necessary prerequisite to maintaining an action against the auctioneer to recover the deposit for a failure to make out good title. Annotation: 23 A.L.R. 125; 35 L.R.A.(N.S.) 481, 482.

To entitle the vendee to interest upon his deposit as against the auctioneer, however, a demand for the return thereof must be made before the institution of suit; and even where a demand is made, interest is recoverable only from the date thereof. Annotation: 23 A.L.R. 126; 35 L.R.A.(N.S.) 483.

Where the money was paid to the auctioneer's clerk, who still retains possession thereof, an action to compel the return of the money may be maintained against the clerk. McClean v. Stansberry, 151 Iowa, 312, 131 N. W. 15, 35 L.R.A.(N.S.) 481.

[8] Annotation: 23 A.L.R. 126.

[9] Gossage v. Waddle, 230 Ky. 148, 18 S. W. (2d) 975, citing R. C. L.

[10] Green v. Crye, 158 Tenn. 109, 11 S. W. (2d) 869, citing R. C. L.

Annotation: 23 A.L.R. 125; 35 L.R.A. (N.S.) 482.

[11] Annotation: 23 A.L.R. 124; 35 L.R.A. (N.S.) 483.

See infra, § 59.

[12] Cohn v. Valentine, 88 Cal. App. 430, 263 P. 846, citing R. C. L.

§ 56. Liability to Seller.—As the relation between an auctioneer and one for whom he undertakes to conduct an auction is purely contractual,[13] the nature and extent of his liability to the vendor depend in each instance upon the terms of the particular contract existing between them. For a failure to live up to the terms thereof and carry out the instructions of his employer he is answerable in damages the same as any other agent.[14] An auctioneer is personally responsible to the vendor for delivering goods upon credit, except where he is expressly authorized to do so.[15] He is also personally responsible for any loss that is a consequence of his failure to use ordinary care and skill in the performance of the duties confided to him. Thus, if he fails to make a memorandum at the time of the sale, as required by the statute of frauds, and the property subsequently sells for less, he is answerable to his principal for the difference between the amount first bid and the net price upon its resale.[16] An auctioneer, like any other agent, must exercise good faith toward his principal with respect to the matters with which he has been intrusted, and he may be held accountable for any secret profit received by him as a result of the sale not disclosed to the principal.[17] He is liable to the vendor for the amount of a deposit of earnest money received in the capacity of a stakeholder where he wrongfully returns it to the purchaser.[18] Obviously, it is the duty of the auctioneer to turn over the proceeds of a sale to his employer;[19] and, if sued for them, he is estopped from disputing his employer's title by setting up title either in himself or in a third person.[20]

§ 57. Liability to Buyer.—An auctioneer, by express agreement, may make himself personally responsible to a purchaser at an auction for performance on the part of his employer.[1] He may also be held liable to the buyer for fraudulent misrepresentations[2] or upon his own personal warranty as to the quality of the goods.[3] In the absence of such an agreement, however, he incurs no personal liability except as to the care and custody of such earnest money as the vendee may have deposited with him,[4] provided he discloses the name

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Annotation: 23 A.L.R. 126, 127; 35 L.R.A. (N.S.) 484; 131 Am. St. Rep. 495.

An auctioneer, insisting upon retaining his commission as auctioneer and the auction duty, may not file a bill of interpleader where an action is brought against him to recover the deposit and the whole thereof. Annotation: 23 A.L.R. 126.

[13] See supra, § 8.

[14] Wright v. May, 127 Minn. 150, 149 N. W. 9, L.R.A.1915B, 151.

Annotation: 131 Am. St. Rep. 498.

Where the vendor instructs the auctioneer not to sell his property below a fixed amount and the auctioneer neglects to follow his instructions and sells for less, then he is liable to his principal for the difference between the price stated and the one received. But if he does as ordered and the goods will not sell at the price instructed, he may not be held liable for the loss occasioned when the goods perish or deteriorate. Annotation: 131 Am. St. Rep. 499.

[15] Annotation: 3 Eng. Rul. Cas. 584.

If the auctioneer is authorized to sell upon credit and the vendee fails to pay, the former does not become personally responsible for the purchase price simply because the note given by the vendee was made payable to the auctioneer himself, provided he did not appropriate it to his own purposes.

Annotation: 131 Am. St. Rep. 499.

[16] Annotation: 131 Am. St. Rep. 498.

As to liability for permitting property to be sold at a ruinous sacrifice, see supra, § 20.

[17] Hippisley v. Knee Bros. [1905] 1 K. B. (Eng.) 1, 5 B. R. C. 193—Div. Ct. (secret trade discount on an advertising bill).

Annotation: 5 B. R. C. 188, 190.

[18] See supra, § 55.

[19] Wright v. May, 127 Minn. 150, 149 N. W. 9, L.R.A.1915B, 151.

[20] Annotation: 131 Am. St. Rep. 499; 3 Eng. Rul. Cas. 586.

[1] Annotation: 23 A.L.R. 123; 131 Am. St. Rep. 499; 14 B. R. C. 310.

[2] Green v. Crye, 158 Tenn. 109, 11 S. W. (2d) 869, citing R. C. L.

Annotation: 23 A.L.R. 124.

[3] Annotation: 131 Am. St. Rep. 483; Ann. Cas. 1915C, 581.

[4] For a discussion of an auctioneer's liability with respect to the care and custody of earnest money, see supra, § 55.

of his principal and contracts in his behalf.[5] Accordingly, an auctioneer selling for a known principal is not responsible to the buyer for the title, in the absence of his own affirmative agreement,[6] for an auctioneer does not impliedly warrant the title of his vendor.[7] In order that he may adequately disclose his principal, it is not essential for an auctioneer to mention him by name; pointing him out to the prospective purchasers is sufficient.[8] The situation is the same where the buyer knows who the principal is.[9] It has been held that where an article purchased does not comply with the seller's warranty and the article is returned to, and accepted by, the seller, an action will lie against the clerk of the auction to recover the price paid to him, which is still in his hands, regardless of whether or not the seller has authorized the clerk to return such money.[10]

§ 58. —Effect of Failure to Disclose Principal.—It is a general rule that an auctioneer who sells property without disclosing the name of his principal will be considered as the vendor himself and, as such, is responsible to the buyer.[11] In such cases he is responsible to the buyer for the title[12] or for a breach of warranty.[13] It is immaterial that he is known to the other party to be an auctioneer or broker usually employed in selling property as the agent for others;[14] the mere fact that one sells goods at auction is no notice to the buyer that he is not selling his own goods.[15] It has been held in an English case, however, that as respects the sale of a specific chattel, as distinguished from a sale of unascertained goods, an auctioneer who discloses the fact that he is an agent but does not name his principal is not personally liable if it later appears that the principal had no right to sell.[16] It has been held that where an auctioneer, without disclosing his principal, signed a contract in which property was sold for a sum less than the minimum price authorized by the owner, in consequence of which the owner repudiated the sale, the auctioneer who knowingly exceeded his authority is personally liable to the purchaser for the amount the premises were worth over and above the price he was to pay therefor.[17]

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[5] Meyer v. Redmond, 205 N. Y. 478, 98 N. E. 906, 41 L.R.A.(N.S.) 675.
Annotation: 23 A.L.R. 123; 131 Am. St. Rep. 500.

[6] Corn Land Farms Co. v. Barcus, 105 Neb. 869, 182 N. W. 487, 23 A.L.R. 119.
Annotation: 23 A.L.R. 123; 35 L.R.A. (N.S.) 483.

Where one acts as a clerk of an auction sale, the fact of his employment and the exercise of the duties incidental thereto do not constitute him a warrantor of the title or ownership of the property sold at the sale. Corn Land Farms Co. v. Barcus, 105 Neb. 869, 182 N. W. 487, 23 A.L.R. 119.

[7] Annotation: 3 Eng. Rul. Cas. 584.

[8] Annotation: 23 A.L.R. 123; 35 L.R.A. (N.S.) 483; 14 B. R. C. 309.

Whether there has been a sufficient disclosure of the principal to relieve the auctioneer from liability has been held to be a question for the jury. Annotation: 14 B. R. C. 309.

[9] Corn Land Farms Co. v. Barcus, 105 Neb. 869, 182 N. W. 487, 23 A.L.R. 119 (action against clerk of auction sale).

[10] McClean v. Stansberry, 151 Iowa, 312, 131 N. W. 15, 35 L.R.A.(N.S.) 481.

[11] Thomas v. Kerr, 3 Bush (Ky.) 619, 96 Am. Dec. 262; Seemuller v. Fuchs, 64 Md. 217, 1 A. 120, 54 Am. Rep. 766; Meyer v. Redmond, 205 N. Y. 478, 98 N. E. 906, 41 L.R.A.(N.S.) 675; Bush v. Cole, 28 N. Y. 261, 84 Am. Dec. 343.
Annotation: 23 A.L.R. 122; 131 Am. St. Rep. 499; 14 B. R. C. 307; 3 Eng. Rul. Cas. 586.

The purchaser cannot, without his consent, be compelled to contract with an insolvent principal or a person who, he has reason to believe, cannot and will not carry out the terms of the contract. Instead thereof, when he bids under a notice in which the principal has not been disclosed, he may properly deem the bid to have been made upon the responsibility of the auctioneer and look to him for the fulfilment of the contract. Meyer v. Redmond, 205 N. Y. 478, 98 N. E. 906, 41 L.R.A.(N.S.) 675.
Annotation: 35 L.R.A.(N.S.) 483.

[12] Seemuller v. Fuchs, 64 Md. 217, 1 A. 120, 54 Am. Rep. 766.

Annotation: 23 A.L.R. 122.

[13] Annotation: 23 A.L.R. 123.

[14] Meyer v. Redmond, 205 N. Y. 478, 98 N. E. 906, 41 L.R.A.(N.S.) 675.
Annotation: 14 B. R. C. 308, 309; 3 Eng. Rul. Cas. 586; 96 Am. Dec. 271.

[15] Annotation: 23 A.L.R. 122; 14 B. R. C. 310.

[16] Benton v. Campbell [1925] 2 K. B. (Eng.) 410, 14 B. R. C. 295.
Annotation: 14 B. R. C. 309.

§ 59. —Effect of Manner in Which Contract Is Signed.—An auctioneer who signs a written contract in his own name merely, which contract does not upon its face show that he was acting as the agent of another, will be personally bound thereby,[18] even though he at the same time discloses the name of his principal,[19] and regardless of whether or not the principal is in fact known.[20] Similarly, when auctioneers on a sale give a bill of sale signed jointly by the owner and themselves, they are liable to the buyer as principals if the title proves bad.[1]

§ 60. Liability to True Owner.—The authorities are practically unanimous in holding that an auctioneer who sells property in behalf of a principal having no title thereto is personally liable to the true owner for conversion,[2] regardless of whether he had notice of the true owner's title,[3] or whether he acted with the utmost good faith in total ignorance thereof,[4] provided, however, that the true owner has not by his own act or assent given a color of title or an apparent right of sale to the party for whom the auctioneer acts.[5] The fact that the auctioneer has sold the goods and turned over the proceeds to his principal in innocence and good faith affords him no protection.[6] The rule of liability on the part of the auctioneer applies where he innocently sells stolen property;[7] where he sells property in behalf of the vendee under a conditional sale where title has not yet vested in the latter;[8] where he sells property in behalf of a mortgagee under a void mortgage;[9] and, in some cases, where he sells mortgaged goods at the instance of the mortgagor.[10] There is, however, some conflict in regard to the sale of chattels subject to a mortgage. Some courts take the view that an auctioneer does not, by selling mortgaged chattels on behalf of a mortgagor without notice of the mortgage, become liable in conversion to the mortgagee.[11]

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[17] Bush v. Cole, 28 N. Y. 261, 84 Am. Dec. 343.

Annotation: 96 Am. Dec. 265.

[18] Meyer v. Redmond, 205 N. Y. 478, 98 N. E. 906, 41 L.R.A.(N.S.) 675.

The purchaser receiving from the auctioneer a written contract of sale signed in the name of the auctioneer is not bound by the terms of a memorandum in the auctioneer's book describing the true owner of the property made for the purpose of satisfying the statute of frauds. Ibid.

[19] Annotation: 23 A.L.R. 124; 14 B. R. C. 308.

[20] Annotation: 23 A.L.R. 124; 35 L.R.A. (N.S.) 483; 14 B. R. C. 310.

[1] Annotation: 23 A.L.R. 124.

[2] Morrow Shoe Mfg. Co. v. New England Shoe Co. (C. C. A. 7th) 57 F. 685, 24 L.R.A. 417, modified on rehearing in (C. C. A. 7th) 60 F. 341, 24 L.R.A. 425; Swim v. Wilson, 90 Cal. 126, 27 P. 33, 13 L.R.A. 605, 25 Am. St. Rep. 110; Higgins v. Lodge, 68 Md. 229, 11 A. 846, 6 Am. St. Rep. 437; Robinson v. Bird, 158 Mass. 357, 33 N. E. 391, 35 Am. St. Rep. 495; Milliken v. Hathaway, 148 Mass. 69, 19 N. E. 16, 1 L.R.A. 510; Hills v. Snell, 104 Mass. 173, 6 Am. Rep. 216; Kearney v. Clutton, 101 Mich. 106, 59 N. W. 419, 45 Am. St. Rep. 394; Mohr v. Langan, 162 Mo. 474, 63 S. W. 409, 84 Am. St. Rep. 503; Consolidated Co. v. Curtis, [1892] 1 Q. B. 495, 25 Eng. Rul. Cas. 162.

Annotation: 20 A.L.R. 135; 50 L.R.A. 654; 131 Am. St. Rep. 500; 3 Eng. Rul. Cas. 585.

The contrary decision of Rogers v. Huie, 2 Cal. 571, 56 Am. Dec. 363, was subsequently discredited in Swim v. Wilson, 90 Cal. 126, 27 P. 33, 13 L.R.A. 605, 25 Am. St. Rep. 110.

There is no more hardship in requiring the auctioneer to account for the value of the goods than there would be in compelling the right owner to lose them or the purchaser from the auctioneer to pay for them. Swim v. Wilson, 90 Cal. 126, 27 P. 33, 13 L.R.A. 605, 25 Am. St. Rep. 110.

The rule requiring the auctioneer to look well to the title of the goods which he sells and holding him responsible to the true owner in the case of feloniously obtained property has been approved as a salutary regulation on general considerations of legal policy. Annotation: 20 A.L.R. 138.

[3] Morrow Shoe Mfg. Co. v. New England Shoe Co. (C. C. A. 7th) 57 F. 685, 24 L.R.A. 417, modified on rehearing in (C. C. A. 7th) 60 F. 341, 24 L.R.A. 425; Higgins v. Lodge, 68 Md. 229, 11 A. 846, 6 Am. St. Rep. 437; Mohr v. Langan, 162 Mo. 474, 63 S. W. 409, 85 Am. St. Rep. 503.

Annotation: 20 A.L.R. 136; 131 Am. St. Rep. 500; 3 Eng. Rul. Cas. 584.

[4] Hills v. Snell, 104 Mass. 173, 6 Am. Rep. 216 (dictum); Robinson v. Bird, 158 Mass. 357, 33 N. E. 391, 35 Am. St. Rep. 495; Kearney v. Clutton, 101 Mich. 106, 59 N. W. 419, 45 Am. St. Rep. 394.

Consolidated Co. v. Curtis, [1892] 1 Q. B. 495, 25 Eng. Rul. Cas. 162.

Annotation: 20 A.L.R. 136; 85 Am. St. Rep. 521; 131 Am. St. Rep. 500; 2 Eng. Rul. Cas. 432.

[5] Annotation: 20 A.L.R. 137.

[6] Kearney v. Clutton, 101 Mich. 106, 59 N. W. 419, 45 Am. St. Rep. 394.

Annotation: 20 A.L.R. 136; 131 Am. St. Rep. 500.

[7] Rogers v. Huie, 1 Cal. 429, 54 Am. Dec. 300; Swim v. Wilson, 90 Cal. 126, 27 P. 33, 13 L.R.A. 605, 25 Am. St. Rep. 110; Koch v. Branch, 44 Mo. 542, 100 Am. Dec. 324 (dictum).

Annotation: 20 A.L.R. 137; 131 Am. St. Rep. 500.

Where an auctioneer sells goods in behalf of one who acquired title by fraud, and hence whose title is voidable at the option of the person defrauded, the auctioneer is liable if he had knowledge of the fraud or of circumstances sufficient to put him upon inquiry.[12] If the goods are still in the possession of the auctioneer, they may be replevied by their rightful owner, for under such circumstances the auctioneer is not entitled to a lien thereon either for his commissions or for any money he may have advanced upon the property as security.[13] If the goods are no longer in his possession, he is liable to the true owner for their actual value irrespective of the price for which they may have been sold.[14]

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[8] Robinson v. Bird, 158 Mass. 357, 33 N. E. 391, 35 Am. St. Rep. 495.

[9] Milliken v. Hathaway, 148 Mass. 69, 19 N. E. 16, 1 L.R.A. 510.
Annotation: 20 A.L.R. 138.

[10] Annotation: 20 A.L.R. 138.

[11] Frizzell v. Rundle, 88 Tenn. 396, 12 S. W. 918, 17 Am. St. Rep. 908.
Annotation: 20 A.L.R. 138; 35 Am. St. Rep. 497; 131 Am. St. Rep. 500.

[12] Morrow Shoe Mfg. Co. v. New England Shoe Co. (C. C. A. 7th) 57 F. 685, 24 L.R.A. 417; modified on rehearing in (C. C. A. 7th) 60 F. 341, 24 L.R.A. 425; Higgins v. Lodge, 68 Md. 229, 11 A. 846, 6 Am. St. Rep. 437.

[13] Higgins v. Lodge, 68 Md. 229, 11 A. 846, 6 Am. St. Rep. 437.

[14] Annotation: 3 Eng. Rul. Cas. 584.

AUDITA QUERELA

§ 1. *Definition and General Nature.*
§ 2. *When Available.*
§ 3. *When Not Available.*
§ 4. *Parties to Proceeding.*
§ 5. *As Factor in Modern Practice.*

§ 1. Definition and General Nature.—Although sometimes classified as an equitable action,[1] audita querela is basically a legal remedy,[2] deriving its name from a writ granted by the courts of common law in favor of one against whom execution had issued or was about to issue upon a judgment which it would be contrary to justice to allow to be enforced, either because of matters arising subsequent to the rendition thereof, or because of prior existing defenses which were not available to the judgment debtor in the original suit by reason of the judgment creditor's fraudulent conduct or through circumstances over which the judgment debtor had no control.[3] The purpose of the proceeding is to set aside the judgment and vacate the execution, if issued,[4] and the levy if a levy has been made.[5] The proceeding is a direct attack on the judgment; and therefore, the party seeking relief may contradict the record.[6] The writ ordinarily issues from, and is returnable to, the court wherein the judgment complained of was rendered, although the ambiguous statement has sometimes been made that it issues to the court where the record remains.[7] Unlike certiorari, it is not a writ that issues from a superior to an inferior court. Though founded on the record of the original suit,[8] it does not constitute a writ of error, but merely brings up for adjudication the alleged fraudulent conduct of the judgment creditor or other circumstances mentioned above which would require that the judgment be set aside. Moreover, the complaint in such a proceeding sounds in tort, and the proper plea thereto is "not guilty."[9] The proceeding has the usual incidents of the ordinary action, with its issues of law and of fact, the trial thereof, and judgment.[10] If the complainant in this process is successful, he recovers of the opposite party damages for the wrongful act complained of and obtains cancelation of the fraudulent judgment and the termination of all further proceedings thereunder.[11] If the basis of the complainant's recovery is that the judgment was never discharged of record, although he had previously paid it, the court will order the satisfaction thereof to be entered on the record.[12] As to the issues involved and as to all others that might have been litigated therein, the judgment rendered in an action of audita querela operates as res judicata.[13]

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[1] Staniford v. Barry, 1 Aik. (Vt.) 321, 15 Am. Dec. 692.

Annotation: 23 Am. St. Rep. 107.

[2] Parker v. Jones, 58 N. C. (5 Jones, Eq.) 276, 75 Am. Dec. 441.

[3] Humphreys v. Leggett, 9 How. (U. S.) 297, 13 L. ed. 145; Harding v. Hawkins, 141 Ill. 572, 31 N. E. 307, 33 Am. St. Rep. 347 (dictum); Electric Plaster Co. v. Blue Rapids City Twp. 81 Kan. 730, 106 P. 1079, 25 L.R.A.(N.S.) 1237; Elliot v. Porter, 5 Dana (Ky.) 299, 30 Am. Dec. 689; State ex rel. Gary Realty Co. v. Hall, 322 Mo. 1118, 17 S. W. (2d) 935, citing R. C. L.; Nichols v. Dissler, 31 N. J. L. 461, 86 Am. Dec. 219; Clark v. Rowling, 3 N. Y. 216, 53 Am. Dec. 290 (dictum); Longworth v. Screven, 20 S. C. L. (2 Hill) 298, 27 Am. Dec. 381; Staniford v. Barry, 1 Aik. (Vt.) 321, 15 Am. Dec. 692.

Annotation: 20 L. ed. 405; 23 Am. St. Rep. 107.

The common-law writ of audita querela lies in favor of a judgment defendant to obtain relief against the consequences of the judgment on account of some matter of defense or discharge arising since its rendition which could not be taken advantage of otherwise. It is not available to one in whose favor the judgment has been rendered for the purpose of aiding in its enforcement by setting aside a release. Kelley v. Kelley (Mo. App.) 290 S. W. 624, citing R. C. L.

The proceeding by writ of audita querela was regarded as a direct attack on the judgment in all cases to which it could be properly applied. Annotation: 23 Am. St. Rep. 107.

[4] Annotation: 20 L. ed. 405.

[5] Gleason v. Peck, 12 Vt. 56, 36 Am. Dec. 329.

[6] Annotation: 23 Am. St. Rep. 107.

[7] See Gleason v. Peck, 12 Vt. 56, 36 Am. Dec. 329.

Annotation: 15 Am. Dec. 695.

[8] Annotation: 15 Am. Dec. 695.

[9] Little v. Cook, 1 Aik. (Vt.) 363, 15 Am. Dec. 698.

§ 2. **When Available.**—Recourse may be had to proceedings by way of audita querela whenever matters of avoidance arise subsequent to the rendition of the judgment the enforcement of which the complainant apprehends.[14] Thus, where execution is subsequently issued upon a judgment in spite of the fact that the judgment debtor had previously paid the same, the court issuing the execution will vacate the same upon proceedings audita querela and order the judgment to be discharged of record.[15] So also, where execution is issued upon a judgment barred by discharge in bankruptcy, the judgment debtor may obtain relief by audita querela.[16] Where a judgment has been recovered in an action of debt on a foreign judgment which is subsequently reversed on appeal, audita querela will lie to set aside the second judgment and vacate any execution that may have been issued thereon.[17] Moreover, the writ is a proper remedy even where the grounds upon which the complainant seeks relief existed prior to the rendition of the judgment, provided he did not have an opportunity to present such grounds in the original suit.[18] The writ is available as a remedy to set aside a default judgment voidable for want of service of process, either actual or constructive, and to vacate the execution issued thereon.[19] Again, where a party in whose favor a verdict has been given releases his cause of action to the party charged thereby and thereafter takes judgment upon his verdict and issues execution thereon, the same may be set aside by a writ of audita querela.[20] This is equally true where, upon the institution of a suit, the defendant pays the amount demanded upon the plaintiff's promise to discontinue the action, which promise the latter fraudulently fails to keep.[1] The judgment

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[10] Annotation: 15 Am. Dec. 695.

Audita querela is a regular suit in which the parties may plead and take issue on the merits; it cannot, therefore, be sued out against the United States. Avery v. United States, 12 Wall. (U. S.) 304, 20 L. ed. 405.

[11] Little v. Cook, 1 Aik. (Vt.) 363, 15 Am. Dec. 698.

[12] Parker v. Jones, 58 N. C. (5 Jones, Eq.) 276, 75 Am. Dec. 441.

[13] See Sartwell v. Sowles, 72 Vt. 270, 48 A. 11, 82 Am. St. Rep. 943.

[14] **It lies for bail when the original judgment against the principal has been reversed, or the principal has paid the debt after judgment against the bail, or where there is judgment against a jailer for an escape and then the first judgment is reversed.** Staniford v. Barry, 1 Aik. (Vt.) 321, 15 Am. Dec. 692.

[15] Parker v. Jones, 58 N. C. (5 Jones, Eq.) 276, 75 Am. Dec. 441; Longworth v. Screven, 20 S. C. L. (2 Hill) 298, 27 Am. Dec. 381.

[16] Longworth v. Screven, 20 S. C. L. (2 Hill) 298, 27 Am. Dec. 381.

Annotation: 20 L. ed. 405.

[17] Merchants' Ins. Co. v. De Wolf, 33 Pa. 45, 75 Am. Dec. 577.

[18] Annotation: 15 Am. Dec. 695.

[19] Harris v. Hardeilman, 14 How. (U. S.) 334, 14 L. ed. 444.

The right to have a judgment which is voidable for want of notice set aside by audita querela is not affected by a false statement on its face that the parties appeared by their attorneys, dispensed with a jury, and submitted the facts to the court. Landers v. Brant, 10 How. (U. S.) 348, 13 L. ed. 449.

[20] See Staniford v. Barry, 1 Aik. (Vt.) 321, 15 Am. Dec. 692.

[1] Longworth v. Screven, 20 S. C. L. (2 Hill) 298, 27 Am. Dec. 381.

The writ lies where the defendant paid

in such cases is fraudulently obtained, and the judgment debtor is considered as having had no opportunity to plead the payment and discharge.[2] The writ has also been used to set aside a judgment recovered against an infant who defended in person without a guardian ad litem being appointed to look after his interests.[3] Audita querela is likewise a proper remedy where the sole ground of relief is that the execution issued calls for an amount greater than that for which judgment was recovered.[4]

§ 3. **When Not Available.**—It is a general and well-settled principle that when a party has had a legal opportunity to make his defense, or when the injury of which he complains is to be attributed to his own neglect, he cannot be relieved by an audita querela.[5] He is deemed to have had this opportunity in all cases where it appears from the return of the officer that he had legal notice of the suit, unless the matter arose after the commencement of the suit and he was deprived of his opportunity by means which bring the case within the principles mentioned in the preceding section.[6] Thus, if a party suffers a judgment by default to be taken against him upon a claim barred by his discharge in bankruptcy, he is not entitled to relief by means of audita querela.[7] As the function of a writ audita querela is distinct from that of an appeal or a writ of error, the complainant's application will be denied if based upon errors of law or fact.[8] Even though the right to a writ of error has been withdrawn by statute, recourse may not be had to audita querela as a substitute.[9] It cannot be made a means of prescribing the mode in which an execution upon a valid judgment shall be enforced, and it has been said that once a judgment has been satisfied audita querela is no longer available as a means of relief.[10] If the judgment complained of is absolutely void, it has been held that a writ of audita querela will not be granted, as there is no necessity therefor.[11] Nor may relief against a judgment rendered upon an unauthorized appearance by an attorney be obtained by means of this writ.[12] As it is a legal remedy, it is not available where a judgment is sought to be avoided solely upon equitable grounds.[13]

§ 4. **Parties to Proceeding.**—Where proceedings audita querela are instituted, all the persons interested in the judgment sought to be vacated should be joined as parties thereto and given notice thereof.[14] Ordinarily, the action lies only between the parties to the original suit wherein the judgment complained of was rendered.[15] The death of the judgment creditor, however,

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the debt during the pendency of the suit and the plaintiff afterwards took judgment. Annotation: 20 L. ed. 405.

[2] See Staniford v. Barry, 1 Aik. (Vt.) 321, 15 Am. Dec. 692.

[3] Annotation: 20 L. ed. 405.

Audita querela lies to vacate a judgment obtained against a lunatic whose guardian had not been notified. Annotation: 20 L. ed. 405.

[4] Wilson v. Fleming, 16 Vt. 649, 42 Am. Dec. 531.

[5] Avery v. United States, 12 Wall. (U. S.) 304, 20 L. ed. 405; State ex rel. Gary Realty Co. v. Hall, 322 Mo. 1118, 17 S. W. (2d) 935, citing R. C. L.; Staniford v. Barry, 1 Aik. (Vt.) 321, 15 Am. Dec. 692.

Annotation: 20 L. ed. 405; 23 Am. St. Rep. 107.

[6] See Staniford v. Barry, 1 Aik. (Vt.) 321, 15 Am. Dec. 692.

[7] Annotation: 15 Am. Dec. 696.

[8] State ex rel. Gary Realty Co. v. Hall, 322 Mo. 1118, 17 S. W. (2d) 935, citing R. C. L.; Little v. Cook, 1 Aik. (Vt.) 363, 15 Am. Dec. 698.

Annotation: 20 L. ed. 405; 23 Am. St. Rep. 107.

Audita querela does not lie where a writ of error is proper at common law. Annotation: 20 L. ed. 405.

[9] Annotation: 15 Am. Dec. 696.

[10] Longworth v. Screven, 20 S. C. L. (2 Hill) 298, 27 Am. Dec. 381.

[11] French v. White, 78 Vt. 89, 62 A. 35, 2 L.R.A.(N.S.) 804, 6 Ann. Cas. 479.

[12] Abbott v. Dutton, 44 Vt. 546, 8 Am. Rep. 394.

Annotation: 20 L. ed. 405.

[13] Annotation: 23 Am. St. Rep. 107.

[14] Annotation: 15 Am. Dec. 695.

[15] Longworth v. Screven, 20 S. C. L. (2 Hill) 298, 27 Am. Dec. 381; Gleason v. Peck, 12 Vt. 56, 36 Am. Dec. 329.

does not bar the right of action, as the same may be brought against his legal representatives.[16] Obviously, where the proceeding is instituted against the legal representatives of a deceased party, the action is limited to setting aside the judgment and execution, as no recovery can be had for the tortious acts of the deceased. Furthermore, a trustee under trustee process is so far a party to a judgment rendered in that form that if a void execution issues against him, he may be relieved by audita querela.[17]

§ 5. As Factor in Modern Practice.—In the great majority of jurisdictions the writ of audita querela has long since fallen into disuse and become more or less obsolete, owing to the fact that it has been almost entirely supplanted by the less expensive and more expeditious means of obtaining relief by motion upon notice to the adverse parties.[18] Wherever audita querela would have been available at common law, as a general rule, relief may now be obtained on motion.[19] In several of the states, however, the writ is occasionally resorted to as a common-law remedy, and it cannot be said to be so far obsolete that some courts would not allow it if preferred.[20] In others, its use is prescribed by statute.[21] But even in those jurisdictions where one has the option of proceeding either by motion or by a writ of audita querela, ordinarily, the better practice is to proceed by way of motion upon notice to the adverse party.[22]

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[16] Staniford v. Barry, 1 Aik. (Vt.) 321, 15 Am. Dec. 692; Gleason v. Peck, 12 Vt. 56, 36 Am. Dec. 329 (dictum).

[17] Wilson v. Fleming, 16 Vt. 649, 42 Am. Dec. 531.

Annotation: 20 L. ed. 405.

[18] Harris v. Hardeman, 14 How. (U. S.) 334, 14 L. ed. 444; Harding v. Hawkins, 141 Ill. 572, 31 N. E. 307, 33 Am. St. Rep. 347; Clark v. Rowling, 3 N. Y. 216, 53 Am. Dec. 290; Longworth v. Screven, 20 S. C. L. (2 Hill) 298, 27 Am. Dec. 381; Steele v. Boyd, 6 Leigh (Va.) 547, 29 Am. Dec. 218; Smock v. Dade, 5 Rand. (Va.) 639, 16 Am. Dec. 780.

[19] See Executions [Also 10 R. C. L. p. 1247, § 41]; Judgments [Also 15 R. C. L. p. 716, § 168].

[20] See Turknett v. Western College, 19 N. M. 572, 145 P. 138, citing R. C. L.; Longworth v. Screven, 20 S. C. L. (2 Hill) 298, 27 Am. Dec. 381.

[21] Electric Plaster Co. v. Blue Rapids City Twp. 81 Kan. 730, 106 P. 1079, 25 L.R.A.(N.S.) 1237.

[22] See Judgments [Also 15 R. C. L. p. 716, § 168].

AUDITORS

See Certified Public Accountants.

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See Gasoline Filling Stations.

AUTOMOBILE INSURANCE

See Automobiles, infra, p. 495.

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I. INTRODUCTION

A. IN GENERAL

1. Survey.—Normally, a law text emphasizes rules of law and, for the purpose of illustration, applies them to specific factual situations. An article on the law of automobiles, however, accentuates the application of these rules. The introduction of automobiles as a means of conveyance upon public highways and the steady increase in their use have led to a rapid accumulation of judicial decisions concerning their operation. The principles enumerated in these cases are, to a large extent, merely special applications of common-law rules. The advent of the motor vehicle has merely created a new factual setting through which well-established legal principles are to operate. The effectiveness of these principles in such an unforeseen factual setting is a tribute to the adaptability and elasticity of the common law. The vast amount of litigation that the automobile sponsors and the variety of common-law doctrines it invokes render a distinct and modern treatment of the law of motor vehicles essential to the comprehensiveness of a legal work such as this.

§ 2. Scope.[1]—As shown in the preceding section,[2] the cases involving the use of automobiles and the statutory enactments regulating their operation have become sufficiently numerous to form a distinct branch of the law. Since the law of automobiles is primarily an application of common-law principles to the variety of factual situations the motor vehicle sponsors, the scope of this article is necessarily an extensive one. It frequently embraces case and statutory law even incidentally pertaining to automobiles. Such subjects as public regulation and control,[3] licensing and registration,[4] insurance,[5] repairs,[6] negligence,[7] damages,[8] crimes,[9] and actions are treated in detail.[10]

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[1] For a discussion of the operation of automobiles as hazardous occupation, see generally WORKMEN'S COMPENSATION [Also 28 R. C. L. pp. 709 et seq.].

As to chattel mortgages of automobiles, see CHATTEL MORTGAGES.

As to validity of statutes relating to motor club service, see CONSTITUTIONAL LAW.

As to damages for personal injuries, see DAMAGES.

As to duties, liabilities, compensation and lien of repairman, see GARAGES, PARKING STATIONS AND LIVERIES.

As to gasoline stations, see GASOLINE STATIONS.

Injuries from defects in highways, see HIGHWAYS, STREETS AND SIDEWALKS.

As to right of a husband or wife to sue the other for injuries arising out of an automobile accident, see HUSBAND AND WIFE.

As to right of a child against a parent for injuries arising out of an automobile accident, see PARENT AND CHILD.

As to sale of automobiles, see SALES.

As to construction of statutes relating to motor club service, see STATUTES.

[2] See supra, § 1.

Despite the natural comprehension of an article on automobiles, in conformity with standard legal classification, certain exclusions are made. For example, while the validity or invalidity of motor vehicle legislation is herein indicated, a full discussion of the reasons therefor is relegated to another title.[11] The liability of a municipality for the negligent operation of motor vehicles belonging to it is likewise treated under another topic.[12] This is also true of such subjects as criminal conspiracies having for their purpose the larceny of automobiles;[13] the transportation by automobile of intoxicating liquors;[14] motor transportation companies;[15] storage;[16] and the maintenance and operation of automobiles for purposes of prostitution.[17] The principles of the law of costs[18] and verdicts against the weight of evidence[19] are likewise discussed elsewhere, although rules peculiarly applicable to automobile cases are herein noted.

While the specific statutes of the various jurisdictions are not treated with particularity, an effort has been made to formulate propositions of law applicable generally to motor vehicle legislation.

B. DEFINITIONS AND DESCRIPTIVE TERMS

§ 3. Generally.—The term "automobile" has its derivation in the Greek "autos," meaning "self," and the Latin "mobiles," meaning "movable." "Automobile," therefore, means "self-moving." It may be defined as a wheeled vehicle propelled by steam, electricity, or gasoline, and used on highways and streets for the transportation of persons or merchandise.[1] The courts, without making clear distinctions, have generally used the terms, "automobile," "motor vehicle," "motorcar,"—and, in the earlier cases, "horseless carriage,"—as synonyms.[2] Questions frequently arose as to whether statutes regulating the use of various classes of vehicles, and not directly referring to automobiles, were broad enough to apply to such machines, which, in numerous instances, were unknown at the time of the passage of the law. The better view seems to be that an automobile is to be classed as a vehicle,[3] and may properly be considered as being a vehicle for hire, under the terms of ordinances prohibiting the standing of such vehicle in the streets elsewhere than at public hack stands.[4] The term “motor vehicle” is not, however, comprehensive enough to include a boy’s sled.[5]

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[3] See infra, §§ 15 et seq.

[4] See infra, §§ 90 et seq.

[5] See infra, §§ 521 et seq.

[6] See infra, §§ 745 et seq.

See also GARAGES, PARKING STATIONS AND LIVERIES.

[7] See infra, §§ 161 et seq.

[8] See infra, §§ 745 et seq.

[9] See infra, § 755.

[10] See infra, §§ 579 et seq.

[11] See CONSTITUTIONAL LAW [Also 6 R. C. L. p. 1].

[12] See MUNICIPAL CORPORATIONS [Also 19 R. C. L. p. 678].

[13] See CONSPIRACY [Also 5 R. C. L. p. 1059].

[14] See INTOXICATING LIQUORS [Also 15 R. C. L. p. 239.

[15] See MOTOR TRANSPORTATION COMPANIES.

[16] See GARAGES, PARKING STATIONS AND LIVERIES.

[17] See PROSTITUTION.

[18] See COSTS [Also 7 R. C. L. p. 779].

[19] See APPEAL AND ERROR, Vol. 3, p. 441, §§ 887 et seq.; EVIDENCE [Also 10 R. C. L. p. 847]; NEW TRIAL [Also 20 R. C. L. p. 214]; TRIAL [Also 26 R. C. L. p. 1008].

[1] Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035, 1 L.R.A.(N.S.) 215, 108 Am. St. Rep. 196, 3 Ann. Cas. 487.

Annotation: 16 Ann. Cas. 608.

[2] Laporte v. North American Acci. Ins. Co. 161 La. 933, 109 So. 767, 48 A.L.R. 1086.

[3] Foster v. Curtis, 213 Mass. 79, 99 N. E. 961, 42 L.R.A.(N.S.) 1188, Ann. Cas. 1913E, 1116; Hennessey v. Taylor, 189 Mass. 583, 76 N. E. 224, 3 L.R.A.(N.S.) 345, 4 Ann. Cas. 396; State v. Dunklee, 76 N. H. 439, 84 A. 40, Ann. Cas. 1913B, 754.

Annotation: Ann. Cas. 1913B, 755.

There was some contrary authority, however. Annotation: Ann. Cas. 1913B, 755.

The operation of an automobile comes within the terms of a regulation or rule providing that no person shall ride or drive faster than a designated rate of speed, since a person may be said to be driving an automobile if he is controlling the motive power.[6]

§ 4. **Automobile as “Carriage” or “Wagon.”**—Whether or not an automobile falls within the meaning of the word “carriage” as used in a statute depends somewhat upon the nature of the statute. In a penal statute, in a proper case, it may not be so included, while in a statute which should receive a liberal construction, it will be.[7] An automobile is a “carriage” within the broad meaning of that term.[8] Thus, a motorcar is a “carriage” within the meaning of a grant of a lot which was a part of a tract purchased for a public park, conveyed to the purchasers, “together with a right of carriage, horse, and footway through the park when laid out.”[9] But it has been held not to be a carriage, within the meaning of a statute requiring towns and cities to keep their highways “reasonably safe and convenient for travelers with their horses, teams, and carriages.”[10] Generally speaking, an automobile is not a wagon,[11] although it has been held that it is a wagon within the meaning of ordinances prohibiting the presence of “advertising trucks, vans, or wagons” upon certain streets.[12]

§ 5. **Motorcycle—In General.**—A motorcycle is generally held to be within the terms of a statute relating to motor vehicles, automobiles, and the like.[13] A motorcycle is not a bicycle, within the meaning of a provision excluding bicycles from the operation of an act requiring motor vehicles to exhibit certain lamps.[14]

§ 6. **—Motorcycle as Used in Statutes and Ordinances.**—The overwhelming weight of authority supports the view that a motorcycle is a motor vehicle within the meaning of statutes and ordinances regulating the operation of such vehicles.[15] Thus, acts pertaining to the speed,[16] lights,[17] registration, and identification[18] of motor vehicles, automobiles, or any other conveyances of a

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[4] Gassenheimer v. District of Columbia, 26 App. D. C. 557, 6 Ann. Cas. 920; State v. Dunklee, 76 N. H. 439, 84 A. 40, Ann. Cas. 1913B, 754.

Annotation: Ann. Cas. 1913B, 755.

[5] Terrill v. Virginia Brewing Co. 130 Minn. 46, 153 N. W. 136, L.R.A.1915E, 1028, Ann. Cas. 1917C, 453.

[6] Com. v. Crowninshield, 187 Mass. 221, 72 N. E. 963, 68 L.R.A. 245.

[7] Annotation: Ann. Cas. 1913B, 756.

[8] Annotation: 1 L.R.A.(N.S.) 216; 20 Ann. Cas. 516.

As used in particular connections, the word “carriage” has been held not to embrace an automobile. Annotation: Ann. Cas. 1913B, 756.

[9] Attorney-Gen. v. Hodgson [1922] 2 Ch. 429, 11 B. R. C. 234.

Annotation: 11 B. R. C. 247.

[10] Doherty v. Ayer, 197 Mass. 241, 83 N. E. 677, 14 L.R.A.(N.S.) 816, 125 Am. St. Rep. 355.

[11] An automobile is not exempt from levy and sale under a statute exempting a “wagon, cart, or dray.” Whitney v. Welnitz, 153 Minn. 162, 190 N. W. 57, 28 A.L.R. 68.

[12] Fifth Ave. Coach Co. v. New York, 194 N. Y. 19, 86 N. E. 824, 21 L.R.A.(N.S.) 744, 16 Ann. Cas. 695, affirmed in 221 U. S. 467, 55 L. ed. 815, 31 S. Ct. 709.

[13] See infra, § 6.

As to insurance policies, see infra, §§ 504 et seq.

[14] Webster v. Terry [1914] 1 K. B. (Eng.) 51, Ann. Cas. 1917A, 226—Div. Ct.

Annotation: Ann. Cas. 1917A, 228.

[15] Re Kessler, 26 Idaho, 764, 146 P. 113, L.R.A.1915D, 322, Ann. Cas. 1917A, 228; People v. Smith, 156 Mich. 173, 120 N. W. 581, 21 L.R.A.(N.S.) 41, 16 Ann. Cas. 607.

Annotation: 48 A.L.R. 1090; s. 70 A.L.R. 1253; Ann. Cas. 1917A, 218.

[16] Annotation: 48 A.L.R. 1090, 1091; s. 70 A.L.R. 1253.

[17] Annotation: 70 A.L.R. 1255.

[18] People v. Smith, 156 Mich. 173, 120 N. W. 581, 21 L.R.A.(N.S.) 41, 16 Ann. Cas. 607.

Annotation: Ann. Cas. 1917A, 218.

In People v. Smith, supra, the act defined the words “motor vehicles” to mean all vehicles propelled by power other than muscular power, except traction engines and similar type or kind are held to include motorcycles.[19] A motorcycle has likewise been regarded as a "motorcar,"[1] as a "light locomotive,"[2] and as a "carriage," within an act imposing a license fee upon "any carriage drawn or propelled upon a road or tramway, or elsewhere than upon a railway, by steam, or electricity, or any other mechanical power."[3] All of the reasons which would induce and require the legislature to regulate automobiles apply to the regulation of motorcycles.[4] Considerable importance obviously must be attached to the wording of the statute.[5] There is a recent commendable tendency upon the part of legislatures to define their terms expressly and to be quite explicit in their requirements. This tendency naturally simplifies judicial interpretation.

§ 7. —Motorcycle as Used in Insurance Policies.—Whether or not a motorcycle can be regarded as a motor vehicle within the meaning of insurance policies is not entirely settled. There is one line of authority to the effect that a motorcycle will not be regarded as a "motorcar," within the meaning of certain insurance policies. Accordingly, it is held that an insurance policy allowing recovery for loss of life caused by the wrecking or disablement of any "motor-driven car" in which the insured is riding or driving does not apply where the insured was riding a motorcycle, the term used indicating a motor-driven car with a body and having more than two wheels for support and as protection to the driver against accidents.[6] It has been suggested that a

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such motor vehicles as run only upon rails or tracks.

[19] **A statute regulating "the running of automobiles, locomobiles,** and other conveyances of like character propelled by . . . any power other than muscular power" includes motorcycles. Annotation: 48 A.L.R. 1091, s. 70 A.L.R. 1253.

[1] Annotation: 48 A.L.R. 1092, s. 70 A.L.R. 1253.

[2] Annotation: 48 A.L.R. 1092, s. 70 A.L.R. 1253.

[3] Annotation: 48 A.L.R. 1092, s. 70 A.L.R. 1253.

[4] People v. Smith, 156 Mich. 173, 120 N. W. 551, 21 L.R.A.(N.S.) 41, 16 Ann. Cas. 607.

It has been asserted: "A motorcycle is propelled by the same power as an automobile, the use of which power causes the same loud and rapid explosion. It moves with kindred speed, and when not propelled by human power has many of the general features of an automobile, the main difference being that it runs on two wheels instead of four. If two motorcycles should be fastened and operated together, side by side, for the purpose of carrying passengers, there would be no question that the vehicle so constructed would be of a type or kind similar to an automobile, and yet, if defendant in error's contention be correct, such contrivance ceases to be of such kind or type when separated into two distinct conveyances. The statute in question was broad in its terms, and in our judgment it would be a conversion of the plain meaning of the words of the act to say that a motorcycle, used in carrying passengers, was not similar to an automobile in either type or kind." Annotation: 48 A.L.R. 1091.

[5] **Where a motor vehicle act** defined the term "motor vehicle" as meaning all vehicles propelled by any power other than muscular power, and used the term in all of its regulatory provisions except the one defining the degree of care to be used while driving, in which section the term "automobile" was used, it was held that, had the legislature used the term "motor vehicle" in this section, there would have been no question but that it would have been applicable to motorcycles, but that the legislature evidently used the term "automobile," instead of "motor vehicle," intentionally and "for the purpose of requiring the operators of automobiles, and not the operators of motorcycles, to exercise the highest degree of care." Annotation: 48 A.L.R. 1091.

In view of a specific provision in one subdivision of a statute, to the effect that every motorcycle on the highway should carry at least one lamp giving sufficient light, to be distributed as provided in another subdivision expressly referred to, motorcycles were held to be contemplated by the provisions of that other subdivision, and apparently also by further provisions, requiring that the headlights of "automobiles" and "motor vehicles" should be of a certain character, be visible for a certain distance, and the like. Annotation: 70 A.L.R. 1255.

[6] Laporte v. North America Acci. Ins. Co. 161 La. 933, 109 So. 767, 48 A.L.R. 1086. In Landwehr v. Continental L. Ins. Co. 159 Md. 207, 150 A. 732, 70 A.L.R. 1249, it is pointed out that while vehicles propelled otherwise than by muscular power are classified as motor-driven vehicles in a statute regulating the operation of such vehicles, a different classification is provided for license purposes, since the fees vary according to the horse power and carrying capacity of some of such vehicles, whereas a flat rate is imposed for motorcycles.

It has been held that a motorcycle is not a "motor-driven car" within the meaning of an insurance policy creating liability for the death of insured caused by the wrecking or disablement of any private motorcycle is a vehicle, rather than a car, since a car has four wheels.[7] Then too, the fact that a policy covered the insured while riding in, rather than on, a motor-driven car has been deemed significant.[8] Moreover, the low price of a policy has been invoked as a reason why the insurer would probably not intend to cover the hazardous risk of a motorcycle.[9] Considerable doubt, however, exists as to whether all of these decisions are still operative.[10]

§ 8. Public Conveyances.—A taxicab is a vehicle propelled by electric or gas power, held for public hire.[11] It is sometimes noted in the definitions that the charges are upon a time or distance basis,[12] and also that the vehicle is held for public hire at designated places subject to municipal control.[13]

A jitney is a vehicle of motor class, the charges of which are much lower than that of a taxicab, the stipulated fare usually being five or ten cents, directly in competition with street cars.[14]

§ 9. Streets and Highways.—The problem frequently arises as to whether or not the term "highway" as used in a statutory provision relating to vehicle traffic includes "street." This problem cannot be regarded as entirely settled. The legislative intent, as indicated by the wording of the various statutes, determines the scope of the term.[15] Although a street, which has been defined as "a public way in a city, town, or village," is a public highway,[16] the term "highway" as used in statutory provisions which pertain to vehicular traffic does not necessarily include a street in a town or city. In several cases it has been held that a city street was not within the contemplation of the general term "highway."[17] Thus, the court, in construing a statute regulating the speed of vehicles approaching highway crossings, held that it did not control the operation of motor vehicles at city street crossings,[18] and it has been held

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motor-driven car in which the insured is riding, the word "car" ordinarily being used in referring to and describing an automobile, and the difference between the mechanical construction of automobiles and that of motorcycles not indicating that a common designation would naturally apply to both. Annotation: 48 A.L.R. 1090, s. 70 A.L.R. 1253.

[7] Annotation: 70 A.L.R. 1254.

[8] Annotation: 70 A.L.R. 1254.

[9] Annotation: 70 A.L.R. 1254.

[10] In annotation in 70 A.L.R. p. 1254, it is said: "But the above authorities (with the exception of the Maryland case, which was later decided) were distinctly repudiated in upholding a lower court's construction of an identical provision as referring to a motorcycle, . . . where at least one of the judges was influenced largely by the consideration that it was the almost universal rule in that state to construe any clause against the insurer where there was the slightest doubt as to its meaning, besides relying upon what appeared to be the view of the authors of Webster's New International Dictionary, namely, that the words "motorcycle" and "motorcar" were practically synonymous; it being noted in Webster's definition of "motorcar" that in a British statute this included motorcycle except where a contrary intention appeared, and in the dictionary definition of motorcycle, that the same statute limited the latter term to motorcars designed to travel on not more than three wheels, and the judge also cited the general statement in 2 R. C. L. p. 1167, that except where special provision is made to the contrary, a motorcycle is considered as falling within statutes which use such terms as motorcar and the like. But it further appeared in the opinion of the judge referred to that not only the insurer's agent, but also his superintendent, understood and represented that policies with this provision covered persons riding motorcycles; and, by regarding the provision as ambiguous, the judge felt justified in looking to the construction which had been placed upon the provision by the parties."

[11] Columbia v. Alexander, 125 S. C. 530, 119 S. E. 241, 32 A.L.R. 746; Anderson v. Yellow Cab Co. 179 Wis. 300, 191 N. W. 748, 31 A.L.R. 1197.

Taxicabs are the modern developments of the old hackney coach. Park Hotel Co. v. Ketchum, 184 Wis. 182, 199 N. W. 219, 33 A.L.R. 351.

[12] Columbia v. Alexander, 125 S. C. 530, 119 S. E. 241, 32 A.L.R. 746.

[13] Anderson v. Yellow Cab Co. 179 Wis. 300, 191 N. W. 748, 31 A.L.R. 1197.

[14] Columbia v. Alexander, 125 S. C. 530, 119 S. E. 241, 32 A.L.R. 746; Memphis v. State ex rel. Ryals, 133 Tenn. 83, 179 S. W. 631, Ann. Cas. 1917C, 1056.

[15] Annotation: 54 A.L.R. 1250.

[16] See HIGHWAYS, STREETS, AND SIDEWALKS [Also 13 R. C. L. p. 17, § 6].

[17] Annotation: 54 A.L.R. 1250.

[18] Annotation: 54 A.L.R. 1251.

that a statute which regulated the running of motor vehicles on public highways did not apply to the operation of automobiles in towns and cities.[19] Other cases, however, have adopted a contrary construction. Accordingly, it has been held that intersecting streets of a city are within the contemplation of a statute prohibiting the operation of vehicles on any of the highways of the state in such a manner as to endanger life or property, and requiring a person approaching a crossing of intersecting highways to operate a vehicle at a certain speed.[20] In a few decisions the courts have construed the term "highway," as used in a particular statute, to include a street in a town or city.[1] Thus, it has been held that a statute relative to the control of motor vehicles "in going around the corner, curve, or crossing in a highway" applies also to cars being operated at the intersection of streets within a city.[2] And the words "public road or highway" in a statute regulating the operation of motor vehicles on the public roads have been deemed to include a public street.[3] So, the provisions of a criminal code controlling the operation of automobiles on the highways of the state have been construed as including within their terms the streets of a city.[4] In a certain instance, where it appeared that the defendant was indicted for driving an automobile on the public highway while under the influence of liquor, it was held that the offense was committed on a public highway, when it was shown that the illegal act took place at the intersection of two streets within a city.[5]

C. Status

§ 10. Generally; Right to Use Highways.—Obviously, the use of highways by automobiles is lawful.[6] The owners and operators thereof have the right to use the highways of the state on an equal footing with the drivers of other vehicles,[7] unless the size and character of the vehicle is restricted by the legislature. The fact that vehicles are heavier than those customarily used does not give the court, or anyone else, an action for such use. A county can neither restrain an owner from using the public roads and bridges because of the size of his vehicles, nor collect damages for their reasonable use.[8] But this equality or right imposes the reciprocal duty of managing one's vehicle, whatever its character, with care and caution to avoid causing injury to others with equal right.[9]

In early cases it was declared that where highways had not been restricted by dedication to some particular mode of use, they were open to all suitable methods of transportation, and a new means of making the way useful could not be excluded merely because its introduction might tend to the inconvenience, or even to the injury, of those who continued to use the road after the same manner as formerly;[10] and although travel upon the public roads had, until a comparatively recent date, chiefly been by means of horses, persons making use of these animals for purposes of travel had no prescriptive rights or privileges superior to those who had recourse to other methods of locomotion upon the public thoroughfares.[11] The automobile was considered an ordinary vehicle of pleasure or business, furnishing a convenient and useful mode of travel and transportation not necessarily inconsistent with the proper use of the highways by others,[12] and while it was generally recognized that motor vehicles had introduced a new element of danger to travelers on the highway,[13] necessarily exacting a degree of care commensurate with their use,[14] yet such vehicles had rights upon the public roads and streets equal to those of horses, carriages, and other vehicles.[15]

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[19] Annotation: 54 A.L.R. 1251.

Where it appeared that the owner of an automobile had left it parked on a sloping street of a city, with the result that it rolled down the street and injured the property of the plaintiff, the court said: "Appellants call attention to § 35 of chapter 96, Laws of 1921, which, in effect, provides that it shall be unlawful to leave any vehicle standing on the main traveled portion of any highway. This statute is not here applicable: First, because there is no semblance of proof that the car was left standing on the main traveled portion of the street. There are some allegations in the pleadings with respect thereto, but the pleadings are not evidence. Second, because we greatly doubt the intent of the legislature, by the use of the words 'main traveled portion of any highway in this state,' to mean a city street. If so, all parking on streets is unlawful, and the right of the local authorities to regulate and permit parking, which seems to be necessary under modern conditions, is wholly taken away." Annotation: 54 A.L.R. 1251.

[20] Annotation: 54 A.L.R. 1251.

[1] Annotation: 54 A.L.R. 1251.

[2] Annotation: 54 A.L.R. 1252.

[3] Annotation: 54 A.L.R. 1252.

[4] Annotation: 54 A.L.R. 1252.

[5] Annotation: 54 A.L.R. 1252.

[6] Slattery v. Haley, 52 Ont. L. Rep. 95, 11 B. R. C. 1036.

[7] Com. v. Nolan, 189 Ky. 34, 224 S. W. 506, 11 A.L.R. 202; Cumberland Teleph. & Teleg. Co. v. Yeiser, 141 Ky. 15, 131 S. W. 1049, 31 L.R.A.(N.S.) 1137; Applewold v. Dosch, 239 Pa. St. 479, 86 A. 244, Ann. Cas. 1914D, 481.

[8] Sumner County v. Interurban Transp. Co. 141 Tenn. 493, 213 S. W. 412, 5 A.L.R. 765.

[9] McIntyre v. Orner, 166 Ind. 57, 76 A. 750, 4 L.R.A.(N.S.) 1130, 117 Am. St. Rep. 359, 8 Ann. Cas. 1087.

§ 11. Automobile as Dangerous Instrumentality.—Although there is some authority to the contrary,[16] it is a principle of law well established by the great weight of authority that an automobile[17]—at least an automobile in proper repair[18]—or motorcycle[19] is not inherently a dangerous agency so as to render the owner or operator thereof liable as an insurer for injuries caused thereby. Liability, if any, must rest upon negligence.[20] The rules requiring extraordinary care of dangerous instrumentalities do not apply to automobiles.[21] In other words, automobiles are not to be regarded in the same category with locomotives, ferocious animals, dynamite, and other dangerous contrivances and agencies.[1]

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[10] Indiana Springs Co. v. Brown, 165 Ind. 465, 74 N. E. 615, 1 L.R.A.(N.S.) 238, 6 Ann. Cas. 656; Macomber v. Nichols, 34 Mich. 212, 22 Am. Rep. 522.

Annotation: 1 L.R.A.(N.S.) 225.

[11] Indiana Springs Co. v. Brown, 165 Ind. 465, 74 N. E. 615, 1 L.R.A.(N.S.) 238, 6 Ann. Cas. 656; Bogue v. Bennett, 156 Ind. 478, 60 N. E. 143, 83 Am. St. Rep. 212.

[12] House v. Cramer, 134 Iowa, 374, 112 N. W. 3, 10 L.R.A.(N.S.) 655, 13 Ann. Cas. 461.

Annotation: 10 L.R.A.(N.S.) 655; 13 Ann. Cas. 463.

[13] Weil v. Kreutzer, 134 Ky. 563, 121 S. W. 471, 24 L.R.A.(N.S.) 557; Gregory v. Slaughter, 124 Ky. 345, 99 S. W. 247, 8 L.R.A.(N.S.) 1228, 124 Am. St. Rep. 402; Com. v. Kingsbury, 199 Mass. 542, 85 N. E. 848, L.R.A.1915E, 264, 127 Am. St. Rep. 513; Com. v. Boyd, 188 Mass. 79, 74 N. E. 255, 108 Am. St. Rep. 464.

[14] Minor v. Stevens, 65 Wash. 423, 118 P. 313, 42 L.R.A.(N.S.) 1178.

Annotation: 42 L.R.A.(N.S.) 1178.

[15] Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035, 1 L.R.A.(N.S.) 215, 108 Am. St. Rep. 196, 3 Ann. Cas. 487; House v. Cramer, 134 Iowa, 374, 112 N. W. 3, 10 L.R.A.(N.S.) 655, 13 Ann. Cas. 461; Gregory v. Slaughter, 124 Ky. 345, 99 S. W. 247, 8 L.R.A.(N.S.) 1228, 124 Am. St. Rep. 402; Shinkle v. McCullough, 116 Ky. 960, 77 S. W. 196, 105 Am. St. Rep. 249; State v. Mayo, 106 Me. 62, 75 A. 295, 26 L.R.A.(N.S.) 502, 20 Ann. Cas. 512; State v. Swagerty, 203 Mo. 517, 102 S. W. 483, 10 L.R.A.(N.S.) 601, 120 Am. St. Rep. 671, 11 Ann. Cas. 725; Lauson v. Fond du Lac, 141 Wis. 57, 123 N. W. 629, 25 L.R.A.(N.S.) 40, 135 Am. St. Rep. 30.

Annotation: 13 Ann. Cas. 461; 108 Am. St. Rep. 196; 120 Am. St. Rep. 671; 124 Am. St. Rep. 402.

[16] Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629, 16 A.L.R. 255.

A motor vehicle operated on the public highways is held to be a dangerous instrumentality, and the owner who intrusts it to another to operate is liable for injury caused to others by the negligence of the person to whom it is intrusted. Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629, 16 A.L.R. 255.

The legislature, under its police power to protect the public from dangerous instrumentalities using the highways, has imposed rigid restraints, regulations, and restrictions upon the use of motor vehicles, thus recognizing the danger from their operation which makes owners liable in damages under the doctrine of respondeat superior as applied to dangerous agencies. Ibid.

[17] Arkin v. Page, 287 Ill. 420, 123 N. E. 30, 5 A.L.R. 216; Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035, 1 L.R.A.(N.S.) 215, 108 Am. St. Rep. 196, 3 Ann. Cas. 487; Fisher v. Fletcher, 191 Ind. 529, 133 N. E. 834, 22 A.L.R. 1392; Indiana Springs Co. v. Brown, 165 Ind. 465, 74 N. E. 615, 1 L.R.A.(N.S.) 238, 6 Ann. Cas. 656; Whitelock v. Dennis, 139 Md. 557, 116 A. 68, citing R. C. L.; McGowan v. Longwood, 242 Mass. 337, 136 N. E. 72, 23 A.L.R. 617; Woods v. Clements, 113 Miss. 720, 74 So. 422, L.R.A.1917E, 357; State v. Miller (Mo.) 234 S. W. 813, citing R. C. L.; Lewis v. Steele, 52 Mont. 300, 157 P. 575, citing R. C. L.; Danforth v. Fisher, 75 N. H. 111, 71 A. 535, 21 L.R.A.(N.S.) 93, 139 Am. St. Rep. 670; Maloney v. Kaplan, 233 N. Y. 426, 135 N. E. 838, 26 A.L.R. 909; Elliott v. Harding, 107 Ohio St. 501, 140 N. E. 338, 36 A.L.R. 1128; McNeal v. McKain, 33 Okla. 449, 126 P. 742, 41 L.R.A.(N.S.) 775; Landry v. Richmond, 45 R. I. 504, 124 A. 263, 32 A.L.R. 1500; Collette v. Page, 44 R. I. 26, 114 A. 136, 18 A.L.R. 74; Coca Cola Bottling Works v. Brown, 139 Tenn. 640, 202 S. W. 926, citing R. C. L.; Leach v. Asman, 130 Tenn. 510, 172 S. W. 303, citing R. C. L.; McFarlane v. Winters, 47 Utah, 598, 155 P. 437, L.R.A.1916D, 618; Blair v. Broadwater, 121 Va. 301, 93 S. E. 632, L.R.A.1918A, 1011; Cohen v. Meador, 119 Va. 429, 89 S. E. 876, citing R. C. L.; Mitchell v. Churches, 119 Wash. 547, 206 P. 6, 36 A.L.R. 1132; Bent-

In accordance with these principles, an owner of an automobile is not responsible for injuries which may be sustained by strangers from its careless and wrongful use while in the possession of another who is using it without his consent.[2] Nor can he be held responsible for the acts of his servant in operating the machine without authority, although he knew that the servant was unskilful and careless.[3] And an automobile in good condition is not such a dangerous instrument that one letting it for hire must test the competency and skill of a customer before intrusting him with it, under penalty of liability for injuries done by the hirer's negligence.[4]

§ 12. —Apparent Limitations upon Dangerous Agency Rule.—Although, as shown above,[5] it is a well-established principle that an automobile is not inherently a dangerous machine, this principle must be considered in the light

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son v. Brown, 186 Wis. 629, 203 N. W. 380, 38 A.L.R. 1417; Hopkins v. Droppers, 184 Wis. 400, 198 N. W. 738, 36 A.L.R. 1156; Steffen v. McNaughton, 142 Wis. 49, 124 N. W. 1016, 26 L.R.A.(N.S.) 382, 19 Ann. Cas. 1227.

Annotation: 16 A.L.R. 270; 26 L.R.A. (N.S.) 382; 108 Am. St. Rep. 212; 3 Ann. Cas. 495; 19 Ann. Cas. 1229.

See also §§ 161 et seq. infra.

[18] Priestly v. Skourup, 142 Kan. 127, 45 P. (2d) 852, 100 A.L.R. 916.

[19] Hopkins v. Droppers, 184 Wis. 400, 198 N. W. 738, 36 A.L.R. 1156.

[20] Parker v. Wilson, 179 Ala. 361, 60 So. 150, 43 L.R.A.(N.S.) 87; Akin v. Page, 287 Ill. 420, 123 N. E. 30, 5 A.L.R. 216; McIntyre v. Orner, 166 Ind. 57, 76 N. E. 750, 4 L.R.A. (N.S.) 1130, 117 Am. St. Rep. 359, 7 Ann. Cas. 1087; Neubrand v. Kraft, 169 Iowa, 444, 151 N. W. 455, L.R.A.1915D, 691; Symington v. Sipes, 121 Md. 313, 88 A. 134, 47 L.R.A.(N.S.) 662; Hartley v. Miller, 165 Mich. 115, 130 N. W. 336, 33 L.R.A.(N.S.) 81; Slater v. Advance Thresher Co. 97 Minn. 305, 107 N. W. 133, 5 L.R.A.(N.S.) 598; Danforth v. Fisher, 75 N. H. 111, 71 A. 535, 21 L.R.A.(N.S.) 93, 139 Am St. Rep. 670; McNeal v. McKain, 33 Okla. 449, 126 P. 742, 41 L.R.A.(N.S.) 775; King v. Smythe, 140 Tenn. 217, 204 S. W. 296, L.R.A.1918F, 293; Goodman v. Wilson, 129 Tenn. 464, 166 S. W. 752, 51 L.R.A.(N.S.) 1116; Birch v. Abercrombie, 74 Wash. 486, 133 P. 1020, 50 L.R.A. (N.S.) 59; Jones v. Hoge, 47 Wash. 663, 92 P. 433, 14 L.R.A.(N.S.) 216, 125 Am. St. Rep. 915; Steffen v. McNaughton, 142 Wis. 49, 124 N. W. 1016, 26 L.R.A.(N.S.) 382, 19 Ann. Cas. 1227.

Annotation: 16 A.L.R. 270.

An automobile is not such a dangerous instrumentality that the owner thereof is liable for an accident occurring while he is operating the same if he is guilty of no negligence in its operation. McIntyre v. Orner, 166 Ind. 57, 76 N. E. 750, 4 L.R.A.(N.S.) 1130, 117 Am. St. Rep. 359, 8 Ann. Cas. 1087.

[21] Fisher v. Fletcher, 191 Ind. 529, 133 N. E. 834, 22 A.L.R. 1392; Hartley v. Miller, 165 Mich. 115, 130 N. W. 336, 33 L.R.A.(N.S.) 81; Blair v. Broadwater, 121 Va. 301, 93 S. E. 632, L.R.A.1918A, 1011; Jones v. Hoge, 47 Wash. 663, 92 P. 433, 14 L.R.A.(N.S.) 216, 125 Am. St. Rep. 915.

[1] Jones v. Hoge, 47 Wash. 663, 92 P. 433, 14 L.R.A.(N.S.) 216, 125 Am. St. Rep. 915.

Annotation: 16 A.L.R. 271.

In one case it was said: "When carefully handled, it is not dangerous either to its passengers or to other persons using the public highways who are themselves in the exercise of reasonable care. Its great capacity and power endow it with dangerous possibilities, but human agency—wanton or negligent agency—must call them into play. It would seem paradoxical to say in one breath that an automobile is a lawful vehicle, and in the next that it is dangerous per se, as dynamite, or a locomotive, or a mad bull is dangerous. If it belonged to the latter class, the rules of the common law would not permit its presence on public highways for general use." Annotation: 16 A.L.R. 271.

[2] Arkin v. Page, 287 Ill. 420, 123 N. E. 30, 5 A.L.R. 216; Daugherty v. Thomas, 174 Mich. 371, 140 N. W. 615, 45 L.R.A.(N.S.) 699, Ann. Cas. 1915A, 1163; Danforth v. Fisher, 75 N. H. 111, 71 A. 535, 21 L.R.A. (N.S.) 93, 139 Am. St. Rep. 670.

Annotation: 21 L.R.A.(N.S.) 93; 45 L.R.A.(N.S.) 699; 139 Am. St. Rep. 673; Ann. Cas. 1915A, 1170.

[3] Danforth v. Fisher, 75 N. H. 111, 71 A. 535, 21 L.R.A.(N.S.) 93, 139 Am. St. Rep. 670.

Annotation: 21 L.R.A.(N.S.) 93; 139 Am. St. Rep. 673.

See §§ 373 et seq. infra.

[4] Neubrand v. Kraft, 169 Iowa, 444, 151 N. W. 455, L.R.A.1915D, 691.

As to the liability of the owner of a car for injuries inflicted when driven by someone else, see §§ 353 et seq.

[5] See §§ 11, 12.

of other principles affecting it. For example, it is a general rule in the law of negligence that the care to be exercised in the use of any instrumentality is proportionate to the possibilities of injury from its careless use; and in a number of cases the courts have referred to the automobile as a dangerous instrumentality in the sense that a high degree of care must be exercised by the person operating it.[6] This "high degree" of care may be regarded as but ordinary care under the circumstances, the fact that the instrumentality used is an automobile constituting one of the circumstances. It has been asserted that the automobile is a dangerous instrumentality "when driven upon the highways in a careless and negligent manner,"[7] and that an automobile is a machine of such "dangerous potentialities" that it is negligence for the owner to intrust it to an incompetent or inexperienced person.[8]

§ 13. Automobile as Nuisance.—Since the use of highways by automobiles is lawful,[9] the motor vehicle cannot be regarded as a nuisance per se.[10] There is a difference of opinion upon the question whether an automobile is an attractive nuisance. The general view is that it is not,[11] although under certain

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[6] Annotation: 16 A.L.R. 272

It has been said: "The duty and responsibility of those driving them should be, and is, proportioned to the possibilities and dangers attending the use upon the public highways of such an instrumentality of travel and transportation." Annotation: 16 A.L.R. 272.

The court, in Weil v. Kreutzer, 134 Ky. 563, 121 S. W. 471, 24 L.R.A.(N.S.) 557, said: "The degree of care one must use always bears a direct ratio to the degree of injury which would probably be caused by negligence. When one comes through the highways of a city with a machine of such deadly force as an automobile, it is incumbent upon the driver to use great care that it be not driven against or over pedestrians. An automobile is nearly as deadly as, and much more dangerous than, a street car or even a railroad car. These are propelled along fixed rails, and all that the traveling public has to do to be safe is to keep off the tracks; but the automobile, with nearly as great weight and more rapidity, can be turned as easily as can an individual, and for this reason is far more dangerous to the traveling public than either the street car or the railway train."

It has been further said: "We cannot shut our eyes to the fact that automobiles are in a manner dangerous, and that they are in a measure a menace to the traveling public. Bearing in mind the number of accidents occurring daily, and the narrow escapes that pedestrians have, and the positive discomfort suffered by many people by reason of the fear of collision from these noiseless but powerful agencies, we do not hesitate to say that the most stringent regulations should be applied to them, and that presumptions in cases of accident should be against rather than in favor of their owners. We do not hold that they are dangerous agencies in such a sense as to make the owners absolutely responsible for all damages occasioned by collision, in whose hands soever they may be. We do decide, however, that they are of such potency for harm as to warrant a very high degree of responsibility upon the owners, both as to their operation and in the selection of parties to whom they intrust them." Annotation: 16 A.L.R. 272.

Where an automobile was out of repair so as to be unmanageable, it was deemed such a dangerous instrumentality that it was negligence to allow its use on the highway; and the owner was held liable for an injury caused by the operation of the car, although his agent, in charge thereof, was not negligent. Annotation: 16 A.L.R. 271.

In Allen v. Schultz, 107 Wash. 393, 181 P. 916, 6 A.L.R. 676, wherein it appeared that an accident resulted from a defect in the brake, the court said: "One who operates on the streets of a city such a dangerous instrumentality as an automobile is bound to take notice that he may be called upon to make emergency stops, and it is negligence on his part not to keep the automobile in such condition that such stops are possible."

[7] Annotation: 16 A.L.R. 272.

In King v. Smythe, 140 Tenn. 217, 204 S. W. 296, L.R.A.1918F, 293, the court said: "It is true that an automobile is not a dangerous instrumentality so as to make the owner liable, as in the case of a wild animal loose on the streets; but, as a matter of practical justice to those who are injured, we cannot close our eyes to the fact that an automobile possesses excessive weight, that it is capable of running at a rapid rate of speed, and, when moving rapidly upon the streets of a populous city, it is dangerous to life and limb, and must be operated with care."

[8] Parker v. Wilson, 179 Ala. 361, 60 So. 150, 43 L.R.A.(N.S.) 87 (obiter).

[9] See § 10, supra.

[10] Indiana Springs Co. v. Brown, 165 Ind. 465, 74 N. E. 615, 1 L.R.A.(N.S.) 238, 6 Ann. Cas. 656; State v. 1920 Studebaker Touring Car, 120 Or. 254, 251 P. 701, 50 A.L.R. 81.

[11] Gamble v. Uncle Sam Oil Co. 100 Kan. 74, 163 P. 627, L.R.A.1917D, 875; Jackson v. Mills Baking Co. 221 Mich. 64, 190 N. W. 740, 26 A.L.R. 906.

Annotation: 36 A.L.R. 156, 284, 285, s. 39 A.L.R. 486, 45 A.L.R. 982, 53 A.L.R. 1344, and 60 A.L.R. 1444.

An ordinary motor truck moving along a public street cannot be regarded as an at-circumstances the automobile has been held to be such a nuisance.[12] Where the owner finds an infant of tender years in his car, he is not absolved of liability by driving it from the car, but is required to exercise reasonable care to avoid injury to the child thereafter.[13]

§ 14. Automobile as Tool or Implement of Trade.—The question occasionally arises as to whether or not an automobile is a "tool," "implement," "instrument," "utensil," or "apparatus" within the meaning of debtor's exemption laws.[14] Obviously, the determination of this question depends to a large extent upon the wording of the statute and upon the specific factual situation involved. An automobile has been held not to be a tool or implement of trade within the meaning of the exemption laws.[15] A truck and an automobile owned by a farmer and used by him for general farm purposes, including the marketing of farm produce, have been held not to be farm "tools" or "instruments" within the meaning of an exemption statute, but are to be classed as "vehicles," where the statute contains the further classification of "the wagon or other vehicle, etc.," of a farmer as being exempt.[16] It has also been held that an automobile of a licensed professional chauffeur is not within a statute exempting "the tools and necessary implements to the extent of $200, used by the execution debtor in the practice of his trade or profession." [17]

II. PUBLIC REGULATION AND CONTROL

A. Power of Regulation

§ 15. Federal Government.—The power of the Federal government to regulate interstate commerce [18] gives it control over motor vehicles engaged in business between one state and another in the same degree as such control exists as to any other class of vehicles engaged in the same occupation. However, as to what constitutes "commerce" of an interstate character, the United States Supreme Court has given a definition which fails to include pleasure vehicles engaged in interstate travel.[19] Concerning police regulations within state limits, the United States government, under ordinary circumstances, has no constitutional authority. The power to regulate commerce among the states

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tractive or alluring vehicle to an intelligent boy about fifteen years old who is accustomed to the traffic of the streets. Gamble v. Uncle Sam Oil Co. 100 Kan. 74, 163 P. 627, L.R.A.1917D, 875.

[12] Annotation: 45 A.L.R. 993, s. 53 A.L.R. 1344, and 60 A.L.R. 1444.

In one instance an electric delivery truck which was left parked on the wrong side of the street so that its control lever could easily be reached from the curb side, with the switch plug in and the brakes not set, was treated as an attractive nuisance. Annotation: 45 A.L.R. 993, s. 53 A.L.R. 1344, and 60 A.L.R. 1444.

[13] Ziehm v. Vale, 98 Ohio St. 306, 120 N. E. 702, 1 A.L.R. 1381.

[14] See generally Exemptions [Also 11 R. C. L. p. 508, §§ 18 et seq.].

[15] Annotation: 2 A.L.R. 827.

[16] Annotation: 36 A.L.R. 670.

[17] Annotation: 36 A.L.R. 671.

The ground of the decision is stated by one of the judges as follows: "Taking the section in its ordinary meaning, I cannot think that the legislature, when using the two words 'tools' and 'implements' in the plural, and placing a limitation in value obviously upon a number of articles taken together, intended to include a single but very valuable article in the nature of a conveyance which the debtor uses as a carrier of passengers. Even if the carriage of passengers for hire came within the meaning of the word 'trade,' which I think it does not, I do not think a single valuable chattel, like an automobile, is within the meaning of the expression 'tools and implements.' When the legislature said to a debtor, in substance, 'You may possess and enjoy the tools and implements (in the plural) of your trade up to the value in all of $200, and you cannot be disturbed in their possession by execution,' I cannot believe that it means to say, 'You may acquire a single chattel of three or four, five or ten, times that value, use it as your means of livelihood in conveying passengers, and you shall not be disturbed.' This would exempt steamboats and aeroplanes, when so used." Annotation: 36 A.L.R. 671.

[18] U. S. Const. Art. 1, § 8.

[19] Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 S. Ct. 277, 13 Ann. Cas. 764.

has always been understood as limited by its terms and as a virtual denial of any power to interfere with the internal trade and business of the several states.[20]

§ 16. States.—The privilege of using public highways does not amount to an absolute and unqualified right, but is subject to regulation by the state acting under its police power as sovereign authority.[1] This power of regulation has expanded to meet changing conditions.[2] With the introduction and development of automobiles as a means of conveyance, it has advanced and has conferred ample authority to regulate their use.[3] Accordingly, the legislature of each state has the power to require the licensing of every motor vehicle operated within its boundaries and to establish detailed and reasonable regulations applicable to their use upon the public highways.[4] The speed at which they may be operated on the highways[5] and the highways and localities where they may be operated [6] fall within the scope of legislative power. The state may provide by statute that a failure to comply with any of the legislative regulations shall constitute a misdemeanor[7] or that persons driving automobiles shall be responsible in damages for all injuries which may be the result of a violation of any of the statutory provisions.[8] The constitutional provisions protecting persons from being compelled to testify against themselves have been held not to be applicable to legislation regulating the operation of motor vehicles and requiring, under penalty, the display of license numbers; nor do such laws infringe the constitutional inhibition of unreasonable searches.[9]

Such regulations may be applicable to roads and streets not public highways if used for travel by the public.[9a]

[20] United States v. Dewitt, 9 Wall. (U. S.) 41, 19 L. ed. 593.

[1] Re Schuler, 167 Cal. 282, 139 P. 685, Ann. Cas. 1915C, 706; Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035, 1 L.R.A.(N.S.) 215, 108 Am. St. Rep. 196, 3 Ann. Cas. 487; State v. Mayo, 106 Me. 62, 75 A. 295, 26 L.R.A.(N.S.) 502, 20 Ann. Cas. 512; Ex parte Kneedler, 243 Mo. 632, 147 S. W. 983, 40 L.R.A.(N.S.) 622, Ann. Cas. 1913C, 923; State v. Swagerty, 203 Mo. 517, 102 S. W. 483, 10 L.R.A. (N.S.) 601, 120 Am. St. Rep. 671, 11 Ann. Cas. 755; State v. Chandler, 131 Me. 262, 161 A. 148, 82 A.L.R. 1389.

Annotation: 1 L.R.A.(N.S.) 215; 10 L.R.A.(N.S.) 601; 108 Am. St. Rep. 212; 3 Ann. Cas. 495; 11 Ann. Cas. 728; 20 Ann. Cas. 516; Ann. Cas. 1916D, 58.

The regulation, maintenance, and protection of highways, as well as the safety of travelers upon them, is within the police power of the jurisdiction maintaining them. Ashland Transfer Co. v. State Tax Commission, 247 Ky. 144, 56 S. W. (2d) 691, 87 A.L.R. 534.

[2] Jones v. Hoge, 47 Wash. 663, 92 P. 433, 14 L.R.A.(N.S.) 216, 125 Am. St. Rep. 915.

McIntyre v. Coote, 19 Ont. L. Rep. 9, 16 Ann. Cas. 395.

As to delegation of legislative power, see CONSTITUTIONAL LAW.

Neither exact precision nor scientific calculation is essential to render regulations of highway traffic reasonable. Ashland Transfer Co. v. State Tax Commission, 247 Ky. 144, 56 S. W. (2d) 691, 87 A.L.R. 534.

[3] State v. Mayo, 106 Me. 62, 75 A. 295, 26 L.R.A.(N.S.) 502, 20 Ann. Cas. 512; Dudley v. Northampton Street R. Co. 202 Mass. 443, 89 N. E. 25, 23 L.R.A.(N.S.) 561; Com. v. Kingsbury, 199 Mass. 542, 85 N. E. 848, L.R.A.1915E, 264, 127 Am. St. Rep. 513.

[4] See §§ 90 et seq.

[5] See §§ 37 et seq.

[6] See §§ 48 et seq.

[7] See § 755.

[8] Mahoney v. Maxfield, 102 Minn. 377, 113 N. W. 904, 14 L.R.A.(N.S.) 251, 12 Ann. Cas. 289.

Annotation: 12 Ann. Cas. 291.

The legislature may impose a lien on an automobile for injuries done by it, which shall be superior to that of a chattel mortgage executed after the passage of the statute, but before the injury was done, and which shall be valid against the owner, although the machine was at the time of the injury in the possession of a stranger. Merchants & P. Bank v. Brigman, 106 S. C. 362, 91 S. E. 332, L.R.A.1917E, 925.

[9] People v. Schneider, 139 Mich. 673, 103 N. W. 172, 69 L.R.A. 345, 5 Ann. Cas. 790.

Annotation: 69 L.R.A. 345; 1 L.R.A. (N.S.) 215; 108 Am. St. Rep. 218; 5 Ann. Cas. 793.

[9a] Crossler v. Safeway Stores, 51 Idaho, 413, 6 P. (2d) 151, 80 A.L.R. 463.

Annotation: 80 A.L.R. 469.

It may include a privately owned and operated toll road within the corporate limits of a village. Weirich v. State, 140 Wis. 98, 121 N. W. 652, 22 L.R.A.(N.S.) 1221, 17 Ann. Cas. 802.

See also § 66 infra.

§ 17. —State Regulation of Use of Highways by Private Motor Vehicles for Hire.—It is well established that uniform regulations necessary for public safety and order may rightfully be prescribed by the state[10] for the government of owners and operators of motor vehicles for hire; that the state cannot, however, impose upon a private carrier the duties and liabilities of a common carrier, since such would be a taking of private property for public use without compensation and denial of due process of law, and for the same reason the state cannot arbitrarily change its status from that of a private carrier to a public carrier;[11] and that imposing on private carriers which haul freight for hire over the public highways of the state the duty of obtaining a permit from the public service commission before using the highways for that purpose from considerations of public safety and in view of the heavy burden of maintaining the highways in reasonable repair at public expense is proper regulation.[12]

The state may regulate automobiles to be rented and driven by a lessee or his privy.[12a]

§ 18. —State Regulation of Motor Vehicle Carriers as Affected by Interstate Commerce Clause.—The Constitution of the United States provides that Congress shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[13] Acting under this power, Congress has assumed the authority to regulate interstate commerce of certain kinds by means of the Interstate Commerce Act,[14] which governs interstate commerce by railroads and other designated agencies, but which clearly does not assume to regulate interstate commerce by motor vehicles. Indeed, until recently, Congress had not assumed to regulate commerce between the states carried on by this means. In the absence of action by Congress, the problem arose as to how far the states might go in regulating such commerce.[15] Within reasonable limitations, the states may regulate the use by common carriers of the public highways, but they have no right to prohibit it altogether.[16] It was formerly held that since Congress had not legislated with reference to the use of the public highways by automobiles, a common carrier by motor vehicle was not exempt, by virtue of the interstate character of its business, from the operation of a state law requiring common carriers by motor vehicle upon the state highways to obtain a certificate of convenience and necessity from the state's public service commission.[17] But it is now held by the Supreme Court of the United States that a statute which would prohibit common carriers by motor vehicle engaged exclusively in interstate traffic from using the highways of the state without a certificate of convenience and necessity is, even though Congress has not acted, violative of the purpose of the interstate commerce clause of the Federal Constitution, which, by expressly committing to Congress the power to regulate commerce among the states, impliedly withholds from the states the power to prohibit that commerce.[18]

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[10] Frost & F. Trucking Co. v. Railroad Commission, 271 U. S. 583, 70 L. ed. 1101, 46 S. Ct. 605, 47 A.L.R. 457; Michigan Pub. Utilities Commission v. Duke, 266 U. S. 570, 69 L. ed. 445, 45 S. Ct. 191, 36 A.L.R. 1105.

Annotation: 56 A.L.R. 1056.

[11] Frost & F. Trucking Co. v. Railroad Commission, 271 U. S. 583, 70 L. ed. 1101, 46 S. Ct. 605, 47 A.L.R. 457; Michigan Pub. Utilities Commission v. Duke, 266 U. S. 570, 69 L. ed. 445, 45 S. Ct. 191, 36 A.L.R. 1105; State ex rel. Public Utilities Commission v. Nelson, 65 Utah, 457, 238 P. 237, 42 A.L.R. 849.

[12] Rutledge Co-op. Asso. v. Baughman, 153 Md. 297, 138 A. 29, 56 A.L.R. 1042; Barbour v. Walker, 126 Okla. 227, 259 P. 552, 56 A.L.R. 1049.

[12a] Levy v. Daniels' U-Drive Auto Renting Co. 108 Conn. 333, 143 A. 163, 61 A.L.R. 846; Robinson v. Bruce Rent-A-Ford Co. 205 Iowa, 261, 215 N. W. 724, 61 A.L.R. 851.

Annotation: 77 A.L.R. 895.

[13] Art. 1, § 8.

[14] U. S. C. A. title 49, §§ 1–27.

[15] Annotation: 36 A.L.R. 1111, s. 38 A.L.R. 291.

For a full discussion of the Federal Motor Carrier Act, see MOTOR TRANSPORTATION COMPANIES.

[16] Buck v. Kuykendall, 267 U. S. 307, 69 L. ed. 623, 45 S. Ct. 324, 38 A.L.R. 286.

In George W. Bush & Sons Co. v. Maloy, 267 U. S. 317, 69 L. ed. 627, 45 S. Ct. 326, it was held that the state had no right to deny the use of its highways to a carrier engaged in commerce exclusively interstate, even though the denial was placed on the ground that such use would be "prejudicial to the welfare and convenience of the public."

[17] Buck v. Kuykendall (D. C.) 295 F. 197, reversed in 267 U. S. 307, 69 L. ed. 623, 45 S. Ct. 324, 38 A.L.R. 286.

All reasonable regulations with reference to the matter of registration, license fees, and the like are within the power of the state and apply to automobiles engaged in interstate traffic, as well as to those operated exclusively within the state.[19] Accordingly, it is within the province of the railroad commissioners to impose reasonable and impartial regulations in the use of highways by persons engaged in or purposing to engage in the transportation of passengers and freight by automobile as a common carrier.[20] While uniform regulations necessary for public safety and order in respect of interstate traffic by motor vehicles may rightfully be prescribed by the state, it cannot impose upon a private carrier the duties and liabilities of a common carrier.[1]

§ 19. **Municipalities.**—It is well settled as a general rule that municipalities having the power to regulate the use of their streets may enact valid rules and regulations for the government of motor vehicles within their boundaries, so long as such rules and regulations are not in conflict with, or repugnant to, legislative enactments governing the use of such vehicles.[2] A city, then, in the absence of express or implied restrictions imposed by the legislature, may pass ordinances regulating the use of automobiles.[3] Thus, the right of a municipality to require the taking out of a municipal license before an automobile may be used regularly within its limits,[4] to require that persons seeking to operate automobiles shall furnish evidence of their competency,[5] to provide for license numbers[6] and their exhibition,[7] to require the use of reasonable safety appliances,[8] and to fix limitations as to speed,[9] have been sustained. Where, however, the rule is established that a municipal corporation has only such powers as may be specially granted by the legislature, in order to find authority to pass an ordinance regulating the use of automobiles, it must appear that a charter provision or statute exists which is broad enough to cover the terms of the ordinance.[10] Obviously, a provision in a statute regulating the use of motor vehicles on the highways, that nothing in it shall affect the power of the municipality to make and enforce regulations affecting vehicles which are

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[18] Buck v. Kuykendall, 267 U. S. 307, 69 L. ed. 623, 45 S. Ct. 324, 38 A.L.R. 286.

The court, while conceding that appropriate state regulations, adopted primarily to promote safety upon the highways and conservation in their use, are not obnoxious to the commerce clause, where the indirect burden imposed upon interstate commerce is not unreasonable, said of this statute: "The provision here in question is of a different character. Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons, while permitting it to others for the same purpose and in the same manner. Moreover, it determines whether the prohibition shall be applied by resort, through state officials, to a test which is peculiarly within the province of Federal action,—the existence of adequate facilities for conducting interstate commerce. The vice of the legislation is dramatically exposed by the fact that the state of Oregon had issued its certificate, which, despite existing facilities, declared that public convenience and necessity required the establishment by Buck of the auto stage line between Seattle and Portland. Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the commerce clause." Ibid. See also George W. Bush & Sons Co. v. Maloy, 267 U. S. 317, 69 L. ed. 627, 45 S. Ct. 326.

[19] Hendrick v. Maryland, 235 U. S. 610, 59 L. ed. 385, 35 S. Ct. 140; Ashland Transfer Co. v. State Tax Commission, 247 Ky. 144, 56 S. W. (2d) 691, 87 A.L.R. 534; Re Opinion of the Justices, 81 N. H. 566, 129 A. 117, 39 A.L.R. 1023.

A state may require private motor carriers of property on its highways to obtain a license, pay a tax, and file a liability insurance policy, where the regulations to which applicants for licenses are required to conform and the license fees required are not unreasonable and the tax and license fees over the expenses of administration go to the state highway fund. Continental Baking Co. v. Woodring, 286 U. S. 352, 76 L. ed. 1155, 52 S. Ct. 595; Hicklin v. Coney, 290 U. S. 169, 78 L. ed. 247, 54 S. Ct. 142.

Reasonable regulations of the use of highways which do not discriminate against the interstate commerce which may be affected do not impose an unconstitutional burden thereon. Continental Baking Co. v. Woodring, 286 U. S. 352, 76 L. ed. 1155, 52 S. Ct. 595, 81 A.L.R. 1402.

[20] Annotation: 36 A.L.R. 1112, s. 38 A.L.R. 291.

The state is not deprived of its power and duty as trustee of the public highways for the benefit of the people of the state to enact reasonable regulations in the exercise of its police power over such highways by § 9 of the Federal Highway Act of November 9, 1921 (42 Stat. at L. 212, chap. 119, U. S. C. A. title 23, § 1), providing that "all highways constructed or reconstructed under the provisions of this act shall be free from tolls of all kinds" (Liberty Highway Co. v. Michigan Pub. Utilities Commission, (D. C.) 294 F. 703). But such provision is sufficient to indicate the purpose of Congress that interstate traffic shall not be barred from such highways (Buck v. Kuykendall, 267 U. S. 307, 69 L. ed. 623, 45 S. Ct. 324, 38 A.L.R. 286; Geo. W. Bush & Sons Co. v. Maloy, 267 U. S. 317, 69 L. ed. 627, 45 S. Ct. 326).

[1] Michigan Pub. Utilities Commission v. Duke, 266 U. S. 570, 69 L. ed. 445, 45 S. Ct. 191, 36 A.L.R. 1105.

A state statute imposing conditions on use of highways by motor vehicle carriers may not be construed as attempting to convert private contract carriers by motor into common carriers and thus take their property for public use without adequate compensation and to deprive them of their property without due process of law, where, though the regulations imposed upon the two classes are in some instances similar if not identical, the provisions applicable to contract carriers are distinctly set forth and separately stated, and the statute does not compel private contract carriers to assume the duties and obligations of common carriers or interfere with their freedom to limit their business to that of carrying under private contracts. Stephenson v. Binford, 287 U. S. 251, 77 L. ed. 288, 53 S. Ct. 181.

[2] Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A.L.R. 1172; Roper v. Greenspon, 272 Mo. 288, 198 S. W. 1107, L.R.A.1918D, 126.

Annotation: 21 A.L.R. 1186.

The right of a citizen to travel upon the public highways and to transport his property thereon, either by horse-drawn carriage or wagon or automobile, is not a mere privilege which a city may permit or prohibit at will, but a common right, which he has under his right to life, liberty, and the pursuit of happiness. Thompson v. Smith, 155 Va. 367, 154 S. E. 579, 71 A.L.R. 604.

It has been held, however, that the general power of a city under its charter to regulate the use of its streets did not include the right to enact an ordinance requiring the examination of operators of automobiles before the issuing of a license. (Annotation: 1 L.R.A.(N.S.) 215), or to establish a general system of regulation and licensing of motor vehicles. (Ex parte Efferson, 61 Tex. Crim. Rep. 237, 134 S. W. 686, 37 L.R.A.(N.S.) 303.)

An ordinance regulating the use of automobiles in public thoroughfares must be reasonable and must not conflict with general laws. Schell v. DuBois, 94 Ohio St. 93, 113 N. E. 664, L.R.A.1917A, 710.

For a discussion of the conflict between statutes and local regulations, see infra, §§ 68 et seq.

[3] People v. Schneider, 139 Mich. 673, 103 N. W. 172, 69 L.R.A. 345, 5 Ann. Cas. 790; Brazier v. Philadelphia, 215 Pa. 297, 64 A. 508, 7 Ann. Cas. 548.

Annotation: 69 L.R.A. 345.

In Bogue v. Bennett, 156 Ind. 478, 60 N. E. 143, 83 Am. St. Rep. 212, it was declared that it might be stated generally that vehicles in customary use and not requiring tracks for their operation, whether drawn or driven by animal or other power, had the right, in the absence of state or local legislation, to travel upon the streets and alleys of a municipal corporation without first obtaining the consent of its governing body.

[4] See infra, § 94.

[5] People v. Schneider, 139 Mich. 673, 103 N. W. 172, 69 L.R.A. 345, 5 Ann. Cas. 790; Mahoney v. Maxfield, 102 Minn. 377, 113 N. W. 904, 14 L.R.A.(N.S.) 251, 12 Ann. Cas. 289; Brazier v. Philadelphia, 215 Pa. 297, 67 A. 508, 7 Ann. Cas. 548.

Annotation: 69 L.R.A. 345; 1 L.R.A. (N.S.) 217; 3 Ann. Cas. 495.

[6] People v. Schneider, 139 Mich. 673, 103 N. W. 172, 69 L.R.A. 345, 5 Ann. Cas. 790; Mahoney v. Maxfield, 102 Minn. 377, 113 N. W. 904, 14 L.R.A.(N.S.) 251, 12 Ann. Cas. 289; Brazier v. Philadelphia, 215 Pa. 297, 64 A. 508, 7 Ann. Cas. 548.

[7] People v. Schneider, 139 Mich. 673, 103 N. W. 172, 69 L.R.A. 345, 5 Ann. Cas. 790; Mahoney v. Maxfield, 102 Minn. 377, 113 N. W. 904, 14 L.R.A.(N.S.) 251, 12 Ann. Cas. 289; Brazier v. Philadelphia, 215 Pa. 297, 64 A. 508, 7 Ann. Cas. 548.

[8] Annotation: 1 L.R.A.(N.S.) 219; 108 Am. St. Rep. 218; 5 Ann. Cas. 793.

[9] People v. Schneider, 139 Mich. 673, 103 N. W. 172, 69 L.R.A. 345, 5 Ann. Cas. 790; Mahoney v. Maxfield, 102 Minn. 377, 113 N. W. 904, 14 L.R.A.(N.S.) 251, 12 Ann. Cas. 289; Brazier v. Philadelphia, 215 Pa. 297, 64 A. 508, 7 Ann. Cas. 548.

A charter provision giving the common council authority to control, prescribe, and regulate the manner in which the highways are to be used and enjoyed is sufficient to sustain an ordinance which regulates the speed and operation of automobiles and requires their registration and numbering. People v. Schneider, 139 Mich. 673, 103 N. W. 172, 69 L.R.A. 345, 5 Ann. Cas. 790.

[10] Ex parte Epperson, 61 Tex. Crim. Rep. 237, 134 S. W. 685, 37 L.R.A.(N.S.) 303.

used within their limits for hire, does not give a municipality authority over vehicles which are operated for hire between it and another municipality or through it between other municipalities.[11]

The power of a municipality to regulate the use of vehicles or other means of transportation within the city limits extends to streets, alleys or driveways which, if properly dedicated, would be accepted and are used by the public the same as other streets and alleys within the municipality.[11a]

The police power of a municipality to regulate the use of automobiles kept for hire, to be driven by the lessee, is not dependent upon such automobiles being operated as common carriers. Such power is limited only by the extent of the public need for such regulation in the promotion of the peace, safety, and morals of the municipality.[11b]

The general rule against delegation of legislative power does not preclude the conferring upon local subdivisions or administrative officers the power to prescribe or vary regulations concerning motor vehicles used on the highways.[12] It may delegate to boards of aldermen or councilmen or to a highway commission the power to designate roads and streets on which automobiles shall not be used.[13]

In considering the subject of municipal control of automobiles, it is of importance to bear in mind that the statutes of the various jurisdictions now make elaborate provisions defining the scope of municipal regulations.

§ 20.—Statutes Affecting Municipal Regulations.—As indicated in the preceding section,[14] the statutes of the various jurisdictions now make elaborate provisions defining the scope of municipal regulations. The legislature may affirmatively authorize the passage of reasonable municipal regulations,[15] or it may, by statute, directly prohibit municipalities from enacting any ordinance regulating or licensing automobiles or excluding them from the use of the highways,[16] or, by enacting a general law, impliedly deprive the local authorities of the right to pass ordinances which would be inconsistent with the legislative provisions.[17] But simply because a state undertakes to impose certain regulations applicable to the entire commonwealth, a city is not necessarily deprived of the power of imposing other regulations adapted to its own peculiar conditions, if these are not inconsistent with those of a general character prescribed for the entire commonwealth.[18]

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[11] Argenta v. Keath, 130 Ark. 334, 197 S. W. 686, L.R.A.1918B, 888.

[11a] Crossler v. Safeway Stores, 51 Idaho, 413, 6 P. (2d) 151, 80 A.L.R. 463.
Annotation: 80 A.L.R. 469.

[11b] Hodge Drive-It-Yourself Co. v. Cincinnati, 123 Ohio St. 284, 175 N. E. 196, 77 A.L.R. 889, affirmed in 284 U. S. 335, 76 L. ed. 323, 52 S. Ct. 144.
Annotation: 77 A.L.R. 895.

[12] Sproles v. Binford, 286 U. S. 374, 76 L. ed. 167, 52 S. Ct. 581; Re Hinkelman, 183 Cal. 392, 191 P. 682, 11 A.L.R. 1222; Harder's Fire Proof Storage & Van Co. v. Chicago, 235 Ill. 58, 85 N. E. 245, 14 Ann. Cas. 536; Ashland Transfer Co. v. State Tax Commission, 247 Ky. 144, 56 S. W. (2d) 691, 87 A.L.R. 534; Smith v. State, 130 Md. 482, 100 A. 778; Com. v. Kingsbury, 199 Mass. 542, 85 N. E. 848, L.R.A.1915E, 264, 127 Am. St. Rep. 513; State v. Wetzel, 208 Wis. 603, 243 N. W. 768, 86 A.L.R. 274; Interstate Trucking Co. v. Dammann, 208 Wis. 116, 241 N. W. 625, 82 A.L.R. 1080.
Annotation: 87 A.L.R. 546; 52 L.R.A. (N.S.) 957.

[13] Com. v. Kingsbury, 199 Mass. 542, 85 N. E. 848, L.R.A.1915E, 264, 127 Am. St. Rep. 513.

Where matters of a "merely local or private nature" are assigned exclusively to a local legislative body, such body may prohibit the use of automobiles upon highways. Re Rogers, 7 East. L. R. (Pr. Edw. Isl.) 212, 15 Ann. Cas. 1167. Annotation: 15 Ann. Cas. 1169.

[14] See § 19.

[15] Annotation: 12 Ann. Cas. 291.

[16] Annotation: 52 L.R.A.(N.S.) 958; 15 Ann. Cas. 1170.

For a discussion of conflict between statutes and ordinances, see §§ 68 et seq.

[17] Brazier v. Philadelphia, 215 Pa. 297, 64 A. 508, 7 Ann. Cas. 548.
Annotation: 11 Ann. Cas. 728.

[18] Mahoney v. Maxfield, 102 Minn. 377, 113 N. W. 904, 14 L.R.A.(N.S.) 251, 12 Ann. Cas.

§ 21. State and Municipal Regulation of Federal Agencies.—The state, in the exercise of its police power, may, within certain limits, make regulations which affect those engaged in handling United States mails.[19] One in charge of a vehicle transporting United States mail is not exempt from the operation of state statutes and municipal ordinances regulating traffic on the highways, although by Federal statute the highways are post roads.[20] However, the state may not require qualifications in addition to those which the Federal government has pronounced sufficient by requiring a postoffice employee to cease driving a government motor truck in the transportation of mail over a post road until he obtains a license by submitting to examination before a state official and paying a fee.[1]

B. Validity of Regulations

§ 22. Generally.—Obviously, in determining the validity of regulations pertaining to automobiles, the general rules of law governing the constitutionality [2] and validity of statutes [3] and ordinances [4] apply. The law of automobiles primarily is but an application of well-established legal principles to the factual situation the advent of the motor vehicle has created. The validity of particular regulations is discussed in sections dealing specifically with such regulations.[5]

§ 23. Class Legislation.—As indicated in a preceding section,[6] the privilege of using public highways does not amount to an unqualified right, but is subject to regulation by the state, acting under its police power as sovereign authority. This power of regulation is not, however, unlimited, but, in the case of automobiles as in all cases, is subservient to the constitutional strictures against class legislation,[7] though motor vehicles have been recognized as properly and reasonably forming a separate class for legislative purposes.[8] They are so different from vehicles propelled by animals that they may be placed by the legislature in a class by themselves for the purpose of regulation.[9] Accordingly a statute or municipal ordinance is not unconstitutional as being special legislation merely because it legislates solely upon the question of the operation of automobiles, and does not attempt to regulate the operation of all vehicles using the public highways.[10] There is also room for

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289; Brazier v. Philadelphia, 215 Pa. 297, 64 A. 508, 7 Ann. Cas. 548.

[19] Com. v. Closson, 229 Mass. 329, 118 N. E. 653, L.R.A.1918C, 939.

[20] Com. v. Closson, 229 Mass. 329, 118 N. E. 653, L.R.A.1918C, 939.

Annotation: L.R.A.1918C, 940.

[1] Johnson v. Maryland, 254 U. S. 51, 65 L. ed. 126, 41 S. Ct. 16.

[2] See CONSTITUTIONAL LAW [Also 6 R. C. L. p. 1].

[3] See STATUTES [Also 25 R. C. L. p. 750].

[4] See MUNICIPAL CORPORATIONS [Also 19 R. C. L. p. 678].

[5] See §§ 24 et seq.

See also §§ 90 et seq.

[6] See § 22.

[7] See CONSTITUTIONAL LAW [Also 6 R. C. L. p. 1].

[8] Continental Baking Co. v. Woodring, 286 U. S. 352, 76 L. ed. 1155, 52 S. Ct. 595, 81 A.L.R. 1402; Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035, 1 L.R.A.(N.S.) 215, 108 Am. St. Rep. 196, 3 Ann. Cas. 487; State v. Mayo, 106 Me. 62, 75 A. 295, 26 L.R.A.(N.S.) 502, 20 Ann. Cas. 512; State v. Swagerty, 203 Mo. 517, 102 S. W. 483, 10 L.R.A.(N.S.) 601, 120 Am. St. Rep. 671, 11 Ann. Cas. 725; Allen v. Smith, 84 Ohio St. 283, 95 N. E. 829, Ann. Cas. 1912C, 611.

Annotation: 1 L.R.A.(N.S.) 215, 225; 26 L.R.A.(N.S.) 502; 108 Am. St. Rep. 212; 3 Ann. Cas. 495; 11 Ann. Cas. 728; 20 Ann. Cas. 516.

[9] Annotation: L.R.A.1918D, 134.

The law regulating the use of automobiles alone, of all the vehicles which use the highways, is not invalid special legislation. State v. Swagerty, 203 Mo. 517, 102 S. W. 483, 10 L.R.A.(N.S.) 601, 120 Am. St. Rep. 671, 11 Ann. Cas. 725.

The constitutionality of a provision that motor vehicles operated or driven upon any highway should, within the usual period, display a rear light was upheld, principally against the contention that it was unreasonable to require an automobile at rest to display a rear light, without also requiring a farm wagon to do so. Annotation: 78 A.L.R. 815.

[10] Christy v. Elliott, 216 Ill. 31, 74 N. E.

discrimination between different classes of owners of automobiles, without infringing on these constitutional guaranties, as, for instance, an exemption from a registration statute of vehicles owned by the manufacturer or vendor thereof and kept in stock for sale, and not for private use or hire.[11] A licensing ordinance applying only to those who use their automobiles for merely private business or pleasure has, however, been considered invalid.[12]

A separate classification, for regulation purposes, of automobiles kept and used for the purpose of renting them to be driven by the lessees upon the public streets, is not an unreasonable classification.[12a]

C. Specific Regulations

1. In General

§ 24. **Generally.**—The advent and development of the automobile have been accompanied by a flood of legislation regulating the operation and use of motor vehicles. This legislation is of a varied nature. Because of it, a detailed consideration of particular enactments is essential to the comprehensiveness of any treatise on the law of automobiles.

2. Lights

a. In General

§ 25. **Generally.**[13]—The statutes of the various jurisdictions provide with considerable detail for lights on motor vehicles. These enactments specify with great particularity the time during which lights are required, the character of such lights, the different types of vehicles which must carry lights, etc. It is therefore necessary, in order to ascertain the law of any state on this point, to study the statutes of that state. Legal principles, however, may be formulated which are generally applicable.

§ 26. **Validity of Enactments.**—Obviously, general principles of constitutional law [14] and statutory interpretation [15] govern in determining the validity of legislation regulating the use of lights on automobiles.[16] The courts require a statute to be definite and reasonable.[17] A statute making it unlawful to operate an automobile the front lights of which project a light of such glare and brilliancy as seriously to interfere with the sight of, or temporarily blind the vision of, a driver of a vehicle approaching from the opposite direc-

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1035, 1 L.R.A.(N.S.) 215, 108 Am. St. Rep. 196, 3 Ann. Cas. 487; Com. v. Nolan, 189 Ky. 34, 224 S. W. 506, 11 A.L.R. 202; State v. Mayo, 106 Me. 62, 75 A. 295, 26 L.R.A. (N.S.) 502, 20 Ann. Cas. 512; Mahoney v. Maxfield, 102 Minn. 377, 113 N. W. 904, 14 L.R.A.(N.S.) 251, 12 Ann. Cas. 289; State v. Swagerty, 203 Mo. 517, 102 S. W. 483, 10 L.R.A.(N.S.) 601, 120 Am. St. Rep. 671, 11 Ann. Cas. 725; Schultz v. State, 89 Neb. 34, 130 N. W. 972, 33 L.R.A. (N.S.) 403, Ann. Cas. 1912C, 495; Allen v. Smith, 84 Ohio St. 283, 95 N. E. 829, Ann. Cas. 1912C, 611.

Annotation: 1 L.R.A.(N.S.) 215; 26 L.R.A.(N.S.) 502; 108 Am. St. Rep. 212; 3 Ann. Cas. 495; 12 Ann. Cas. 291; 11 Ann. Cas. 728; 20 Ann. Cas. 516.

[11] Annotation: 1 L.R.A.(N.S.) 215; 5 Ann. Cas. 793.

[12] Annotation: 108 Am. St. Rep. 219; 5 Ann. Cas. 793.

[12a] Hodge Drive-It-Yourself Co. v. Cincinnati, 123 Ohio St. 284, 175 N. E. 196, 77 A.L.R. 889, affirmed in 284 U. S. 335, 76 L. ed. 323, 52 S. Ct. 144.

Annotation: 77 A.L.R. 895.

[13] As to the effect of a violation of regulations as to lights upon the right to recover for injuries, see infra, § 412.

[14] See Constitutional Law [Also 6 R. C. L. p. 1].

[15] See Statutes [Also 25 R. C. L. p. 750].

[16] With reference to provisions that every trailer on the highways should have in the rear at night a red light visible for at least 100 feet, and that trailers more than 6 feet wide should have also a white light at the left, so fixed as to be seen from both the front and rear, it was declared that there was no doubt as to the legislative power so to enact. Annotation: 78 A.L.R. 815.

[17] Annotation: 11 A.L.R. 1226, s. 78 A.L.R. 815.

tion is obnoxious to the rule which requires some degree of certainty in informing one accused of crime of the nature of the accusation against him, since glare and brilliancy are not described by any standard that is certain and that may be known in advance by the citizen.[18] But an ordinance imposing absolute liability for operating a motor car upon a city street, between certain hours, without displaying a red rear light was held valid against an objection that it was invalid for failure to make intent an element of the offense.[19] A statute requiring a display of one or more white lights has been held not void for uncertainty on the ground that it does not designate the person who should be held liable for a violation thereof, it being held that the intention of the legislature was to prohibit during certain hours the use of motor vehicles not lighted in the manner designated, and that it, by implication, designated the person who should be liable for a violation, the prohibition being against the "use," and consequently the "user" being the one who was intended to be held responsible for a violation of the statute.[20] A provision of a jitney bus act requiring the maintenance of a light in the tonneau of cars during certain hours if the top is up, which was designed to prevent crime, has been held not invalid on the ground that it was unreasonable and unnecessary.[1] A statutory requirement that motor vehicles be equipped at night with lights which must be kept burning was upheld as a reasonable regulation even though the driver was required by another provision to dim his lights upon approaching cars coming in the opposite direction.[2]

The legislature may, in prescribing the quality of headlights which may be used on automobiles, establish a testing agency to determine whether or not the lights in use comply with the law.[2a]

b. CONSTRUCTION OF ENACTMENTS

§ 27. Generally.—The general rules relating to statutory interpretation[3] govern the construction of statutes or ordinances relating to lights on automobiles. The situations themselves, although ordinarily similar or analogous,[4] by virtue of variations in statutory provisions and variations in factual settings, are of a miscellaneous nature. While the legislature constitutionally may make the one in charge of an automobile absolutely liable for failure to maintain a rear light, although it may have gone out without his knowledge,[5] where the provision of the statute is that no one shall allow a motor vehicle owned by him to be operated on the streets after dark without a rear red light, knowledge, express or implied, is essential to liability.[6] Moreover, the provisions of such a statute do not impose liability upon the owner during the time that the vehicle is under the control of another person.[7]

A regulation of the lights on "motor cars," excepting from its provisions bicycles and tricycles, is applicable to motorcycles.[7a]

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[18] Annotation: 11 A.L.R. 1226, s. 78 A.L.R. 815.

[19] Annotation: 11 A.L.R. 1226, s. 78 A.L.R. 815.

[20] Annotation: 11 A.L.R. 1226, s. 78 A.L.R. 815.

[1] Annotation: 11 A.L.R. 1226, s. 78 A.L.R. 815.

[2] Annotation: 78 A.L.R. 815.

Re Hinkelman, 183 Cal. 392, 191 P. 682, 11 A.L.R. 1222.

[3] See STATUTES [Also 25 R. C. L. p. 750].

[4] For example, see §§ 28 et seq.

[5] See § 778.

[6] Annotation: 11 A.L.R. 1227, 1228, s. 78 A.L.R. 815.

[7] Annotation: 11 A.L.R. 1228, 78 A.L.R. 815.

The intention of the legislature is said to be to impose the liability upon any person other than the owner, when such other person was operating the vehicle and it was under his control. Annotation: 11 A.L.R. 1228, s. 78 A.L.R. 815.

[7a] Webster v. Terry [1914] 1 K. B. 51, Ann. Cas. 1917A, 226.

§ 28. **As Affected by Purpose.**—In construing statutes relating to automobile headlights, the courts frequently consider the purpose of the legislature.[8] The purpose of requiring lights on automobiles is not merely to warn others on the highway, but to guide the operator of the car.[9]

A statutory provision that "every motor vehicle . . . shall, while in operation on the public highway" during a specified time, carry certain lights has been construed, in connection with other provisions, including one that every motor vehicle shall carry a lamp so placed as to illuminate conspicuously the number plate on the rear, as being only regulatory, and not prohibitory, the intention being merely to impose a penalty for noncompliance, rather than to outlaw cars not complying therewith.[10]

§ 29. **Time Requirements.**—In the regulations as to lights, it is usually specified in some general way the time within which lights must be shown, such as from sunset to sunrise; sometimes it is even required that lights should be shown at any time when there is not sufficient light to render objects discernible. In a case involving an ordinance making it unlawful for the driver of an automobile or other wheeled vehicle to use the streets of a city without displaying "until daybreak" one or more lights, "daybreak" was construed to mean the dawn or first appearance of light in the morning.[11] The words "and at any other time when there is not sufficient light to render clearly discernible any person on the highway at a distance of 200 feet ahead," which immediately followed the phrase "a half hour after sunset to a half hour before sunrise," were construed as intending not to limit the requirement as to lights, but to enlarge it.[12]

§ 30. **Intensity or Visibility Requirements.**[13]—The intensity of the lights is usually specified. The most general regulation is that they must be visible. Some statutes add to this that they must be visible a reasonable distance. In the case of headlights, a common requirement is that they must be such as to enable the driver to distinguish clearly an object a certain distance ahead. A provision that "the minimum requirements for head lamps . . . shall be such as to enable the driver to clearly distinguish a . . . substantial object 200 feet ahead, and the design, adjustment, and operation of such head lamps shall be such as to avoid dangerous glare or dazzle," does not prohibit lamps properly equipped with ordinary ribbed lenses, the court noting that any headlight projecting light of an intensity sufficient to enable the driver to distinguish an object 200 feet ahead would necessarily have some glare or dazzle.[14]

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[8] **In construing such a statute** the court may take into consideration the fact that automobiles are in common use and that certain lights used on them oftentimes blind the driver of a vehicle approaching in the opposite direction, and that the purpose of the legislature was to correct this condition. State v. Claiborne, 185 Iowa, 170, 170 N. W. 417, 3 A.L.R. 392.

[9] Lauson v. Fond du Lac, 141 Wis. 57, 123 N. W. 629, 25 L.R.A.(N.S.) 40, 135 Am. St. Rep. 30.

Annotation: 11 A.L.R. 1229, s. 78 A.L.R 815.

For example, a statute providing that there shall be exhibited on automobiles operated at night "one or more lamps showing white lights visible within a reasonable distance in the direction toward which the automobile is proceeding" does not require the lights for the guidance and benefit only of those approaching the automobile, but also for the guidance and benefit of the person in charge of the car. Lauson v. Fond du Lac, 141 Wis. 57, 123 N. W. 629, 25 L.R.A.(N.S.) 40, 135 Am. St. Rep. 30.

Annotation: 11 A.L.R. 1229, s. 78 A.L.R. 815.

The purpose of a statute requiring motor vehicles to have lights visible at least 200 feet in the direction in which they are proceeding was held not to be simply to warn persons in front of it of its approach, but also to light the road for the guidance and direction of the driver. Annotation: 78 A.L.R. 818.

The purpose of a statute requiring front and rear lights on automobiles is said to be to render them visible to travelers on the highway at night, in order that the public may use the highway in safety, and in any specific instance, the attainment of visibility in time to prevent disaster meets the demand of the law. Annotation: 78 A.L.R. 819.

[10] Annotation: 78 A.L.R. 821.

[11] Annotation: 11 A.L.R. 1226, s. 78 A.L.R. 815.

A light hung on the side of an inclosed milk wagon, which was visible only to those approaching the wagon with a view of such side, does not comply with a regulation that the light shall be so displayed as to be visible from the rear and front of such vehicle during certain hours of the night. Annotation: 11 A.L.R. 1229, s. 78 A.L.R. 815.

[12] Annotation: 78 A.L.R. 820.

[13] As to ability to stop within range of lights, see infra, § 263.

A road with a uniform grade, whether horizontal or otherwise, is held to be a "level road" within the meaning of a statute requiring the headlights of motor vehicles to be such that under normal atmospheric conditions and on a level road, they will produce a driving light sufficient to render clearly discernible all vehicles, persons, or substantial objects 160 feet ahead.[15] An earth embankment 6 to 8 feet high, extending across the end of a street, is a "substantial object" within the meaning of such a statute.[16]

Intensity may be limited from the standpoint of preventing glare. Some statutes expressly require testing by official agencies to determine the matter of intensity. That a headlight used on an automobile does not produce a dangerous glare does not make its use lawful where it has not been tested and sanctioned as required by statute.[17]

§ 31. Dimming or Casting Beam Down.—In some states dimming headlights or casting the beam of the light down is required when meeting and passing another car.[18] Extinguishing all the lights on a car when it is a considerable distance from another, and then proceeding forward at full speed in the dark, is not within the contemplation of a provision that a person in charge of a motor vehicle equipped with "electric" headlight or headlights should dim or extinguish it or them on approaching a vehicle proceeding in an opposite direction, when within not less than 250 feet of same, inasmuch as another provision called for showing two white lights visible for at least 200 feet.[19]

§ 32. As Affected by Atmospheric Conditions.—An interesting question arises whether or not regulations regarding lights on automobiles are applicable to situations where unusual atmospheric conditions exist. Obviously, the wording of the particular statute involved is of considerable significance in the determination of this question. The courts although not uniform in their outlook have been inclined in this connection, not to be arbitrary and dogmatic but to apply a "rule of reason." A statute requiring lights on automobiles "capable of clearly lighting the highway at least 200 feet ahead" was held to require such lighting only under ordinary conditions, and not on a dark and misty morning[20] or on a foggy and dark night.[21] Some statutes specifically limit their application to "normal atmospheric conditions," and when this is true, it is obvious that such statutes are not in force except under normal conditions.[1] Accordingly, a statute requiring automobiles to carry headlights of certain power showing lights visible "under normal atmospheric conditions" at least 500 feet in the direction toward which the car is facing, which lamp shall produce sufficient light to reveal objects 150 feet ahead, etc., has been construed as requiring sufficient light to reveal objects 150 feet ahead only under normal conditions.[2] But a provision that head lamps should be so constructed, arranged, and adjusted that, except as otherwise provided, they would, "under normal atmospheric conditions" and on a level road, produce a driving light sufficient to render clearly discernible a person 200 feet ahead, but would not project a glaring or dazzling light to persons in front, was construed as merely defining the head lamps necessary under such conditions, and as in no way relieving a driver from his duty to drive carefully where the atmospheric conditions demand greater care, and particularly when he is bound to know that under such conditions his lamps may not light up the roadway for 200 feet.[3]

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[14] Annotation: 78 A.L.R. 820.

[15] O'Rourke v. Washington, 304 Pa. 78, 155 A. 100, 78 A.L.R. 811.

[16] Ibid.

[17] Re Hinkelman, 183 Cal. 392, 191 P. 682, 11 A.L.R. 1222.

[18] The danger from glaring lights is recognized, and this means of obviating the danger is taken. State v. Claiborne, 185 Iowa, 170, 170 N. W. 417, 3 A.L.R. 392.

[19] Annotation: 78 A.L.R. 821.

[20] Annotation: 78 A.L.R. 819.

[21] Annotation: 78 A.L.R. 819.

A duty, however, imposed by a trailer statute was held to be absolute, regardless of weather conditions. Annotation: 78 A.L.R. 820.

[1] Annotation: 78 A.L.R. 819.

§ 33. Requirements as to Location on Car.—The position of the lights on the car is sometimes specified. The words "on the front," as used in a statute requiring automobiles during certain hours to display at least two lighted lamps "on the front," which shall be visible at least 500 feet in the direction in which the machine is proceeding, do not necessarily mean the very foremost part of the vehicle, but mean such a point in front of the driver as will make the light visible in the direction in which the car is proceeding for as least 500 feet.[4]

§ 34. Requirements as to Location of Car.—The statutes, either by express terms or by construction, are limited in their application to automobiles on the streets and highways. The term "highway," however, is generally interpreted in its broad sense to include every common way for travel by person on foot or with vehicles rightfully used on highways.[5]

A statute requiring lights on an automobile traveling a public highway after dark has no application to a vehicle on a private way.[6]

§ 35. Applicability to Cars Not in Motion.—A legal problem frequently arises as to whether or not statutes requiring lights on automobiles are applicable to cars not in motion.[7] Obviously, the solution of this problem depends to a large extent upon the wording of the specific statute involved. These statutes usually provide for lights on motor vehicles "operated," "driven," or "run" on the highways. Although the courts of the various jurisdictions are not entirely in accord, it is fairly well established that provisions regarding lights are applicable to automobiles not in motion.[8] This is particularly true of recent enactments.[9] An automobile standing on the street after dark with its engine at rest is within the purview of a statute prohibiting the operation of automobiles on the streets, after dark, without lights.[10] Such a car does not cease to be "driven," within the meaning of a statute providing that "every automobile or motor vehicle, when driven on any public road" between certain hours, should have "at least one lighted lamp, showing white to the front and red to the rear.[11] A truck parked across a road for the purpose of unloading is "in operation," within the meaning of a statute as to lights.[12] Stalled cars [13] or cars stopped for repairs [14] are also deemed to be in operation, and, accordingly, are required to have their rear lights burning. A disabled truck is being both "operated" and "driven" when it is temporarily parked in the highway, and it must have its tail light burning.[15]

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[2] Annotation: 78 A.L.R. 819.

A provision under which it was charged that headlights must be so constructed, arranged, and adjusted that they would under normal atmospheric conditions produce ample driving light for the use of the operator, but would not project a glaring or dazzling light to persons approaching, must be read in connection with other sections under which the "ample" light referred to was limited in certain ways other than what was suggested by that section alone. Annotation: 78 A.L.R. 820.

[3] Annotation: 78 A.L.R. 819, 820.

[4] Annotation: 11 A.L.R. 1229, s. 78 A.L.R. 815.

[5] Weirich v. State, 140 Wis. 98, 121 N. W. 652, 22 L.R.A.(N.S.) 1221, 17 Ann. Cas. 802.

[6] Annotation: 11 A.L.R. 1229, s. 78 A.L.R. 815.

[7] For a holding as to the applicability of such statutes to a car in motion but not under its own power, see § 136.

[8] Com. v. Henry, 229 Mass. 19, 118 N. E. 224, L.R.A.1918B, 827; Murphy v. Hawthorne, 117 Or. 319, 244 P. 79, 44 A.L.R. 1397; Jaquith v. Worden, 73 Wash. 349, 132 P. 33, 48 L.R.A.(N.S.) 827.

Annotation: 11 A.L.R. 1227, s. 78 A.L.R. 816.

[9] Annotation: 78 A.L.R. 816.

The reasons for holding such statutes applicable to stationary cars are obvious. An unlighted stationary automobile may be fully as great a menace to the safety of travelers as if in motion without lights. Then too, the word "operate" is deemed not limited to a state of motion produced by the mechanism of the car, but to include at least ordinary stops upon the highway, such stops being regarded as fairly incidental to its operation.[16]

Automobiles temporarily standing, as well as those moving, are within a provision that the lights of all vehicles should be so arranged, adjusted, and operated as to avoid dangerous glare or dazzle.[17] On the other hand, provisions regarding automobile lights are, according to some authorities, not applicable to cars not in motion. Thus, a provision requiring a light on the rear of an automobile "while being driven on a highway" was held inapplicable to a "dead" car which had been standing for several hours.[18] And it has been held that an automobile left standing on the street with its engine stopped is not within the contemplation of an ordinance providing that motor vehicles "operated or driven" upon the street shall, during certain hours, display two lighted lamps on the front and one on the rear, and that the rays of the latter shall shine upon the number plate in such a manner as to render the numerals thereon visible for a stated distance "in the direction from which the motor vehicle is proceeding," and that the front light shall be visible for a stated distance "in the direction in which the motor vehicle is proceeding."[19]

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[10] Com. v. Henry, 229 Mass. 19, 118 N. E. 224, L.R.A.1918B, 827.

[11] Jaquith v. Worden, 73 Wash. 349, 132 P. 33, 48 L.R.A.(N.S.) 827.

[12] Annotation: 78 A.L.R. 816.

[13] Annotation: 78 A.L.R. 816.

[14] **Notwithstanding a provision that every vehicle should display certain lights "while running,"** a car parked temporarily because of engine trouble, without a required tail light, was held within another provision making it the duty of every person who "operates, drives, or has" a car on the highway during stated times to have lights thereon, visible at least 200 feet from the front and also 200 feet from the rear. The latter provision was held applicable to a car parked temporarily while an effort to repair the headlights was being made. Annotation: 78 A.L.R. 817.

A provision that every motor vehicle should carry lights in front and back was held to require a car temporarily parked for repairs to have its rear light on, when the person responsible for it was making such repairs. Annotation: 78 A.L.R. 817.

A statute providing that "an automobile or a motor vehicle operated during the period of forty-five minutes after sunset to forty-five minutes before sunrise shall display at least two lighted lamps on the front and one on the rear," construed in connection with the context immediately following, specifying that the rays of the rear light should shine upon the rear-end number plate in such a manner as to render the numerals visible for a certain distance "in the direction from which such automobile or motor vehicle is proceeding," and that the light from the front lamps should be visible a certain distance "in the direction in which the automobile or motor vehicle is proceeding," was held to have reference to automobiles and motor vehicles which were moving, and not to be violated by one who left his automobile standing unlighted on a public street. Annotation: 11 A.L.R. 1228, s. 78 A.L.R. 815.

[15] Annotation: 78 A.L.R. 816.

[16] Com. v. Henry, 229 Mass. 19, 118 N. E. 224, L.R.A.1918B, 827.

Along these lines it has been said that "highways are not maintained for the purpose of providing places for storage of automobiles. . . . Automobile traffic, like other highway traffic, involves movement from place to place. The movement involved does not, however, demand uninterrupted motion. . . . All temporary stoppings attending ordinary use of a highway by an automobile passing from place to place are incidents of operation linked with motion by necessary relationship, and in general understanding are not discriminated from motion as disconnected, independent modes of highway use. . . . The warning is more necessary when the automobile is at rest than when it is in motion." Annotation: 78 A.L.R. 817.

[17] Annotation: 78 A.L.R. 817, 818.

A car temporarily stopped, with its driver in it, is within a statute which requires all motor vehicles "operated or driven" on any highway to have a visible red light on the rear. Annotation: 78 A.L.R. 816.

[18] Annotation: 78 A.L.R. 818.

§ 36. **Applicability to Towed Cars.**—A regulation that every motor vehicle, while in use on a public highway, shall exhibit lights visible within a reasonable distance in the direction toward which the vehicle is going, and also a red light visible in the reverse direction, does not apply to "dead" cars being towed through the streets by a "live" car bearing sufficient lights.[20]

3. SPEED

a. FUNDAMENTAL PRINCIPLES

§ 37. **Generally.**[1]—At common law there was no precise limit to the speed at which one might travel on the public ways. The principles of the law of negligence governed.[2] The advent and development of the automobile have been accompanied by a flood of legislation relating to the speed at which motor vehicles may be operated. The statutes and ordinances of the various jurisdictions and municipalities naturally differ. However, certain general principles of law have been formulated which apply to the interpretation and validity of enactments pertaining to speed. Limitations upon the speed of automobiles operated on the public streets and highways are primarily intended for the protection of travelers thereon.[3]

§ 38. **Regulation by States.**—It is a well-established principle of law that statutes fixing reasonable limits upon the speed of automobiles are valid as police regulations.[4] It is a prerequisite to the validity both of statutory provisions and of ordinances regulating the speed of motor vehicles, that the regulations be reasonable.[5] A state may establish a uniform maximum reasonable rate of speed for all motor vehicles operated anywhere in the state,[6] or it may make special regulations for particular localities, such as a prohibition against driving faster than a "common traveling pace" in a designated locality.[7] A comprehensive law intended to meet the different conditions which arise in various parts of the state may be enacted providing a designated speed limit for motor vehicles on state highways and a lower speed limit within the corporate limits of any city or borough.[8] In general, the speed limit fixed by statute and city ordinances is a maximum limit which motor cars may not exceed in any case, and not a minimum speed at which they may run under all circumstances.[9]

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[19] Annotation: 11 A.L.R. 1228, s. 78 A.L.R. 815.

[20] Annotation: 11 A.L.R. 1228, s. 78 A.L.R. 815.

It is stated that the statute applied to cars only "while in use on a public highway," and that it was manifest that it was the intention of the legislature to limit its provisions to such cars only as were actually being used on the highway, that is, such as were being driven by their own power. Annotation: 11 A.L.R. 1229, s. 78 A.L.R. 815.

[1] As to effect of violation of regulations as to speed upon right to recover for injuries, see infra, § 410.

[2] See §§ 259 et seq., for a discussion of injuries from speeding.

[3] Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035, 1 L.R.A.(N.S.) 215, 108 Am. St. Rep. 196, 3 Ann. Cas. 487; Walker v. Faelber, 102 Kan. 646, 171 P. 605, L.R.A.1918D, 569. Annotation: 108 Am. St. Rep. 212.

[4] Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035, 1 L.R.A.(N.S.) 215, 108 Am. St. Rep. 196, 3 Ann. Cas. 487; State v. Mayo, 106 Me. 62, 75 A. 295, 26 L.R.A.(N.S.) 502, 20 Ann. Cas. 516; Dudley v. Northampton Street R. Co. 202 Mass. 443, 89 N. E. 25, 23 L.R.A.(N.S.) 561; Com. v. Kingsbury, 199 Mass. 542, 85 N. E. 848, 127 Am. St. Rep. 513; Mahoney v. Maxfield, 102 Minn. 377, 113 N. W. 904, 14 L.R.A.(N.S.) 251, 12 Ann. Cas. 289; Roper v. Greenspon, 272 Mo. 288, 198 S. W. 1107, L.R.A.1918D, 126; Opocensky v. South Omaha, 101 Neb. 336, 163 N. W. 325, L.R.A.1917E, 1170; Schultz v. State, 89 Neb. 34, 130 N. W. 972, 33 L.R.A.(N.S.) 403, Ann. Cas. 1912C, 495; Kalich v. Knapp, 73 Or. 558, 142 P. 594, 145 P. 22, Ann. Cas. 1916E, 1051.

Annotation: 1 L.R.A.(N.S.) 215; 26 L.R.A.(N.S.) 502; L.R.A.1918D, 126; 108 Am. St. Rep. 212; 3 Ann. Cas. 495; 11 Ann. Cas. 728; 12 Ann. Cas. 291; 20 Ann. Cas. 516; Ann. Cas. 1916E, 1067.

[5] Annotation: L.R.A.1918D, 135.

A statute prohibiting the operation of a motor vehicle at a speed greater than is reasonable or proper, is a valid statute. State v. Schaeffer, 96 Ohio St. 215, 117 N. E. 220, L.R.A.1918B, 945, Ann. Cas. 1918E, 1137.

A statute prohibiting travel in built-up localities at a greater rate than a mile in 6 minutes or elsewhere in a city at a greater rate than a mile in 4 minutes, or outside a city, town, or village at a greater rate than 20 miles an hour, is not void for unreasonableness. Schultz v. State, 89

§ 39. Regulation by Municipalities.—The general rules relating to the power of a municipality to regulate the operation of motor vehicles are discussed elsewhere.[10] Such rules obviously apply to ordinances pertaining to the speed of automobiles and within the limits there stated, the municipality may regulate speed.[11] Principles of law applicable in construing speed statutes and determining their validity are frequently likewise applicable to speed ordinances.[12] In the absence of express or implied prohibition by the legislature, a municipality may pass ordinances fixing within reasonable limits the speed at which motor vehicles may be operated within its boundaries,[13] and it is within the province of a city council to prescribe different rates of speed for automobiles in different portions of the city according to the width of the streets, their use, and the density of population.[14] Some early limitations fixed an extremely low speed.[15] The state may delegate certain powers with reference to speed to the highway commission and to municipalities and counties.[16]

The state may expressly leave to the municipalities the right of determining within certain limits the proper maximum speed of motor vehicles, but may prohibit the passage of an ordinance or regulation requiring automobiles to travel at a slower rate of speed than a designated number of miles per hour within the closely built-up portions of such city, or at a higher rate where the houses upon any highway are more than 100 feet apart. It may also be required by law that regulations locally adopted as to speed limits shall be

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Neb. 34, 130 N. W. 972, 33 L.R.A.(N.S.) 403, Ann. Cas. 1912C, 495.

[6] State v. Swagerty, 203 Mo. 517, 102 S. W. 483, 10 L.R.A.(N.S.) 601, 120 Am. St. Rep. 671, 11 Ann. Cas. 725.

[7] Annotation: 11 Ann. Cas. 728; Ann. Cas. 1916E, 1067.

[8] Brazier v. Philadelphia, 215 Pa. 297, 64 A. 508, 7 Ann. Cas. 548.

[9] Annotation: L.R.A.1918D, 145.

[10] See §§ 19 et seq.

[11] People v. Schneider, 139 Mich. 673, 103 N. W. 172, 69 L.R.A. 345, 5 Ann. Cas. 790; Mahoney v. Maxfield, 102 Minn. 377, 113 N. W. 904, 14 L.R.A.(N.S.) 251, 12 Ann. Cas. 289; Brazier v. Philadelphia, 215 Pa. 297, 64 A. 508, 7 Ann. Cas. 548.

Annotation: 1 L.R.A.(N.S.) 219.

[12] For this reason it is advisable to refer to § 38, supra, for a discussion of speed statutes.

[13] Annotation: 3 Ann. Cas. 496; 11 Ann. Cas. 728; Ann. Cas. 1916E, 1068.

[14] Annotation: 1 L.R.A.(N.S.) 215; 3 Ann. Cas. 495.

Such an ordinance was not held invalid because another ordinance allowed street cars to be run at a much greater rate of speed. Annotation: 1 L.R.A.(N.S.) 215; 3 Ann. Cas. 495.

As to statutes, see supra, § 38.

[15] An early ordinance fixing the maximum speed at 7 miles an hour was held reasonable. Annotation: 1 L.R.A.(N.S.) 220.

In an early case the court upheld as reasonable city ordinances limiting the speed of automobiles to 6 miles an hour on city streets between crossings and to 4 miles an hour at crossings (Eichman v. Buchheit, 128 Wis. 385, 107 N. W. 325, 8 Ann. Cas. 435), and even a provision that all persons having the care of vehicles should drive at a moderate foot pace was upheld. (Annotation: 3 Ann. Cas. 495; 11 Ann. Cas. 728; Ann. Cas. 1916E, 1067.) See also Brazier v. Philadelphia, 215 Pa. 297, 64 A. 508, 7 Ann. Cas. 548 (where this speed limit applied only to the built-up portions of the city).

[16] Ashland Transfer Co. v. State Tax Commission, 247 Ky. 144, 56 S. W. (2d) 691, 87 A.L.R. 534.

Annotation: 87 A.L.R. 546.

effective only upon notice thereof being posted at the points where the streets affected thereby join with other streets or roads.[17]

§ 40. Exemption from Speed Regulation.—Statutes and ordinances frequently limit the speed at which vehicles may be driven along streets and highways. Provisions for such limitations ordinarily apply to all vehicles except those expressly exempted thereby,[18] although there is authority to the effect that even without an express exemption, such provisions are inapplicable to public officials and the apparatus under their control, such as fire or police apparatus, while on active duty.[19]

The operation and effect of exempting certain classes of vehicles from the application of speed limitations depends upon the provisions of the particular ordinance or statute, as well as upon the conditions which may justify violation of such regulations.[20] For example, the exigencies of a fire, police, or ambulance call may require the drivers of the particular vehicles to exceed speed limits. Such excessive speed will not, of course, constitute a violation of a regulation, provided the circumstances causing it excuse compliance therewith.[21] Some ordinances regulating the speed of motor vehicles specifically except police and fire department vehicles from their operation [22] or expressly provide that such apparatus is not limited as to speed while in discharge of duty [23] or when "proceeding to a fire" or "responding for emergency work in case of fire, accident, public disaster, or impending danger.[24] Moreover, it has been held that such exceptions apply where apparatus is responding to a fire call outside the city limits.[25]

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[17] Annotation: 1 L.R.A.(N.S.) 219.

Provisions are found in many of the acts regulating the speed of automobiles for the erection of signs warning drivers of the speed allowed in the particular locality. See annotation: L.R.A.1918D, 142.

[18] Dowler v. Johnson, 225 N. Y. 39, 121 N. E. 487, 3 A.L.R. 146.

Annotation: 19 A.L.R. 462, s. 23 A.L.R. 418.

[19] Balthasar v. Pacific Electric R. Co. 187 Cal. 302, 202 P. 37, 19 A.L.R. 452.

Annotation: 19 A.L.R. 460, s. 23 A.L.R. 418.

The provisions of a statute requiring "all vehicles approaching an intersection," in turning to the left, to go beyond the center of the intersection, and the provision that "no person" should drive a motor vehicle on the highway in excess of a certain speed, were held not applicable to fire or police apparatus, although the language used was broad enough to include them, the court applying the fundamental rule that general language should not be construed to include the government or its agencies unless expressly included by name. Balthasar v. Pacific Electric R. Co. 187 Cal. 302, 202 P. 37, 19 A.L.R. 452.

A member of the United States Naval Reserve force, on duty as a despatch bearer, is not subject to state speed laws when traveling on a public highway under orders of his superior officer, in time of war, to proceed with all possible despatch in the performance of a duty assigned him. State v. Burton, 41 R. I. 303, 103 A. 962, L.R.A.1918F, 559.

[20] Dowler v. Johnson, 225 N. Y. 39, 121 N. E. 487, 3 A.L.R. 146.

The language of an exemption from a speed law in favor of vehicles operated under the direction of the police in the chase or apprehension of violators of the law, the fire department or fire patrol vehicles when traveling in response to fire alarms, and public or private ambulances when traveling in emergencies, should be so construed as to further the purposes and policy of the act. Vandell v. Sanders, 85 N. H. 143, 155 A. 193, 80 A.L.R. 550.

Giving ambulances the right of way on city streets does not authorize them to exceed the statutory speed limit. West v. Jaloff, 113 Or. 184, 232 P. 642, 36 A.L.R. 1391.

As to defenses in criminal prosecutions for excessive speed, see infra, §§ 806 et seq.

[21] Dowler v. Johnson, 225 N. Y. 39, 121 N. E. 487, 3 A.L.R. 146; Opocensky v. South Omaha, 101 Neb. 336, 163 N. W. 325, L.R.A.1917E, 1170; West v. Jaloff, 113 Or. 184, 232 P. 642, 36 A.L.R. 1391.

Merely sending an ambulance for a sick person does not create such an emergency as to justify it in exceeding the speed limits on the highway. West v. Jaloff, 113 Or. 184, 232 P. 642, 36 A.L.R. 1391.

[22] Hubert v. Granzow, 131 Minn. 361, 155 N. W. 204, Ann. Cas. 1917D, 563.

Annotation: 19 A.L.R. 460, s. 23 A.L.R. 418.

[23] Opocensky v. South Omaha, 101 Neb. 336, 163 N. W. 325, L.R.A.1917E, 1170; Vandell v. Sanders, 85 N. H. 143, 155 A. 193, 80 A.L.R. 550.

Annotation: 19 A.L.R. 460, s. 23 A.L.R. 418.

A member of a fire department, riding in his own car to a fire, is within the exemption from speed laws conferred upon vehicles operated under the direction of the police in the chase or apprehension of violators of the law, fire department or fire patrol vehicles when traveling in response to fire alarms, and public or private ambulances when traveling in emergencies. Vandell v. Sanders, 85 N. H. 143, 155 A. 193, 80 A.L.R. 550.

b. INDEFINITENESS OF SPEED REGULATIONS AS AFFECTING VALIDITY

(1) IN GENERAL

§ 41. Generally.—It is a well-established principle of law that where an act of the legislature is so vague, indefinite, and uncertain that the courts are unable to determine, with any reasonable degree of certainty, what the legislature intended, or is so incomplete or so conflicting and inconsistent in its provisions that it cannot be executed, it will be declared to be inoperative and void.[26] Obviously this principle applies to enactments governing the speed of motor vehicles.[1] Some narrow and different questions of law, however, arise in applying this principle to specific regulations.

(2) CRIMINAL CASES

§ 42. Generally.—The principle that an act of the legislature may be declared inoperative and void for vagueness, indefiniteness, and uncertainty[2] obviously applies to automobile speed regulations in criminal cases. Naturally a diversity of situations may arise in the application of this principle. Thus, the indefiniteness asserted may exist as to locality,[3] or as to rate,[4] or as to some other provision of the particular statute involved. For example, an act, making it a crime to operate an automobile around a curve on a public road without having the car under control or without reducing its speed to a reasonable and proper rate is held void for uncertainty not only in respect of speed, but also in respect of "control."[5] A statute which provides that the driver of any motor vehicle shall drive or operate such vehicle in a careful manner with regard for the safety and convenience of pedestrians and all vehicles of traffic upon the highway has likewise been held invalid for indefiniteness and uncertainty, as has been an ordinance attempting to make it unlawful for any person to run or operate an automobile "in a careless and reckless manner," without undertaking to define in any way what constitutes such carelessness and recklessness.[6]

Frequently the validity of statutes and ordinances attacked for uncertainty is sustained. Thus, an ordinance prescribing different rates of speed in different localities of a municipality was held not invalid for uncertainty in that it made no provision for the erection of signs at the points where the areas of limited speed began.[7] And a provision that "upon approaching a bridge, dam, high embankment, sharp curve, descent, or crossing of intersecting highways and railroad crossings, the person operating a machine shall have it under control and operate it at a speed not greater than 6 miles per hour," attacked for indefiniteness and uncertainty, was also sustained.[8] A

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[24] Dowler v. Johnson, 225 N. Y. 39, 121 N. E. 487, 3 A.L.R. 146.

[25] Hubert v. Granzow, 131 Minn. 361, 155 N. W. 204, Ann. Cas. 1917D, 563.

[26] See STATUTES [Also 25 R. C. L. p. 810].

[1] Annotation: 3 Ann. Cas. 495; 11 Ann. Cas. 728; Ann. Cas. 1916E, 1067.

[2] See § 41.

[3] See § 43.

[4] See § 44.

[5] State v. Lantz, 90 W. Va. 738, 111 S. E. 766, 26 A.L.R. 894.

[6] Annotation: 26 A.L.R. 905, s. 29 A.L.R. 1066.

[7] Eichman v. Buchheit, 128 Wis. 385, 107 N. W. 325, 8 Ann. Cas. 435.

[8] Annotation: 26 A.L.R. 903, s. 29 A.L.R. 1066.

The court said: "It is insisted, in behalf of the plaintiff in error, that the word 'descent' is so general and indefinite that a person operating a machine along a high-contention that a rule of the board of park commissioners which provided that no person should ride or drive at a rate of speed exceeding 8 miles an hour was too indefinite to support a criminal proceeding because of the use of the words "ride or drive" was denied on the ground that a person may be said to be driving an automobile if he is controlling the motive power.[9]

§ 43. Indefiniteness as to Locality.—The principle that an act of the legislature may be declared inoperative and void for vagueness, indefiniteness, and uncertainty[10] obviously applies to indefiniteness as to locality in automobile speed regulations in criminal cases. While the principle involved is clear cut and well established, the cases are not entirely consistent in applying it. A statute forbidding the driving of a motor vehicle at more than a specified speed upon a highway where the territory contiguous thereto "is closely built up" was held void for indefiniteness as to territory under a constitutional provision guaranteeing to every citizen the right to know the nature and character of an accusation against him.[11] But a statute forbidding the driving of automobiles in excess of a certain speed "in the business portion" of cities was held not so uncertain and indefinite as to render it void as a violation of the constitutional provision with reference to due process of law.[12]

§ 44. Indefiniteness as to Rate.—The principle that an act of the legislature may be declared inoperative and void for vagueness, indefiniteness, and uncertainty[13] obviously applies to indefiniteness as to rate in automobile speed regulations in criminal cases. It is generally held that statutes or ordinances providing that no person shall operate or drive any motor vehicle recklessly or at a rate of speed greater than is reasonable and proper, having regard to the width, traffic, and use of the highways, and the general and usual rules of the road, or so as to endanger the property, life, or limb of any person, are not invalid on the ground that they are too vague, uncertain, and indefinite to sustain a criminal conviction.[14] And acts which, in addition to the foregoing

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way can never know whether he is approaching a 'descent' within the meaning of the act. Words used in a legislative enactment are to be given their ordinary signification, unless the context demands a different construction. The word 'descent,' as used in . . . this act, must be construed in the light of the declared purpose of the act. It is true, as insisted by counsel for the accused, that the word 'descent,' given its literal interpretation, may include any declivity in the highway, of however small a degree, and upon this premise it is argued that it would be unreasonable to hold that the general assembly intended to make penal the operation of an automobile at a greater rate of speed than 6 miles per hour when approaching such a slight declivity in the highway that it would not ordinarily be dangerous to persons or property to operate it at a greater rate of speed. The purpose of the act being to prevent danger to the life or limb of any person, and to insure the safety of any property which might be upon the highway, the word 'descent,' as used in that act, will not be given the literal interpretation above mentioned." Annotation: 26 A.L.R. 904, s. 29 A.L.R. 1066.

[9] Annotation: 26 A.L.R. 905, s. 29 A.L.R. 1066.

[10] See § 41.

[11] Ex parte Slaughter, 92 Tex. Crim. Rep. 212, 243 S. W. 478, 26 A.L.R. 891.

[12] Annotation: 26 A.L.R. 898, s. 29 A.L.R. 1066.

The court said: "The difficulty in determining in any case whether territory at a particular point is either wholly or partially built up with structures devoted to business does not seem to us to be either real or apparent. Whether it is so wholly or partially built up at a particular point is a question of fact. If a maximum speed within the corporate limits of a city was fixed by statute, it would be a question of fact whether the accused was within the limits. In either case, difficulty in ascertaining the fact would not be reason for saying the statute provision was uncertain or indefinite. It may be inconvenient for the driver of a motor car to diminish or increase speed accordingly as he enters and leaves a portion of the city wholly or partially built up with structures devoted to business, but this is not a good reason for saying that the requirement is unreasonable." Annotation: 26 A.L.R. 898, s. 29 A.L.R. 1066.

[13] See § 41.

[14] Schultz v. State, 89 Neb. 34, 130 N. W. 972, 33 L.R.A.(N.S.) 403, Ann. Cas. 1912C, 495; Schier v. State, 96 Ohio St. 245, 117 N. E. 229; State v. Schaeffer, 96 Ohio St. 215, 117 N. E. 220, L.R.A.1918B, 945, Ann.

provision, contain provisions fixing rates of speed for certain localities and making an excess of that speed prima facie evidence of negligence or specifying a speed that shall be prima facie unlawful are likewise sustained.[15] But a statute making it a crime to operate an automobile around a curve on a public road, without having the same under control or without reducing the speed thereof to a reasonable and proper rate is held so indefinite and uncertain as to be void, being violative of sections of the Constitution forbidding anyone to be deprived of life, liberty, or property without due process of law and providing that in all criminal trials the accused shall be fully and plainly informed of the character and cause of the accusation against him.[16] Obviously, a statute which provides that it shall be unlawful to drive at a rate of speed in excess of a designated number of miles per hour is not invalid for indefiniteness.[17]

(3) Civil Cases

§ 45. **Generally.**—The principle that an act of the legislature may be declared inoperative and void for vagueness, indefiniteness, and uncertainty[18] applies to automobile speed regulations in civil, as well as in criminal, cases.[19] In civil cases a statute or ordinance providing that it shall be unlawful to operate or run any motor vehicle upon the public highways recklessly or at a rate of speed greater than is reasonable and proper, having regard to the width, traffic, and use of the highway, or so as to endanger property or the life or limb of any person, has been held merely to declare the common law, and that it is not void for unreasonableness or uncertainty.[20]

Cas. 1918E, 1137; Maxon v. State, 177 Wis. 379, 187 N. W. 753, 21 A.L.R. 1484.

Annotation: 26 A.L.R. 898, s. 29 A.L.R. 1066.

[15] Gallaher v. State, 193 Ind. 629, 141 N. E. 347, 29 A.L.R. 1059.

Annotation: 26 A.L.R. 901, s. 29 A.L.R. 1066.

A statute was held sufficiently definite which provided that no person should drive a motor vehicle at a speed greater than was reasonable and proper, having regard to the traffic and use of the highway, and providing that driving in the closely built-up portions of a city in excess of 25 miles an hour should be prima facie evidence that the vehicle was being run at a speed greater than was reasonable and proper. Annotation: 26 A.L.R. 901, s. 29 A.L.R. 1066.

Where a statute provided that no person should drive a motor vehicle upon any public highway at a speed greater than was reasonable and proper, having regard to the traffic and use of the highway, or so as to endanger the life or limb or injure the property of any person, and further specified what speeds in certain localities should be prima facie evidence of a violation of the act, it was held valid in a prosecution for driving over 15 miles an hour in the closely built-up residence district of a city, the speed fixed by the act, the accused having admitted that he was driving 25 miles an hour. Annotation: 26 A.L.R. 901, s. 29 A.L.R. 1066.

A statute was held not invalid on the ground of indefiniteness and uncertainty which provided that no person should operate a motor vehicle upon the public highway at a speed greater than was reasonable and prudent, having regard to the traffic and use of the highway, or so as to endanger the life or limb or injure the property of any person, and further providing that if the rate of speed of a motor vehicle through the residence portion of a city, town, or village exceeded 15 miles an hour, such rate should be prima facie evidence that it was being run at a speed greater than was reasonable and prudent, having regard to the traffic and use of the highway, or so as to endanger the life or limb or injure the property of any person. Annotation: 26 A.L.R. 902, s. 29 A.L.R. 1066.

[16] State v. Lantz, 90 W. Va. 738, 111 S. E. 766, 26 A.L.R. 894.

The provision of the Georgia statute making it penal to operate an automobile at a rate of speed greater than was reasonable and proper, having regard to the traffic and use of the highways, or so as to endanger the life or limb of any person or the safety of any property was held invalid on the ground that it was too uncertain and indefinite in its terms to be capable of enforcement in a criminal action. Annotation: 26 A.L.R. 902, 903, s. 29 A.L.R. 1066.

[17] Annotation: 26 A.L.R. 903, s. 29 A.L.R. 1066.

[18] See §§ 41 et seq.

[19] For application in criminal cases, see §§ 807, 808.

[20] Annotation: 26 A.L.R. 905, s. 29 A.L.R. 1066.

Where a like statute was involved, it was held unnecessary to determine whether the statute was unconstitutional as being so vague and indefinite that it was not

4. Law of the Road

§ 46. Generally.—The "law of the road," as it stands today, is found in statutory enactments, in regulations and ordinances prescribed by various boards and commissions, and in judicial decisions extending through a wide field of facts and circumstances.[1] It is a general rule that the common-law duty of due care[2] always rests on drivers of automobiles, irrespective of statutes or ordinances, and that the requirements of such enactments are cumulative, and do not destroy this common-law duty.

§ 47. Regulations Prohibiting Passing at Street Intersections.—Numerous traffic regulations exist prohibiting motor vehicles from falling out of line and passing vehicles ahead of them at a street intersection. Such regulations must be given a reasonable construction.[3] One who drives out of a single file of cars in motion just before entering a street intersection, and proceeds abreast of it, violates a traffic ordinance forbidding attempts to pass vehicles "at a street intersection."[4] A statute, however, which provides that no vehicle shall pass another from the rear "on a curve, where the view ahead is in any wise obstructed or while the vehicle ahead is crossing an intersecting highway," does not apply so as to prohibit an automobile driver who has been following a street car from crossing an intersecting street when the street car has made a turn to the left therein and has proceeded far enough to enable him to do so. Consequently, negligence cannot be founded on his act in

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susceptible of enforcement, the court holding that it was, at least, sufficient as a remedial statute, imposing a civil duty, so as to render its violation negligence per se. Annotation: 26 A.L.R. 905, s. 29 A.L.R. 1066.

It has been held that while so much of an act regulating the use of automobiles on the highway and prohibiting their operation at a rate of speed greater than is reasonable and proper, having regard to the traffic and use of such highway, or so as to endanger the life or limb of any person, is too uncertain and indefinite in its terms to be capable of enforcement, yet the measure of care laid down in the act is not too indefinite to furnish a rule of civil conduct. Annotation: 26 A.L.R. 905, s. 29 A.L.R. 1066.

In Eichman v. Buchheit, 128 Wis. 385, 107 N. W. 325, 8 Ann. Cas. 435, an action to recover for personal injuries, an ordinance providing that no automobile should be driven faster than 6 miles an hour in a city within a radius of half a mile of a certain bridge, and should slow down to 4 miles an hour "at crossings," was held not invalid on the ground that it was uncertain because there was nothing to show whether the word "crossing" meant highway crossing or railroad crossing, the court stating that the word plainly referred to street crossings, where the danger resulting from high speed is the greatest. It was further held that an ordinance providing that no automobile should be driven faster than a stated speed within a radius of half a mile of a named bridge was not uncertain because no provision was made for establishing or marking in any way the limits of the district so that a driver might know when he reached a half-mile radius, the court stating that they did not deem it necessary for the municipality to erect signs at the city limits or elsewhere to inform the traveler at what point the area of limited speed began.

[1] For discussion of injuries from operation and law of road, see §§ 280 et seq.

For general discussion of law of the road, see Highways, Streets and Sidewalks [Also 13 R. C. L. p. 270, §§ 222 et seq.].

[2] See §§ 165 et seq.

[3] Crosby v. Canino, 89 Colo. 434, 3 P. (2d) 792, 78 A.L.R. 1202.

Annotation: 78 A.L.R. 1206.

[4] Crosby v. Canino, 89 Colo. 434, 3 P. (2d) 792, 78 A.L.R. 1202. This case was an action for damages for personal injuries sustained by the plaintiff by reason of being struck by the defendant's truck while proceeding to the far side of the street after alighting from a street car at a street intersection. The traffic regulation involved was a local rule providing that a "driver of any vehicle must not attempt to pass another vehicle or street car at a street intersection." It appeared that when the plaintiff alighted from the car, the defendant's truck was in a line of vehicles which were waiting near the curb to proceed in the same direction as the street car, that the defendant's truck was then at the threshold of, but not in, the street intersection, and that the defendant's driver drove out of the line and passed the vehicle ahead when the street car moved on. The court overruled the defendant's contention that the traffic regulation was inapplicable because the defendant's truck had not reached the intersection when it passed the vehicle ahead of it, and, calling attention to the fact that the regulation used the word "at," not "in," said that the manifest intent and purpose of the rule was to forbid the very thing that was done.

doing so by the owner of a motor vehicle with which his automobile collided in the street intersection.[5] And in an action for damages for personal injuries sustained in a collision at a street intersection between the plaintiff's automobile which she was driving and a truck owned by the defendant, a statute prohibiting the passing of a vehicle from the rear when crossing an intersecting highway was held inapplicable where the traffic in which the plaintiff's automobile was being operated had been moving in a double line at the time of the collision and the operator of the plaintiff's automobile unintentionally moved her car in front of a truck along the side of which she had been driving because of the sudden stopping of the truck without warning and collided with the defendant's truck which came out of the intersecting street at a high rate of speed and without warning.[6]

5. Exclusion from Particular Highways and Districts

a. General Principles

§ 48. Generally.—Since no one has an absolute right to use the public streets as he chooses, without regard to the safety of others,[7] the state, acting under its police power, may establish reasonable regulations for the safety of persons using the highways[8] and, under limited circumstances, even may altogether exclude dangerous vehicles, such as automobiles, from the highways of certain districts when in its judgment the public safety so requires.[9] The power to exclude motor vehicles from certain districts and streets is one which can be specifically delegated to the local municipal authorities,[10] but a municipal corporation cannot, in the absence of statutory authority, pass an ordinance excluding automobiles from the use of its public highways.[11] Where the legislature has provided that automobiles shall not be driven on public streets and highways unless licensed, permission is impliedly granted to all persons having a license to use and operate motor vehicles upon all public thoroughfares, subject only to the conditions of such act; and therefore in some jurisdictions the courts hold that the authority given by charter to a municipality to take all needful means for securing the safety of persons and property within the commonwealth is not sufficient to sustain an ordinance excluding licensed automobiles from designated portions of narrow, crooked highways upon which the driving of automobiles or other motor vehicles may be dangerous to pedestrians and to all persons in vehicles, whether driven by motor or drawn by horses.[12] The courts have no general power to review legislative action in respect of matters affecting the general welfare, such as laws regulating automobiles and excluding them from particular highways and districts, but they may, under certain conditions, declare unconstitutional a statute which, while purporting to protect the safety of the public, has no real or substantial relation to this object or is plainly an invasion of rights secured by the fundamental law.[13]

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[5] Annotation: 78 A.L.R. 1208.

[6] Annotation: 78 A.L.R. 1208.

[7] Com. v. Kingsbury, 199 Mass. 542, 85 N. E. 848, 127 Am. St. Rep. 513.

[8] State v. Mayo, 106 Me. 62, 75 A. 295, 26 L.R.A.(N.S.) 502, 20 Ann. Cas. 512; State v. Swagerty, 203 Mo. 517, 102 S. W. 483, 10 L.R.A.(N.S.) 601, 120 Am. St. Rep. 671, 11 Ann. Cas. 725.

Annotation: 26 L.R.A.(N.S.) 502; 120 Am. St. Rep. 678; 11 Ann. Cas. 728.

See Highways, Streets and Sidewalks [Also 13 R. C. L. p. 1].

[9] State v. Mayo, 106 Me. 62, 75 A. 295, 26 L.R.A.(N.S.) 502, 20 Ann. Cas. 512; Com. v. Kingsbury, 199 Mass. 542, 85 N. E. 848, 127 Am. St. Rep. 513; People v. Rosenheimer, 209 N. Y. 115, 102 N. E. 530, 46 L.R.A.(N.S.) 977, Ann. Cas. 1915A, 161.

Annotation: 20 Ann. Cas. 516; 26 L.R.A. (N.S.) 502.

In an early case it was held that in view of the danger to traffic involved in the use of automobiles on country roads, especially in the nighttime, a county ordinance prohibiting the running of automobiles on country roads between sunset and sunrise might be not unreasonable under certain conditions. Re Berry, 147 Cal. 523, 82 P. 44, 109 Am. St. Rep. 160. Annotation: 1 L.R.A.(N.S.) 222; 5 Ann. Cas. 794; 15 Ann. Cas. 1170.

[10] Com. v. Kingsbury, 199 Mass. 542, 85 N. E. 848, 127 Am. St. Rep. 513; Re Rogers, 7 East. L. R. (Pr. Edw. Isl.) 212, 15 Ann. Cas. 1167.

Annotation: 15 Ann. Cas. 1169.

[11] Annotation: 20 Ann. Cas. 516.

In State v. Mayo, 106 Me. 62, 75 A. 295, 26 L.R.A.(N.S.) 502, 20 Ann. Cas. 512, it appeared to be doubted whether a municipality, in the absence of express statutory authority, could pass ordinances excluding automobiles from particular streets or districts, acting merely under the general law authorizing municipalities to make reasonable regulations for the safety and welfare of the public.

§ 49. One-way Streets.—It is a well-established rule of law that a municipal corporation having by statute exclusive control over its streets may confine traffic by motor vehicles on narrow streets to one direction.[14] An ordinance to this effect does not violate the constitutional provision against special and discriminatory legislation, even though it fails to regulate the operation of all other vehicles using the same street.[15]

§ 50. Limitations upon Use of Streets by Motor Vehicles for Hire.—Under the well-settled rule that a municipality having the power to regulate the use of its streets may pass any reasonable ordinance within its delegated powers governing automobile traffic on the streets, it has been generally held that a municipality has the right to pass an ordinance prohibiting or limiting the use of certain streets by motor vehicles operated for hire.[16] Thus, an ordinance prohibiting jitneys from using public streets, unless they paid additional license tax, was held reasonable and valid,[17] as was an ordinance prohibiting jitney busses from operating within certain designated zones.[18] Likewise, where a motorbus line running between two cities was prohibited, by virtue of an ordinance in one of the cities, from using certain streets when running through that city, it was held that the ordinance was reasonable because it tended to relieve the congested traffic conditions of the city.[19] It has, however, been held that an ordinance forbidding duly licensed cab drivers to operate their vehicles on the principal streets of the city between certain points, except to discharge and take up passengers on prior calls, in which case the vehicle must enter and leave the street at the point nearest the place where the passenger is to be taken or discharged, is an unconstitutional interference with the rights of such drivers.[20]

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[12] Annotation: 26 L.R.A.(N.S.) 502.

[13] State v. Mayo, 106 Me. 62, 75 A. 295, 26 L.R.A.(N.S.) 502, 20 Ann. Cas. 512.

Annotation: 26 L.R.A.(N.S.) 502; 20 Ann. Cas. 516.

[14] Com. v. Nolan, 189 Ky. 34, 224 S. W. 506, 11 A.L.R. 202.

[15] Ibid.

[16] Desser v. Wichita, 96 Kan. 820, 153 P. 1194, L.R.A.1916D, 246; Hadfield v. Lundin, 98 Wash. 657, 168 P. 516, L.R.A.1918B, 909, Ann. Cas. 1918C, 942; Ex parte Dickey, 76 W. Va. 576, 85 S. E. 781, L.R.A.1915F, 840.

Annotation: 32 A.L.R. 752.

[17] Desser v. Wichita, 96 Kan. 820, 153 P. 1194, L.R.A.1916D, 246, wherein the court said: "Whatever natural right a citizen may have to traverse the streets of his city with a motor vehicle for the conveyance of his family or his friends, no inherent right exists to devote his vehicle to the public use of carrying passengers for hire, and to appropriate to himself the use of all the streets for purposes of profit. Beyond question, the city could vacate one or more of the streets over which he might desire to operate. It can not only require him to pay a license tax, but it may also regulate the manner of his carrying on his enterprise. Why may it not classify motor vehicles by themselves, and refuse to permit them to crowd congested portions of the business streets where patrons of another class of vehicles—street cars—must alight and take passage? Suppose, indeed, a company or corporation owning motor vehicles had the facilities and the desire to occupy all the streets to the utter destruction of the street car business. Would the city have nothing to say? Is the municipality a mere automaton, helpless in the presence of crowding and conflicting enterprises and scrambles for business which involve the comfort, the convenience, and the safety of the traveling public? Not so."

[18] Annotation: 32 A.L.R. 753.

In Ex parte Dickey, 76 W. Va. 576, 85 S. E. 781, L.R.A.1915F, 840, wherein it appeared that a city passed an ordinance regulating the use of jitneys on the streets, the court held the ordinance to be valid, saying: "The right of a citizen to travel upon the highway and transport his property thereon, in the ordinary course of life and business, differs radically and obviously from that of one who makes the highway his place of business and uses it for private gain, in the running of a stagecoach or omnibus. The former is the usual and ordinary right of a citizen, a common right, a right common to all, while the latter is special, unusual, and extraordinary. As to the former, the extent of legislative power is that of regulation; but, as to the latter, its power is broader,—the right may be wholly denied, or it may be permitted to some and denied to others, because of its extraordinary nature. This distinction, elementary and fundamental in character, is recognized by all the authorities."

b. Limitations upon Weight of Vehicles or Loads Thereon

§ 51. Weight of Vehicle or Load.—It has generally been held that a state, or a municipality acting under a proper delegation of authority, may reasonably limit the weight of a vehicle or the load thereon to be transported on a highway or street.[1] Power to determine matters connected with weight may be delegated to municipalities, counties, and highway departments.[2] An act authorizing a municipality to adopt by-laws "for the regulation of all vehicles used therein, by establishing the rates of fare, routes, and places of standing, and in any other respect," has been held to give authority for the adoption of an ordinance restricting loads of a certain weight to a designated portion of the street.[3]

§ 52. Weight as Affected by Width of Tires.—It has been held in a number of instances that it is within the power of the state or of a municipality reasonably to prescribe that loads above a specified weight shall not be transported on the highway except in vehicles having tires of a certain width.[4] Thus, it has been held that an act which gives power to municipal corporations to regulate the use of streets authorizes the enactment of an ordinance which prohibits the driving on the streets of a city of any loaded vehicle which, with its load, weighs 3,500 pounds or upward, unless the fellies and tires on the wheels thereof are at least 3 inches in width.[5]

[19] Annotation. 32 A.L.R. 753.

[20] Columbia v. Alexander, 125 S. C. 530, 119 S. E. 241, 32 A.L.R. 746.
Annotation: 32 A.L.R. 755.

[1] State ex rel. Bonsteel v. Allen, 83 Fla. 214, 91 So. 104, 26 A.L.R. 735; Brown v. Nichols, 93 Kan. 737, 145 P. 561, L.R.A. 1915D, 327; State v. Boardman, 93 Me. 73, 44 A. 118, 46 L.R.A. 750.
Annotation: 26 A.L.R. 747, s. 72 A.L.R. 1004.

In State ex rel. Bonsteel v. Allen, 83 Fla. 214, 91 So. 104, 26 A.L.R. 735, the court upheld a statute fixing the maximum weight which might be carried by a motor vehicle operated on the highways of the state. The statute referred to limited the load, including weight of car, to 16,000 pounds in case of motor vehicles with pneumatic tires, and 8,000 pounds if the tires were solid, and also limited the weight to be carried in trailers according to the number of wheels and the nature of the tires.

The validity of an ordinance reading as follows was upheld: "It shall be unlawful for any person to drive . . . upon . . . any public street . . . within the corporate limits of the city of Everett, any vehicle or object, which, with or without its load, shall be of such weight . . . as to destroy or permanently injure such street . . . or the surface, foundation, or other part thereof. . . ." It was said: "We hold that any city may lawfully enact and enforce ordinances which prohibit any vehicle which, with or without its load, because of the weight, destroys or permanently injures the streets." Annotation: 26 A.L.R. 749, s. 72 A.L.R. 1004.

As to liability for injury to the highway from excessive weight, see Highways, Streets and Sidewalks.

[2] Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct. 581; Ashland Transfer Co. v. State Tax Commission, 247 Ky. 144, 56 S. W. (2d) 691, 87 A.L.R. 534; State v. Wetzel, 208 Wis. 603, 243 N. W. 768, 86 A.L.R. 274.
Annotation: 87 A.L.R. 546.

[3] Annotation: 26 A.L.R. 748, s. 72 A.L.R. 1004.

[4] Brown v. Nichols, 93 Kan. 737, 145 P. 561, L.R.A.1915D, 327.
Annotation: 26 A.L.R. 749, s. 72 A.L.R. 1004.

[5] Annotation: 26 A.L.R. 749, s. 72 A.L.R. 1004.

In one case the defendant was convicted of violating a resolution of the board of supervisors, fixing the maximum load of lumber that might be hauled over the highways on tires of a certain width. The limitation on the power of the board to legislate in matters relating to the roads was that laws fixing the width of tires should not be enacted until the matter

§ 53. Reasonableness and Definiteness of Enactments.—Limitations upon the weight of vehicles or loads thereon are subject to the general requirement of reasonableness and definiteness.[6] The prohibition of the use of motor vehicles carrying more than a certain weight on highways outside municipalities is generally held not unreasonable in consideration of the character of the existing highways.[7] An enactment making it unlawful to operate a motor vehicle over a wet road "at any time at which the said roads are wet to a sufficient extent to be materially damaged by such hauling or use" was deemed not invalid because of vagueness and uncertainty.[8] A resolution requiring the hauling of wood and lumber in loads above a certain weight to be done on wide tires was deemed reasonable and necessary.[9] But an ordinance purporting to prohibit the driving of "any engine or heavy machinery upon the paved streets" of a city was held unreasonable and void, inasmuch as it operated as a prohibition of a lawful use of the public streets.[10]

c. Regulations as to Dimensions or Combinations of Motor Vehicles

§ 54. Generally.—Subject to constitutional limitations, the state has absolute control of its public streets and highways, including those of its municipal and quasi municipal corporations.[11] It is within the power of the states to enact statutes regulating the dimensions of motor vehicles and combinations of such vehicles, so long as such regulations are reasonable, make no unjust discriminations, and impose no undue burdens on interstate commerce.[12] In exercising its authority over its highways, a state is not limited to the raising of revenue for maintenance and reconstruction or to regulations as to the

should be ratified at an election by a majority of qualified voters. The resolution in question was held to have been passed in compliance with this requirement. The matter of regulating the amount of loads to be carried over the public roads was considered as properly within the discretion of the authorities charged with the care of the highways. Annotation: 26 A.L.R. 750, s. 72 A.L.R. 1004.

[6] In State v. Boardman, 93 Me. 73, 44 A. 118, 46 L.R.A. 750, the defendant attacked the validity of an ordinance providing as follows: "All of that portion of Union street in Rockport, situated northerly and westerly and within fifteen (15) feet of the northerly and westerly rail of the electric railroad track, is hereby set apart and designated as the portion of said street over and upon which limestone may be transported on wheels, also all other material on wheels, where the load, exclusive of cart, wagon, or vehicle, exceeds 2,500 pounds in weight; and all persons are prohibited from using any other portion of said street for the purposes aforesaid." The court said: "By its terms all persons passing over the street named, with any vehicle on which there were loads exceeding 2,500 pounds in weight, are restricted to the use of 15 feet of the width of the street next to the electric railroad track. That this would be a reasonable, and in many cases a most salutary, regulation, we have no doubt; but such a by-law might be unreasonable, if that portion of the way to which such vehicles were restricted was allowed to become in such a condition as to be impassable, that is, if the only portion of the way which the by-law allowed to be used for heavily loaded vehicles could not be at all used, because it had been allowed to become in such a condition of want of repair as to be impassable, then that portion of the public who had occasion to use the way for this purpose would be absolutely deprived of their right to use the way for the purpose of travel. For such a by-law, then, to be reasonable and valid, with reference to such a way and in such a locality as in this case, that portion of the street which may be used by heavily loaded vehicles must be reasonably suitable for the purpose; and the by-law will be valid or invalid, depending upon whether that portion of the way to which such vehicles are restricted is or is not reasonably suitable for the purpose." It was held, further, that evidence offered to show that the portion of the street next to the railroad track was impassable should have been admitted, since, if true, the by-law became unreasonable.

[7] State ex rel. Bonsteel v. Allen, 83 Fla. 214, 91 So. 104, 26 A.L.R. 735.

[8] Annotation: 26 A.L.R. 752, 753, s. 72 A.L.R. 1004.

[9] Annotation: 26 A.L.R. 754, s. 72 A.L.R. 1004.

[10] Brown v. Nichols, 93 Kan. 737, 145 P. 561, L.R.A.1915D, 327.

[11] See Highways, Streets and Sidewalks [Also 13 R. C. L. p. 163, § 143].

[12] Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct. 581; Ashland Transfer Co. v. State Tax Commission, 247 Ky. 144, 56 S. W. (2d) 691, 87 A.L.R. 534; State v. Wetzel, 208 Wis. 603, 243 N. W. 768, 86 A.L.R. 274.

Annotation: 86 A.L.R. 282.

manner in which vehicles shall be operated, but may prevent the wear and hazards due to excessive size of vehicles and weight of load.[13] The legislature, in classifying motor vehicles for the purpose of restricting the size of vehicles and weight of load permissible on highways, is entitled to consider frequency and character of use and to adapt its regulations to the classes of operations which, by reason of their extensive as well as constant use of the highways, brought about the conditions making such regulations necessary.[14] And a classification in a statute imposing restrictions on the size of vehicles and weight of load permissible on the highways is not invalid because it favors transportation by railroads as against transportation by motor trucks, since the state has the right to foster a fair distribution of traffic to the end that all necessary facilities shall be maintained and that the public shall not be inconvenienced by inordinate uses of its highways for purposes of gain.[15] Regulations as to size or dimensions are subjects within the broad range of legislative discretion, and to make scientific precision a criterion of constitutional power would be to subject the state to an intolerable supervision.[16]

§ 55. **Regulations as to Length or Width.**—Within certain limitations, a state may make regulations as to length and width of motor vehicles using the highways.[17] Thus, a statute which, after limiting the overall length of combinations of vehicles to 60 feet, provides that the overall length of a vehicle shall not exceed 33 feet and that the overall length of a semitrailer shall be measured from the rear thereof to the rear of the vehicle to which it is attached is not unconstitutional on the ground that it imposes an unreasonable burden upon interstate commerce or that it violates the Fourteenth Amendment of the Federal Constitution in that it takes property without due process and denies equal protection of the law.[18] And a statute fixing a maximum length of a motor truck alone of 26½ feet, and a semitrailer truck not exceeding 30 feet, and a width of 96 inches, is not unconstitutional on the ground that it is arbitrary or a violation of the due process clause, or the equal protection clause, or that it impairs the obligation of contract with patrons for the carriage of freight; this result is reached although the statute postpones the application of a provision as to maximum weight until a stated time, but does not postpone the provision as to length and width.[19]

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[13] Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct. 581.

[14] Ibid.

[15] Ibid.

[16] Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct. 581; Ashland Transfer Co. v. State Tax Commission, 247 Ky. 144, 56 S. W. (2d) 691, 87 A.L.R. 534.

[17] Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct. 581.

Annotation: 86 A.L.R. 282.

A statute limiting the size of vehicles and weight of loads permissible upon public highways does not deny the equal protection of the laws because it provides that the limitation as to size shall not apply to "implements of husbandry, including machinery used solely for the purpose of drilling water wells and highway building and maintenance machinery temporarily propelled or moved upon the public highways," or because it fixes the same limit of length for individual motor vehicles and for a combination of such vehicles, or because it permits an additional length of vehicle and greater load than that generally prescribed when the vehicle is operated between points of origin or destination and common carrier receiving or unloading points, or because passenger busses are not subject to the net-load limit prescribed for motor vehicles transporting freight. Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct. 581.

[18] State v. Wetzel, 208 Wis. 603, 243 N. W. 768, 86 A.L.R. 274.

The statute was not held unconstitutional because it excluded from the restrictions as to length implements of husbandry temporarily propelled or moved upon the highway, or because of an exemption providing that whenever it was necessary to transport a single article which could not reasonably be divided, and which exceeded the maximum permissible weight or dimensions or both, it should be done only after the issuance of a special permit for a single trip, designating the load to be transported pursuant to authority granted under the statute, or because of another provision authorizing, under special conditions, the operation of trains of vehicles. Ibid.

The statute was held not unreasonable and invalid because it exempted public service corporations engaged in the transportation of poles and other similar materials, the court holding that there was ample room for the classification exempting such corporations from the operation of the length limitation. Ibid.

§ 56. Regulations as to Height.—Within certain limitations, a state may make reasonable regulations as to the height of motor vehicles using the highways. A statute fixing a maximum height of 11½ feet for motor trucks is not unconstitutional on the ground that it is arbitrary or a violation of the due process clause or the equal protection clause, or that it impairs the obligation of contracts.[20] But an ordinance prohibiting the operation of double-decked auto busses not equipped with pneumatic tires on the city streets has been held void as unreasonable, on the ground that the number of decks on a motorbus does not present a substantial basis for classification or regulation to conserve the highways, that the weight, and not the height, of the vehicle bears relationship to the evil designed to be prevented for the preservation and proper maintenance of the street.[1]

§ 57. Delegation of Legislative Authority.—Authority is not unconstitutionally delegated to a board or commission by giving it power to waive certain regulations as to dimensions or weight. The legislature may delegate to the state highway commission and to municipal officers power to authorize the operation, under special permit from such commission and officers, of trains of vehicles not complying with the statute,[2] at least for a limited time.[3]

6. Parking

§ 58. Generally.—In general, the right of a municipality to enact reasonable parking regulations is well established.[4] It may prohibit parking in certain congested blocks,[5] it may limit the time of parking,[5a] parking for more

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[19] Ashland Transfer Co. v. State Tax Commission, 247 Ky. 144, 56 S. W. (2d) 691, 87 A.L.R. 534.

[20] Ashland Transfer Co. v. State Tax Commission, 247 Ky. 144, 56 S. W. (2d) 691, 87 A.L.R. 534.

[1] Annotation: 86 A.L.R. 284.

[2] State v. Wetzel, 208 Wis. 603, 243 N. W. 768, 86 A.L.R. 274.

In Ashland Transfer Co. v. State Tax Commission, 247 Ky. 144, 56 S. W. (2d) 691, 87 A.L.R. 534, a statute fixing the length, width, and height of motor trucks was held not unconstitutional on the ground of delegation of legislative power because it authorized the highway commission to prescribe rules and regulations for the issuance of permits for the operation of trucks not complying with the requirements of the statute for special purposes or to meet unusual conditions.

[3] Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct. 581.

[4] Pugh v. Des Moines (Pugh v. Crawford) 176 Iowa, 593, 156 N. W. 892, L.R.A.1917F, 345.

Annotation: 72 A.L.R. 229.

Authority to enact an automobile parking ordinance may be implied from a statute granting authority "to prevent the encumbering of streets, sidewalks, crosswalks, and alleys with carriages, carts, wagons, sleighs, sleds, buggies, railroad cars, engines, boxes, lumber, firewood, or other substances or materials," and to ordain and establish ordinances and by-laws for the government and good order of the village. Wonewoc v. Taubert, 203 Wis. 73, 233 N. W. 755, 72 A.L.R. 224.

An individual has no right to permit his automobile to stand in a public highway for an unreasonable time. Pugh v. Des Moines (Pugh v. Crawford) 176 Iowa, 593, 156 N. W. 892, L.R.A.1917F, 345.

The word "Park" in an ordinance providing that drivers might park their vehicles in such streets and places as were designated, and that the city council might from time to time appoint openings through such parking areas to permit cross traffic and forbidding parking in any openings so fixed, connoted the withdrawing the vehicle from the stream of "traffic," and such ordinance is invalid where the city council was only given power to make by-laws for the purpose of "regulating traffic and processions." Schilling v. Melbourne [1928] Vict. L. R. 302, 16 B. R. C. 45.

[5] Pugh v. Des Moines (Pugh v. Crawford) 176 Iowa, 593, 156 N. W. 892, L.R.A.1917F, 345.

Annotation: L.R.A.1917F, 352; 16 B. R. C. 52.

A municipal corporation is not deprived of authority to prohibit the parking of automobiles on its congested streets by the fact that the legislature has made it unlawful to permit them to stand near corthan an hour in other blocks,[6] and parking during certain specified hours in certain districts.[7] The municipality may require parking crosswise of the center of the street[8] and parking on certain streets at a 45-degree angle, and it may forbid automobiles for hire from parking on these streets.[9] Moreover, it may make it unlawful to park vehicles operated for hire upon the public square in a municipality[10] and may authorize a commissioner of public safety to prohibit parking in streets in times of emergency.[11]

There are certain limits to the power to regulate parking. The tests of reasonableness and certainty which are applicable to legislation generally apply to parking regulations.[12] The rules governing the delegation of authority by legislative bodies apply to delegation by the legislative body of the municipality of power over parking regulations.[13] The due process of law guaranty has also been invoked against certain parking regulations.[14]

The city council cannot charge for the use of prescribed parking areas in the streets.[14a]

§ 59. Right of Abutting Owner to Control Cab Stands or Parking in Street.[15]—It is a well-established rule of law that an abutting property owner has the right to park his own vehicle in the street in front of his premises, for the accommodation of himself, his customers, or his guests, in a reason-

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ners, hydrants, or the entrance to theaters, or with machinery running, and has forbidden municipalities to exclude them from the free use of highways. Pugh v. Des Moines (Pugh v. Crawford) 176 Iowa, 593, 156 N. W. 892, L.R.A.1917F, 345.

Statutory authority to control the streets, keep them free from nuisance, and regulate the driving of vehicles thereon empowers a municipal corporation, where the statute declares the obstruction of streets to be a nuisance, to forbid the parking of automobiles on streets in congested districts. Pugh v. Des Moines (Pugh v. Crawford) 176 Iowa, 593, 156 N. W. 892, L.R.A.1917F, 345.

[5a] Annotation: 16 B. R. C. 52.

[6] Annotation: L.R.A.1917F, 352.

[7] Annotation: 72 A.L.R. 230.

[8] Wonewoc v. Taubert, 203 Wis. 73, 233 N. W. 755, 72 A.L.R. 224.

[9] Annotation: 72 A.L.R. 230.

[10] Annotation: 72 A.L.R. 231.

[11] Annotation: 72 A.L.R. 231.

[12] **The objection that it was unreasonable and oppressive** prevailed against an ordinance which purported to make it unlawful for any automobile for hire to remain stationary or parked in any street or alley except for a reasonably sufficient time to permit passengers to embark or disembark, besides the further objection that by being, in effect, a prohibition of parking, it violated a statute which authorized municipalities simply to regulate parking. Annotation: 72 A.L.R. 231.

An ordinance requiring parking of automobiles on a certain street to be crosswise of the center of the street is not void for unreasonableness, for uncertainty because it does not define parking, or for discrimination in that it does not apply to all vehicles. Wonewoc v. Taubert, 203 Wis. 73, 233 N. W. 755, 72 A.L.R. 224.

[13] **An ordinance making it unlawful for the driver of any vehicle to permit it to stand in front of a certain railway station,** "unless the permission to stand has been granted by the person having the supervision over said passenger station," has been held invalid because of its attempted delegation of legislative power, and for the further reason that it violated the equal protection of the law guaranty. Annotation: 72 A.L.R. 231, 232.

In view of an ordinance empowering traffic council to make recommendations which were to have no binding force until adopted by the aldermen, another ordinance which purported to give the council more specific powers,—among which were included the designation of streets on which there should be no parking or parking for only a limited time, also the exclusion or restriction of parking on designated streets during certain hours, and the permission of angle parking in designated places, and which further purported to make the council's regulation along these lines immediately effective, pending action thereon by the aldermen,—was held to be subject to the objection that a legislative body cannot delegate its authority, but must alone exercise its legislative functions. Annotation: 72 A.L.R. 232.

An ordinance expressly intended to prohibit parking on the side of a street opposite apartment houses, as well as on the same side beyond the limits of the premises, by any owner, occupant, or visitor of such apartment houses, or their servants, was held to be arbitrary and discriminatory, and thus to violate the provision of the state Constitution that no law shall be passed granting to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens. Annotation: 72 A.L.R. 232.

[14] Annotation: 72 A.L.R. 231, 232.

[14a] Schilling v. Melbourne [1928] Vict. L. Rep. 302, 16 B. R. C. 45.

[15] As to delegation of power to abutting owner to control parking, see supra, § 58.

able manner and to a reasonable number;[16] however, he cannot ordinarily prevent others from also parking their vehicles there,[17] except in so far as they unreasonably interfere with his right of ingress and egress,[18] and therefore he has no right to grant to another the exclusive privilege, as against the public, of parking on the street in front of his property.[19] The rights of the abutting owner, with respect to parking in the highway adjoining his property, are, however, subject to reasonable regulation by the proper public authorities.[20] The character of the abutting property does not generally affect the rights of the owner, with respect to parking, except in so far as it has a bearing upon the reasonableness of the extent of his use of the adjacent street.[1] In accordance with these principles, it is held that a hotel keeper may park his automobile in the street for the use of his guests;[2] that a hotel company, as an abutting owner, cannot control, as against the municipality, the street in front of its premises as a cab stand;[3] and that a hack stand established by municipal ordinance in front of a railroad depot, which does not prevent ingress or egress, does not interfere with the rights of the railroad company as an abutting owner in the street in front of its premises.[4]

The power of a municipality to make it unlawful for the driver or operator of an automobile to permit it to stand in front of a certain railroad passenger station, unless permission had been obtained from the person having supervision over the passenger station, has been held invalid as a delegation of legislative power.[4a] However, the power of a municipal corporation and a railroad company to regulate the parking of vehicles in the public highway immediately in front of the depot entrances and to prefer certain operators of transportation conveyances to others in the allotment of space has been affirmed.[4b]

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[16] Annotation: 33 A.L.R. 355, 356.

[17] Donovan v. Pennsylvania Co. 199 U. S. 279, 50 L. ed. 192, 26 S. Ct. 91; Pennsylvania Co. v. Chicago, 181 Ill. 289, 54 N. E. 825, 53 L.R.A. 223, writ of error dismissed in (U. S.) 45 L. ed. 1258, 21 S. Ct. 921; Park Hotel Co. v. Ketchum, 184 Wis. 182, 199 N. W. 219, 33 A.L.R. 351.

[18] McFall v. St. Louis, 232 Mo. 716, 135 S. W. 51, 33 L.R.A.(N.S.) 471; Schopp v. St. Louis, 117 Mo. 131, 22 S. W. 898, 20 L.R.A. 783.

[19] Pennsylvania Co. v. Chicago, 181 Ill. 289, 54 N. E. 825, 53 L.R.A. 223, writ of error dismissed in (U. S.) 45 L. ed. 1258, 21 S. Ct. 921; Park Hotel Co. v. Ketchum, 184 Wis. 182, 199 N. W. 219, 33 A.L.R. 351.

[20] Ibid.

[1] Annotation: 33 A.L.R. 357.

[2] Annotation: 33 A.L.R. 357.

[3] Annotation: 33 A.L.R. 358.

This holding was sustained as against the contention of a hotel company that a cab stand unconstitutionally impaired its rights in the street in front of its property, where the ordinance established, without the consent of the hotel company, a public hack stand in front of the hotel in the identical space which the hotel company was using as a stand for the use of its guests under arrangement with a private corporation, the court holding that the only limitation upon the power of the municipality to provide for public hack stands in the streets was that the hack stand could not be of such a nature as to interfere with the ingress and egress of abutting property, and that the ordinance in question did not impair the rights of the hotel company, because the ordinance required a space of 30 feet to be left unoccupied in front of the hotel entrance to assure the hotel company's right of ingress and egress.

As the streets are for the use of all, upon equal terms, for any purpose consistent with the object for which they were established, subject to valid regulation by the public authorities for the public convenience, and as a taxicab is making a legitimate use of the city street while standing at the curb waiting for a fare, provided it does not interfere with the rights of the abutting property owner, a hotel company, though owning the fee to the center of the street, has no right to confer upon one taxicab company the exclusive privilege of parking on the street in front of the hotel, and to exclude all other taxicabs therefrom. Park Hotel Co. v. Ketchum, 184 Wis. 182, 199 N. W. 219, 33 A.L.R. 351.

In McFall v. St. Louis, 232 Mo. 716, 135 S. W. 51, 33 L.R.A.(N.S.) 471, upholding the validity of an ordinance allowing the municipality to grant special permission to licensed hack drivers, who can procure the consent of the abutting property owners to stand their vehicles in the street in front of such property, when the same privilege is not granted to those who do not obtain such consent, the court said that hack and carriage drivers cannot stand their vehicles upon the streets in front of abutting property, thereby obstructing the ingress and egress, without the consent of the abutting property owners, who may have them declared private nuisances.

[4] Pennsylvania Co. v. Chicago, 181 Ill. 289, 54 N. E. 825, 53 L.R.A. 223, writ of error dismissed in (U. S.) 45 L. ed. 1258, 21 S. Ct. 921.

It was held in Kenyon Hotel Co. v. Oregon Short Line R. Co. 62 Utah, 364, 220 P. 382, 33 A.L.R. 343, that where a depot adjoins a public street which the people, in passing to and from the trains, must necessarily pass over, the railroad company has the right to promulgate reasonable rules for the safety and convenience of the traveling public, designating the particular places in the street in front of the depot for the parking of the motor vehicles of the several hotel companies of the city and the taxicab companies, and that such rules are not void as discriminatory in that one hotel company or taxicab company may be allotted a more favorable place than another.

§ 60. Validity of Ordinance Denying to Automobiles for Hire Parking Privileges Extended to Automobiles Generally.—Ordinances which deny to automobiles used for hire the parking privileges extended to motor vehicles generally have ordinarily been held valid.[5]

§ 61. Validity of Municipal Regulation Requiring Vehicles for Hire to Use Taxicab Stands.—The regulation of those who offer to serve the public with the use of their vehicles, such as taxicab drivers, draymen, expressmen, and the like, is within the usual police powers of a municipal corporation.[6] An ordinance requiring vehicles for hire to make use of taxicab stands,[7] and excluding therefrom other vehicles, is reasonable and valid.[8] A traffic regulation which assigned designated stands near a depot for the use of vehicles operated by certain named hotels was held not to be unreasonably discriminatory in that it excluded from such stands a taxicab or omnibus operated by an independent concern.[9]

The state may delegate to a local board the designation of hack or cab stands within a city and the regulation of their use.[10]

[4a] Annotation: 16 B. R. C. 52.

[4b] Kenyon Hotel Co. v. Oregon Short Line R. Co. 62 Utah, 364, 220 P. 382, 33 A.L.R. 343.
Annotation: 33 A.L.R. 355.

[5] **An ordinance forbidding any person to use as a stand for any vehicle operated for** a fee any part of certain named streets, with a proviso that nothing in the ordinance should "be construed as depriving operators of such vehicles of the rights common to them and to operators of other vehicles to park vehicles in the streets for other purposes, as said rights are or may be determined and regulated by law," was held not invalid as discriminatory or as denying the equal protection of the law guaranteed by the Fourteenth Amendment, although another ordinance prohibited the parking of vehicles within a specified area for a period exceeding fifteen minutes between certain hours. New Orleans v. Calamari, 150 La. 737, 91 So. 172, 22 A.L.R. 106.

An ordinance was held not invalid, on the ground that it was unreasonable and confiscatory, which provided that "no taxicab, motorbus, hack, or other vehicle for hire shall park on any street within the fire limits of the city of Atlanta longer than to discharge or take on passengers, unless in actual service, except in front of railroad stations and except that three taxicabs or hacks for the exclusive use of the patrons of hotels shall be allowed to park either in front or on the side of hotels where permission is obtained in writing from the proprietor of such hotel," and that "no hotel proprietor shall give permission to park in front of any place of business occupying the store on the ground floor facing the street," and providing a fine not exceeding $50, or imprisonment on the public works not exceeding thirty days, either or both penalties to be inflicted at the discretion of the recorder for a violation of the ordinance. Annotation: 22 A.L.R. 113.

[6] Annotation: 55 A.L.R. 1132.

[7] **An ordinance which empowered the police authorities** to designate stands for taxicabs on the streets in the vicinity of railroad stations, and provided that they should occupy only the designated stands, was upheld against the contention that it was oppressive, unreasonable, and discriminatory by depriving other vehicles of the right to park in such stands. Kenyon Hotel Co. v. Oregon Short Line R. Co. 62 Utah, 364, 220 P. 382, 33 A.L.R. 343.

An ordinance which, in effect at least, required taxicabs to use stands in places outside of a prohibited zone, upon obtaining permission of the owners of abutting property, was held not to discriminate unjustly against taxicab owners either by permitting automobiles belonging to the general public to park within such zone or by providing that vehicles for hire might stop therein to load and unload merchandise. Annotation: 55 A.L.R. 1133.

[8] Com. v. Rice, 261 Mass. 340, 158 N. E. 797, 55 A.L.R. 1128.

[9] Annotation: 55 A.L.R. 1133.

[10] Annotation: 55 A.L.R. 1133.

7. Miscellaneous Regulations

§ 62. Generally.—The advent and development of motor vehicles have created a diversity of factual situations giving rise to all sorts of legislative enactments. It is within the power of the legislature to exclude motor vehicles from the use of the public highways altogether, and certainly it may call upon the users of such vehicles to contribute to the expense imposed upon the public by their use.[11] A provision in a general city ordinance regulating the use of motor vehicles, that "it shall be unlawful for any person operating a motorcycle to carry another person on said machine in front of the operator," is a valid exercise of the police power of the city with respect to the safety of travelers on the city streets and persons carried on motorcycles.[12]

§ 63. Regulations as to Safety Appliances.—The law is elementary and mandatory that the traveler shall not only provide a proper vehicle, but also that it shall be in such good order and condition as to be no menace to the safety of others on the road.[13] Thus, a state may provide by statute that automobiles must be equipped with safety devices such as lamps, bells, and horns,[14] and in like manner, a municipal corporation may pass an ordinance requiring automobiles to carry signal and other safety appliances.[15]

§ 64. Regulations as to Safety Zones.—A municipality has the power to authorize for a public purpose obstructions and erections in the streets which would otherwise be deemed nuisances, on the ground that this is merely putting the street to a new and improved use, as demanded by the necessities of the times and modern conveniences and appliances.[16] Thus, a municipal authority has been expressly declared to have power to establish safety zones for the protection of street car passengers.[17] A safety zone ordinance was upheld against five objections, namely: That it contravened the state Constitution and statutes; that the city council lacked power to enact it; that it was unreasonable and discriminatory; that its delegation of power to a police officer to direct traffic to the left of the standards marking the safety zone made it unconstitutional; and that the obstruction constituted a nuisance.[18]

§ 65. Regulations as to Stopping.—Early in the history of automobile legislation, it was held that the state might, by law, require that the operator of any motor vehicle on any public highway stop at the signal of the driver of any vehicle drawn by horses.[19] Where the horse appeared frightened, such operator had to stop the motor of the machine and all motive power, and remain stationary unless a movement forward should be deemed necessary in order to avoid accident or injury, until the horse appeared to be under control.[20] The state might also require that when an automobile approached or came up behind a vehicle drawn by horses, the driver had to manage and control his machine in such manner as to exercise every reasonable precaution to prevent the frightening of the horses and to insure the safety and protection of any person riding or driving them,[1] or even that the driver of a motor vehicle, at the indication of a horse becoming alarmed, had to go to the side of the road and remain stationary until the horse had passed.[2] Where a statute required the operator of an automobile to stop upon signal, there had to be an actual signal before he will be held responsible for negligence for violating the law.[3]

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[11] Re Hoffert, 34 S. D. 271, 148 N. W. 20, 52 L.R.A.(N.S.) 949.

[12] Re Wickstrum, 92 Neb. 523, 138 N. W. 733, 42 L.R.A.(N.S.) 1068.

[13] Indiana Springs Co. v. Brown, 165 Ind. 465, 74 N. E. 615, 1 L.R.A.(N.S.) 238, 6 Ann. Cas. 656.

[14] Annotation: 1 L.R.A.(N.S.) 220.

For a discussion of regulations regarding lights, see §§ 25 et seq.

For statutory requirement of horn or other device for signaling approach, see Henderson v. O'Leary, 177 Wis. 130, 187 N. W. 994, 24 A.L.R. 942.

[15] Annotation: 1 L.R.A.(N.S.) 219; 108 Am. St. Rep. 218; 5 Ann. Cas. 793.

[16] See Highways, Streets, and Sidewalks [Also 13 R. C. L. p. 198].

[17] District of Columbia v. Manning, 57 App. D. C. 156, 18 F. (2d) 806, 53 A.L.R. 167.

See also Jacksonville v. Bell, 93 Fla. 936, 112 So. 885, 53 A.L.R. 163, in which it was stated that the concrete "safety island" in question in that case was not a nuisance and was not prohibited by the law. Annotation: 79 A.L.R. 1328.

[18] Cleveland v. Gustafson, 124 Ohio St. 607, 180 N. E. 59, 79 A.L.R. 1325.

[19] Mahoney v. Maxfield, 102 Minn. 377, 113 N. W. 904, 14 L.R.A.(N.S.) 251, 12 Ann. Cas. 289; Hays v. Hogan, 273 Mo. 1, 200 S. W. 286, L.R.A.1918C, 715, Ann. Cas. 1918E, 1127.

Annotation: 14 L.R.A.(N.S.) 251.

Some statutes require the drivers of motor vehicles to bring their cars to an absolute stop when about to overtake a street car taking on or discharging passengers.[4] Under a statute requiring motor vehicles to stop 10 feet behind street cars stopping to permit passengers to alight, the vehicle must not be alongside the street car when it is stopped, although the passengers are to be discharged from the front end of the car.[5]

Stopping at main thoroughfares is also a common requirement now.[6]

§ 66. **Regulations of Use in Parks and on Toll Roads.**—When the automobile was in an early stage of development, certain regulations existed regarding its use in parks and on toll roads. Although in small parks and cemeteries, where narrow roads were constructed for carriages drawn by horses, it was customary and proper to exclude automobiles because of the danger of frightening horses,[7] park commissioners intrusted with general power to make rules and regulations for the use and government of parkways and streets under their control were not usually given the right to exclude automobiles as such from thoroughfares in the park which were open to horse-drawn vehicles,[8] though they were permitted to adopt an ordinance or regulation excluding vehicles more than 10 feet high from the tread of the wheels, whether propelled by muscular or motor power, from the driveways of the park, and such an ordinance was held reasonable and valid as applied to double-decked motor omnibuses.[9] Park commissioners were empowered to adopt and enforce regulations fixing the maximum speed limits of all vehicles using roads in the park, and a limitation of 8 miles an hour was upheld as reasonable when applied to motor vehicles as well as to those drawn by horses.[10] A state law regulating the speed of automobiles throughout the state does not necessarily abrogate all park regulations relating to automobiles, when it refers only to the speed of automobiles on public highways, streets, and ways.[11]

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[20] Annotation: 12 Ann. Cas. 292.

[1] Annotation: 1 L.R.A.(N.S.) 224; 14 L.R.A.(N.S.) 253; 5 Ann. Cas. 793.

[2] Annotation: 13 Ann. Cas. 464.

[3] Mahoney v. Maxfield, 102 Minn. 377, 113 N. W. 904, 14 L.R.A.(N.S.) 251, 12 Ann. Cas. 289.

Annotation: 14 L.R.A.(N.S.) 251; 12 Ann. Cas. 289.

[4] **See, for example,** the regulations involved in Schell v. Du Bois, 94 Ohio St. 93, 113 N. E. 664, L.R.A.1917A, 710; Frankel v. Norris, 252 Pa. 14, 97 A. 104, L.R.A.1917E, 272.

Annotation: 47 A.L.R. 1258.

[5] Ruddy v. Ingebret, 164 Minn. 40, 204 N. W. 630, 44 A.L.R. 159.

The effect of failure to comply with such requirement upon liability for negligence is discussed in §§ 215 et seq. infra.

[6] **The effect of failure to comply** with such requirement upon liability for negligence is discussed in §§ 300 et seq. infra.

[7] Com. v. Kingsbury, 199 Mass. 542, 85 N. E. 848, 127 Am. St. Rep. 513.

Where a tract of land was purchased for a park for the benefit of a municipality, and lots on one side were conveyed to purchasers, "together with a right of carriage, horse, and footway" through the park, subject to such by-laws and regulations as should be made for the purpose of "promoting safety and for establishing and maintaining the character of the park as a place of public recreation," and the corporation was given power to pass by-laws regulating the admission of vehicles to parks, a by-law passed in the interests of public safety, prohibiting any motor vehicle or other similarly driven vehicle from passing through any part of the park, to or from any of the houses on the lots conveyed, was held to be reasonable and valid. Atty.-Gen. v. Hodgson [1922] 2 Ch. (Eng.) 429, 11 B. R. C. 234. Annotation: 11 B. R. C. 247.

[8] Annotation: 1 L.R.A.(N.S.) 222.

See PARKS AND SQUARES [Also 20 R. C. L. p. 637].

[9] Annotation: 26 L.R.A.(N.S.) 503; 15 Ann. Cas. 1170.

A turnpike company, which, by its charter, is required to admit to its toll roads carriages of burden or pleasure, is without power to exclude automobiles,[12] but unless limited by their charters or forbidden by legislative enactment, the managers of highways owned by private corporations have the right, in the exercise of a sound discretion, to exclude automobiles from the use of their highways.[13]

A toll road company chartered before the invention of automobiles and given the right to exact tolls for horse-drawn vehicles has no right to take tolls from automobiles.[14] Mandamus is the proper proceeding to compel a turnpike company to permit a person to operate and use his automobile over its turnpike road, and in such cases the burden is upon the petitioner to show all the facts necessary to make out his legal right to the remedy requested, including the fact that he has complied with the requirements of the law as to the registration of motor vehicles.[15] Laws regulating automobiles while upon highways are equally applicable to them while in operation upon toll roads.[16]

§ 67. Use of Highways for Races and Speed Contests.—Owing to the fact that highways are constructed and maintained for public travel, a municipality has no power to authorize the exclusive use of a highway for the purpose of holding an automobile speed contest, in the absence of legislative sanction. Such a use, at common law, would amount to a nuisance.[17] The want of power in a municipality in this respect is more marked where a statute fixing the maximum rate of speed must necessarily be violated in the races attempted to be authorized by an ordinance, and in such a case the municipality even may render itself a participator in the illegal acts consequent upon the adoption of the ordinance.[18] Authority in a municipality for the adoption of such an ordinance is not derived from a charter provision which is in conflict with statutes subsequently enacted regulating the speed of motor vehicles on the highways of the state.[19]

D. CONFLICT BETWEEN STATUTES AND LOCAL REGULATIONS

1. IN GENERAL

§ 68. Generally.—It is a well-settled general rule that municipalities, having the power to regulate the use of their streets, may enact valid rules and regulations for the government of motor vehicles within their boundaries, so long as they are not in conflict with or repugnant to legislative enactments governing the use of such vehicles, but that such ordinances are invalid if they are in conflict with statutes relating to the subject.[20]

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[10] Com. v. Crowninshield, 187 Mass. 221, 72 N. E. 963, 68 L.R.A. 245.
Annotation: 1 L.R.A.(N.S.) 219; 108 Am. St. Rep. 218; 11 Ann. Cas. 728.

[11] Com. v. Crowninshield, 187 Mass. 221, 72 N. E. 963, 68 L.R.A. 245.
Annotation: 1 L.R.A.(N.S.) 219.

[12] Annotation: 20 Ann. Cas. 516.
See TURNPIKES AND TOLL ROADS [Also 26 R. C. L. p. 1395, § 1].

[13] Annotation: 5 Ann. Cas. 794.

[14] Peru Turnp. Co. v. Peru, 91 Vt. 295, 100 A. 679, L.R.A.1917E, 559.

[15] Annotation: 1 L.R.A.(N.S.) 222.

[16] Weirich v. State, 140 Wis. 98, 121 N. W. 652, 22 L.R.A.(N.S.) 1221, 17 Ann. Cas. 802.
Annotation: 17 Ann. Cas. 804.

[17] Bogart v. New York, 200 N. Y. 379, 93 N. E. 937, 21 Ann. Cas. 466; Johnson v. New York, 186 N. Y. 139, 78 N. E. 715, 116 Am. St. Rep. 545, 9 Ann. Cas. 824.
Annotation: 9 Ann. Cas. 828; 21 Ann. Cas. 469.
See HIGHWAYS, STREETS, AND SIDEWALKS [Also 13 R. C. L. p. 254, § 210].

[18] Johnson v. New York, 186 N. Y. 139, 78 N. E. 715, 116 Am. St. Rep. 545, 9 Ann. Cas. 824.
Annotation: 9 Ann. Cas. 828.

[19] Bogart v. New York, 200 N. Y. 379, 93 N. E. 937, 21 Ann. Cas. 466; Johnson v. New York, 186 N. Y. 139, 78 N. E. 715, 116 Am. St. Rep. 545, 9 Ann. Cas. 824.
Annotation: 9 Ann. Cas. 828; 21 Ann. Cas. 469.

Under some modern developments of municipal government, the powers of the municipality are conferred by constitutional provision or at least are protected against change by the legislature. Where the powers so conferred are broad enough to include the regulation of automobile traffic, the power of the municipality in this regard is supreme and the legislature cannot interfere therewith.[1] But if such power is not broad enough to include the regulation of automobile traffic, then the general rule that the legislative power is supreme applies.[2]

2. REGULATIONS AS TO SPEED

§ 69. Generally.—Subject to what is said in the preceding section, it is generally held that where a municipality has power to regulate the use of vehicles within its boundaries, ordinances regulating the speed of motor vehicles therein are valid if they do not conflict with legislative enactments.[3] Of course, however, as a general rule, where an ordinance regulating the speed of motor vehicles within a municipality is in conflict with a statute on the same subject, the ordinance is invalid.[4] In accordance with these principles, it is held that an ordinance providing that the speed limit on all motor vehicles should not exceed 8 miles an hour over the streets in what is known as the fire limit, and that through any other streets the speed should not exceed 15 miles an hour, and providing for punishment by a fine of $5 for the first offense and $10 for the second offense, and for cancelation of the permit to operate automobiles for the third violation, is in conflict with certain sections of a statute, municipal corporations being expressly inhibited from passing any ordinance contrary to those statutory provisions.[5] It is also held that local authorities are without power to suspend the provisions or lessen the restriction of the sections of the motor vehicle act with respect to speed, and that the fact that park commissioners had, prior to the passage of such act, established by ordinance the rate of speed for motor vehicles in parks and boulevards, did not prevent the provisions of the motor vehicle act as to speed from being applicable to the operation of automobiles in the park in question.[6] The decisions in some cases are affected by constitutional provisions relating to the authority of municipalities.[7]

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[20] Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A.L.R. 1172; Roper v. Greenspon, 272 Mo. 288, 198 S. W. 1107, L.R.A.1918D, 126.

Annotation: 21 A.L.R. 1186, s. 64 A.L.R. 993; 3 Ann. Cas. 495; 11 Ann. Cas. 728; Ann. Cas. 1916E, 1067.

Regulations which merely place additional and more stringent limitations upon the operation of motor vehicles than those prescribed by the state law are not in conflict therewith. Annotation: 21 A.L.R. 1186, s. 64 A.L.R. 993.

That a state statute makes the operation of an automobile by a child unlawful only in the case of a child under sixteen years of age does not affect the validity of a municipal ordinance prohibiting the operation of automobiles on the streets of the city by persons under eighteen years of age, such ordinance not being in conflict with the statute, but merely imposing a superadded obligation. United States Fidelity & G. Co. v. Guenther, 281 U. S. 34, 74 L. ed. 683, 50 S. Ct. 165, 72 A.L.R. 1064.

[1] Kalich v. Knapp, 73 Or. 570, 142 P. 594, 145 P. 22, Ann. Cas. 1916E, 1051.

Where the Constitution confers upon municipal corporations a reasonable control of their streets, the legislature cannot deprive the municipal authorities of power to prescribe the lights on automobiles which shall be used upon such streets. Annotation: 11 A.L.R. 1227, s. 78 A.L.R. 815.

[2] Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A.L.R. 1172.

It has been held that the regulation of street traffic is not a municipal affair within the constitutional provision giving the municipality supremacy over the legislature in municipal affairs. Ibid.

[3] Brazier v. Philadelphia, 215 Pa. 297, 64 A. 508, 7 Ann. Cas. 548.

Annotation: 21 A.L.R. 1187, s. 64 A.L.R. 994.

[4] Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A.L.R. 1172.

Annotation: 21 A.L.R. 1187, s. 64 A.L.R. 994.

[5] Annotation: 21 A.L.R. 1188, s. 64 A.L.R. 994.

§ 70. Fixing Rate Lower than Statutory Rate.—The determination of the validity of an ordinance which establishes a speed limit lower than the statutory rate obviously depends to a large extent upon the wording of the statute and the charter powers of the municipality. Where the statute is designed to regulate the speed limit in a municipality as well as on the state highways, an ordinance establishing a lower speed limit than the statutory limit may be held invalid because of inconsistency.[8] But where the power of

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[6] Annotation: 21 A.L.R. 1188, s. 64 A.L.R. 994.

In Com. v. Crowninshield, 187 Mass. 221, 72 N. E. 963, 68 L.R.A. 245, it was held that regulations by the board of park commissioners of Boston as to the rate of speed of automobiles in parks and streets under its control were not abrogated by Mass. Stat. 1902, chap. 315, p. 235, limiting the speed of automobiles throughout the state on public highways, streets, and ways.

[7] In Kalich v. Knapp, 73 Or. 570, 145 P. 22, Ann. Cas. 1916E, 1055, reversing on rehearing 73 Or. 558, 142 P. 594, Ann. Cas. 1916E, 1051, where a section of the Constitution provided that the legislature should not enact, amend, or repeal any charter or act of incorporation of any municipality, and that the legal voters of municipalities were granted power to enact and amend their charters, subject to the Constitution and criminal laws of the state, and another section of the Constitution provided that the initiative and referendum powers reserved to the people were thereby further reserved to the local voters of every municipality as to all local, special, and municipal legislation of every character, in or for their respective municipalities, and declared that these provisions conferred ample and exclusive power upon the people of every municipal corporation to regulate their own affairs respecting municipal legislation, and that the legislative assembly could not pass laws to repeal or amend municipal charters, even by implication, respecting such matters, it was held that these provisions removed the legislative power over the subject of municipal traffic, and that a motor vehicle act declaring that its purpose was to limit the authority of municipalities on like subjects, and providing that local authorities should have no power to prescribe a lower rate of speed than that fixed by the act, was unconstitutional, although the act provided for a punishment for its violation.

[8] Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A.L.R. 1172.

The legislature may constitutionally fix a speed at which vehicles may be operated on the city streets, and forbid the municipal authorities to attempt to fix a lower limit. Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A.L.R. 1172.

An ordinance providing that it should be unlawful for any person to drive an automobile over any bridge within the city limits at a rate of speed exceeding 10 miles an hour, regardless of particular conditions, was held to be in conflict with the motor vehicle act which provided, in part, that motor vehicles should not be driven within the corporate limits of a city at a speed exceeding 15 miles an hour, and that no person should operate such a vehicle recklessly or at a rate of speed greater than is reasonable and proper, having regard to the width, traffic, and use of the highway and the general and usual rules of the road, or so as to endanger the property, life, or limb of any person; and further providing that no city should have power to enact any ordinance requiring local registration, or other requirements in any manner excluding or prohibiting any vehicle whose owner had complied with the provisions of the motor vehicle act from the free and unobstructed use of the public highways, but providing that it should not prohibit any city from passing any ordinance in strict conformity with the provisions of such act, imposing the same penalty for a violation of any of the provisions of the act, where such violations occur within such city or town. Annotation: 21 A.L.R. 1191, s. 64 A.L.R. 995.

It was held that the general control of its streets given a city by a statute was subject to the general laws of the state, and must not be so exercised as to violate those laws, but that the fact that the legislature had provided limitations upon the speed of motor vehicles did not prevent further restrictions by the city, if they were reasonable and made necessary by special conditions and circumstances that were plainly not considered by the legislature, and did not prohibit or restrict the free use of the streets; and although the statute provided that in the closely built-up portion of a city, motor vehicles should not be driven at a greater speed than 1 mile in six minutes, and in other portions at a greater speed than a mile in four minutes, it was held that it was not shown that the free use of the streets was restricted by an ordinance, providing that no automobile should be driven in the streets of a city at a greater rate of speed than 8 miles an hour, and that in turning a corner of any street or avenue, or in any alley of the city, the speed should not be greater than 4 miles an hour. Annotation: 21 A.L.R. 1193, s. 64 A.L.R. 995.

In Brazier v. Philadelphia, 215 Pa. 297, 64 A. 508, 7 Ann. Cas. 548, an ordinance which provided that no person should drive a motor vehicle at a rate of speed greater the municipality to set a speed limit is not limited and is not intended to be limited by the statute, an ordinance establishing a lower speed limit than that prescribed by the statute cannot be regarded as in conflict with it.

§ 71. Fixing Rate Higher than Statutory Rate.—The same considerations involved in determining the validity of an ordinance which establishes a speed limit lower than the statutory rate[9] seem to apply in determining the validity of ordinances fixing higher rates than the statutory rates. Thus, although there appears to be some authority to the contrary,[10] where the statute is designed to regulate the speed limit in a municipality as well as on the state highways, an ordinance establishing a higher speed limit than the statutory limit may be held invalid as inconsistent.[11]

§ 72. Definite and Indefinite Rates.—In general it may be held that an

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than 7 miles per hour within the built-up portions of the city, and at a greater speed than 8 miles in other portions, was held not invalid as in conflict with a statute providing that no person should be allowed to operate a motor vehicle on any of the public streets of a city at a greater speed than a mile in six minutes within the corporate limits, and that outside the corporate limits of any city, the lawful rate of speed should not exceed 1 mile in three minutes.

It has been held, under the provisions of the New York Motor Vehicle Act of 1904, permitting local authorities of cities and villages to "limit by ordinance, rule, or regulation hereafter adopted the speed of motor vehicles upon the public highways," that a city or village is authorized to prescribe a lower rate of speed within its territorial jurisdiction than that permitted by the motor vehicle act itself, providing the ordinance by which this is accomplished prescribes the same rate for all other vehicles, the same penalties for a violation thereof applicable to all other vehicles, and providing that before the ordinance becomes effective, signs have been erected which notify drivers, upon entering the limits of the municipality, that they are required to lessen their speed to the rate established by the ordinance. Annotation: 21 A.L.R. 1192, s. 64 A.L.R. 993.

[9] See § 70.

[10] **In one case,** an ordinance dividing the city into two districts and fixing the maximum rate of speed for one of them at 12 miles an hour and for the other at 20 miles, and providing penalties of fines or imprisonment or both, graduated in severity for first and subsequent offenses for all violations of the speed regulations where the speed attained did not exceed 30 miles an hour, and providing that where the rate exceeded 30 miles an hour a violation should be a misdemeanor and punishable by imprisonment in jail for different terms, was held not to enact regulations at variance with the provisions of, or to fix a different penalty than, the motor vehicle act, which provided for the registration of motor vehicles, and the regulation of speed at which such vehicles should be operated, and provided, for streets and highways within the boundaries of incorporated cities and towns, a maximum rate of 1 mile in six minutes where the territory was closely built up, and 1 mile in four minutes elsewhere in cities and towns, and providing for graduated penalties for first and subsequent violations of the act in the form of fines or imprisonments, or both, and limited the power of local authorities to enact any ordinance with reference to motor vehicles except in accordance with the provisions of the act. The ordinance was held to comply with the requirements of the statute that the penalties for a violation of the speed laws by motor vehicles should be similar to and no greater than those fixed for other vehicles, where it made the provisions of the ordinance in this respect applicable generally to all vehicles. Annotation: 21 A.L.R. 1194, s. 64 A.L.R. 997.

[11] **Accordingly, it was conceded that the provision of the motor vehicle act,** that no person should drive a motor vehicle at a greater speed than 15 miles an hour in approaching or traversing an intersection, or in approaching or going around corners or curves when the operator's view of the way was obstructed, prevailed over an ordinance providing that any person who should drive any vehicle at a rate of speed greater than 20 miles per hour, and not greater than 30 miles an hour, upon any street in the city outside of certain territory, should be deemed guilty of a misdemeanor. Annotation: 21 A.L.R. 1194, s. 64 A.L.R. 997.

It has been held that an ordinance fixing a uniform rate of speed for motor vehicles of 12 miles an hour for all parts of a city was in conflict with a state law providing, among other regulations, that where the operator's view of the road traffic is obstructed upon approaching an intersecting way, or in traversing a crossing or intersection of ways, or in approaching or traversing a bridge, dam, trestle, causeway, or viaduct, or in going around corners or a curve in a street or highway, the speed limit shall be 10 miles an hour. Annotation: 21 A.L.R. 1194, s. 64 A.L.R. 997.

Where a motor vehicle act provided that it should not be construed as changing or interfering with a regulation or ordinance adopted by a municipality, regulating the running and operation of automobiles, "providing such regulation or ordinance is not in conflict with the provision of this act," and the act forbade a greater speed than 6 miles an hour on approaching crossings, an ordinance allowing a speed of 10 miles an hour at crossings in the city was held in conflict with the motor vehicle act and therefore inoperative, null, and void. Annotation: 21 A.L.R. 1194, s. 64 A.L.R. 997.

ordinance which establishes a definite speed limit where the statutory regulation is indefinite is not invalid. Thus, it was held that a statute claiming to be exclusively controlling, and making the driving of an automobile in excess of 25 miles per hour presumptive evidence of driving at a speed not prudent, did not annul an ordinance enacted under the police power of a municipal corporation, limiting the speed at various points in the city to from 6 to 8 miles an hour.[12] And an ordinance providing that it should be unlawful to operate or run any motor vehicle upon the public highway in a certain city recklessly, or at a rate of speed greater than is reasonable and proper, having regard to the width, traffic, and use of a highway, or so as to endanger property or the life or limb of any person, was held not void for inconsistency with a statute worded in substantially the same manner, but containing provisions that a rate of speed in excess of 30 miles an hour for a stated distance should be presumptive evidence of traveling at a rate of speed not careful and prudent, although the ordinance in question contained no such provision.[13]

But an ordinance fixing the speed of automobiles on city streets at a certain rate conflicts with a statute forbidding such vehicles to be driven at an unreasonable speed.[13a]

3. REGULATIONS AS TO LICENSES OR TAXES

a. IN GENERAL

§ 73. **Generally.**—The general rules stated above[14] obviously apply to regulations as to licenses or taxes. For the purpose of convenience, these regulations are divided into two parts—those affecting vehicles for hire[15] and those affecting vehicles other than those for hire.[16]

b. ON VEHICLES OTHER THAN THOSE FOR HIRE

§ 74. **Generally.**—The cases involving conflict between statutes and local automobile regulations relating to licenses or taxes on vehicles other than those for hire cannot be regarded as entirely in accord. In some cases ordinances providing for the licensing or taxing of motor vehicles other than those used for hire have been sustained as not in conflict with statutes regulating the licensing of such vehicles.[17] In other cases, ordinances imposing taxes or licenses, or requiring owners of motor vehicles not used for hire to display a city license plate, have been held invalid as in conflict with statutes regulating motor vehicles.[18]

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[12] Roper v. Greenspon, 272 Mo. 288, 198 S. W. 1107, L.R.A.1915D, 126.

[13] Annotation: 21 A.L.R. 1196, s. 64 A.L.R. 997.

[13a] Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A.L.R. 1172.

[14] See § 68.

[15] See §§ 78 et seq.

[16] See §§ 74 et seq.

[17] Brazier v. Philadelphia, 215 Pa. 297, 64 A. 508, 7 Ann. Cas. 548.

Annotation: 21 A.L.R. 1196, s. 64 A.L.R. 993.

An ordinance imposing a wheel tax upon vehicles was held not forbidden by a statute which, after providing for state registration of motor vehicles, the use of brake, horns, lamps, etc., provided that "no city . . . shall make or pass any ordinance, rule, or regulation limiting or restricting the speed of motor vehicles; and no ordinance, rule, or regulation heretofore or hereafter made by any city . . . in respect to or limiting the use or speed of motor vehicles shall have any force, effect, or validity." Annotation: 21 A.L.R. 1197, s. 64 A.L.R. 997.

[18] Barrett v. New York (C. C.) 189 F. 268, reversed on other grounds in 232 U. S. 14, 58 L. ed. 483, 34 S. Ct. 203.

Annotation: 21 A.L.R. 1196, s. 64 A.L.R. 993.

An ordinance requiring persons operating vehicles first to procure a license from the city for that privilege, and also to procure a state chauffeur's license from the tax collector of the county in which the city was situated, was held invalid in that it was in substantial conflict with the highway law regulating the taking out of a chauffeur's

§ 75. Where Statute Purports to Be Exclusive.—It is a well-established principle of law that a municipal ordinance relating to licenses or taxes upon vehicles other than those for hire is invalid where the state statute on the subject purports to be exclusive.[19] Thus, an ordinance requiring owners of automobiles not used for hire to pay the municipality a license tax was held invalid where the motor vehicle act in force provided that the registration fee imposed by that act should be in lieu of any county or municipal license fee, and that it should be unlawful for any county or municipality to collect any license fee on any motor-driven vehicle, but provided that an additional license tax might be charged on motor-driven vehicles used for hire.[20] Where the state act regulating the licensing of automobiles and chauffeurs provides that "local authorities shall have no power to pass, enforce, or maintain any ordinance, rule, or regulation requiring from any owner or chauffeur to whom this article is applicable any tax, fee, license, or permit for the use of the public highways, or excluding any such owner or chauffeur from the free use of such public highways, . . . and no ordinance, rule, or regulation contrary to, or in any wise inconsistent with, the provisions of this article, now in force or hereafter enacted, shall have any effect," a municipality cannot require licenses for vehicles and drivers in addition to the licenses issued by the state.[1]

§ 76. Statutes Forbidding More than One License Number.—Obviously, an ordinance requiring automobile owners to obtain a license from the municipality is invalid where the state statute expressly forbids more than one license number. Thus, an ordinance requiring the owner of a motor vehicle, other than a motor truck or motor-driven commercial vehicle, to display a number thereon, other than the number issued by the secretary of state, is invalid as in conflict with a state act providing that no owner of a motor vehicle, except motor trucks and motor-driven commercial vehicles, should be required to display upon his motor vehicle any other number than the number of the registration seal issued by the secretary of state.[2] Similarly, an ordinance requiring that on every automobile operated in the city there should be displayed the number of its city license, is in conflict with a state law which prescribes the manner in which the registration number of all motor vehicles registered at the office of the secretary of state should be displayed, and con-

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license throughout the state elsewhere than within the corporate limits of cities having ordinances requiring the procurement of a license to operate such vehicles within the corporate limits of such cities; but the court stated that it believed that it would be within the province of the city to require any applicant who operates a motor vehicle within the city also to take out a chauffeur's license under the state law, as well as a license under the city ordinances, as such a requirement would be a reasonable requirement as a public safeguard. Annotation: 21 A.L.R. 1197, s. 64 A.L.R. 997.

[19] See generally, annotation: 21 A.L.R. 1197, s. 64 A.L.R. 997.

A statute providing that no ordinance which regulates the speed at which motor vehicles shall run, or which governs or restricts the use of such vehicles, shall thereafter have any force or effect, does not repeal a municipal ordinance requiring the licensing of vehicles, including taxicabs, carrying passengers within the limits of a city for hire. State v. Dunklee, 76 N. H. 439, 84 A. 40, Ann. Cas. 1913B, 754.

[20] Annotation: 21 A.L.R. 1197, s. 64 A.L.R. 997.

[1] Annotation: 21 A.L.R. 1198, s. 64 A.L.R. 997.

It has been held, however, that the provisions of a state motor vehicle act, that no owner of motor vehicles who has obtained a certificate from the secretary of state as provided for in the motor vehicle act should be required to obtain any other license or permit to use or operate his vehicles, and that such owner should not be required to display upon his vehicles any other number than that furnished by the secretary of state, was not violated by a city ordinance requiring owners of motor vehicles to pay an annual license to the city on their machines, since the word "license," as used, meant tax, and the issuing of the license was merely the giving of a receipt by the city for the payment of the tax. Annotation: 21 A.L.R. 1199, s. 64 A.L.R. 993.

[2] Annotation: 21 A.L.R. 1199, s. 64 A.L.R. 993.

cludes: "And provided that said owner shall not be required to place any other mark of identity upon his motor vehicle." [3]

Occasionally, a question of statutory construction arises in determining whether or not a statute actually does prohibit municipal licenses. Accordingly, an ordinance regulating the use of automobiles and requiring owners to obtain a license from a city department was held not rendered invalid by a subsequent act of the legislature providing that no motor vehicle should be operated on the highway until the operator should procure a license from the state, and providing that not more than one state license number should be carried upon front and back of the vehicle, and that a license number obtained in any other place or state should be removed while the vehicle is being used within the commonwealth.[4]

§ 77. **Amount of Fee as Affecting Validity.**—The amount of the fee exacted by a municipality may have considerable bearing in the determination of the validity of the ordinance establishing the fee. An ordinance requiring a license fee of $1 from motor vehicle drivers was held not a revenue measure, and not in conflict with the state law which prohibited an additional tax being imposed on private motor vehicles by a municipality, the court stating that the fee of $1 was merely incidental and bore a reasonable relation to the purpose of the ordinance and the expense of its enforcement.[5]

c. ON VEHICLES FOR HIRE

§ 78. **Generally.**—Obviously, the decisions in cases involving a conflict between statutory and local regulations relating to licenses or taxes on motor vehicles for hire depends to a large extent upon the wording of the statutes and ordinances considered. In some cases ordinances relating to the licensing of motor vehicles for hire have been upheld, notwithstanding the provisions of statute regulating such vehicles.[6] Accordingly, although an ordinance regulating the parking, lights, driving, etc., of taxicabs, and requiring chauffeurs driving them to procure a license from the city, was in conflict with the state law regulating such vehicles, the ordinance was held to prevail in view of the provision of the Constitution that "no person, firm, association, or corporation shall be authorized or permitted to use the streets, alleys, or public places of any city, town, or village for the constructing or operation of any public utility or private enterprise, without first obtaining the consent of the proper authorities of such city, town, or village." [7] In other cases, however, ordinances relating to the licensing of motor vehicles for hire have been deemed invalid. Thus, a municipality was held to have no authority to impose a privilege tax on the operation of automobiles for hire, where the statute provided that no municipality should impose a privilege tax or registration fee upon any motorcycle, electric motor vehicle, commercial motor vehicle, or motor vehicle, and should not require any registration of the same.[8]

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[3] Annotation: 21 A.L.R. 1199, s. 64 A.L.R. 997.

[4] Brazier v. Philadelphia, 215 Pa. 297, 64 A. 508, 7 Ann. Cas. 548.

In this case the court said: "It has been argued that the Act of 1905 was intended to provide that only one license number or tag shall appear upon the front and back of the vehicle when operated on the highways, but we do not regard this to be the proper construction of the act. In its second section it is provided that only one 'state license' number shall be carried upon the vehicle. There is no prohibition against the carrying of a license which was not a state license, and the limitation of the prohibition to a single class of licenses implies that it was not intended to exclude a local municipal license from being carried upon the vehicle. And when in the same section it was enacted that a 'license number obtained in any other place or state shall be removed from said vehicle while the vehicle is being used within this commonwealth,' we understand that no reference was intended to be made to any such license as the city would issue under the ordinance in question. We do not think that the word 'place' can properly be regarded as applying to a municipality within the commonwealth. It seems to us very plain that what was intended to be enacted by the clause just cited was that a foreign license number should be removed from any vehicle which comes from another territorial division outside of the state into the limits of the state, and only in such a case. The language, 'while the vehicle is being used within this commonwealth,' seems to indicate clearly that the vehicle in mind was one which comes from outside the commonwealth."

[5] Annotation: 21 A.L.R. 1200, s. 64 A.L.R. 997.

In a Pennsylvania case, the court upheld the validity of an ordinance passed by the City of Pittsburgh, under the power conferred by the special Act of April 1, 1868, P. L. 565, § 7, to regulate and license every description of carriages, which made it unlawful for any person to operate, or cause to be operated, upon the streets of the city, an automobile, motor vehicle, or other conveyance or wagon, the motor power of which shall be electricity, steam, gasoline, or any source of energy other than human and animal power, except upon the conditions, inter alia, of the payment by the owner of an annual license fee of $6 on vehicles intended to carry one or two persons, and a fee of $10 on those intended to carry more than two persons. The court said that the license imposed was not unreasonable, and was uniform upon different kinds of the several classes of vehicles named, and that that was all the law required in that respect. Annotation: 21 A.L.R. 1200, s. 64 A.L.R. 997.

A license granted by the state usually confers upon motor vehicles only the rights which are possessed by other vehicles in the use of the public streets and highways. The fact that a motor vehicle is thus licensed does not, in and of itself, exclude the power of a municipality to require an additional license, at least to impose a license under the police power.[9]

§ 79. Regulations as to Vehicles for Hire Other than Those Relating to Licenses.—The well-established rules stated above [10] apply to regulations as to vehicles for hire other than those relating to licenses.[11] Thus, an ordinance regulating the use of city streets by corporations or individuals with public service automobiles not operating under the jitney ordinance, which prescribed the streets on which they should operate, was held not in conflict with the state highway department act which provided that it should not interfere with "the powers now or hereafter vested in local authorities to license and regulate the operation of vehicles offered to the public for hire," and also provided that the license and registration prescribed by the act "should not affect the right of incorporated cities and towns to license and regulate the use of motor vehicles for hire in such corporation." [12] Likewise, an ordinance providing certain routes for jitneys, and changing former routes and restricting them to fewer streets, was held not in conflict with the general laws regulating vehicular traffic over the highways of the state.[13]

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[6] Applewold v. Dosch, 239 Pa. 479, 86 A. 1070, Ann. Cas. 1914D, 481.

Annotation: 21 A.L.R. 1200, s. 64 A.L.R. 993.

The Pennsylvania Act of April 27, 1909, P. L. 265, providing for the licensing of automobiles by the state, and providing that "no city, county, borough, or township shall have power to enforce or maintain any ordinance, rule, or regulation inconsistent with or fixing a rate of speed lower than that permitted by this act; or require of any person any license tax upon or permit to operate motor vehicles upon the public highways; or the registration of any motor vehicles; and all such local ordinances, rules, or regulations now in force shall expire and shall be null and void and of no further effect," does not prevent a borough from enacting a law requiring the owners of automobiles kept for hire to pay a license fee by virtue of the Act of April 22, 1889, P. L. 39, conferring power upon boroughs "to enact ordinances establishing reasonable rates of license tax on all hacks, carriages, omnibuses, and other vehicles used in carrying persons or property for pay, and limit the compensation for the same within the limits of said borough," since such ordinance provides for a tax for a special use of the highwavs, and is not in conflict with the Act of 1919. Annotation: 21 A.L.R. 1200, s. 64 A.L.R. 998.

[7] Annotation: 21 A.L.R. 1202, s. 64 A.L.R. 998.

[8] Annotation: 21 A.L.R. 1202, s. 64 A.L.R. 998.

[9] Applewold v. Dosch, 239 Pa. 479, 86 A. 1070, Ann. Cas. 1914D, 481.

Annotation: Ann. Cas. 1914D, 483.

[10] See § 68.

[11] For license regulations, see §§ 90 et seq.

[12] Annotation: 21 A.L.R. 1203, s. 64 A.L.R. 1000.

4. Miscellaneous Regulations

§ 80. Regulations as to Passing Street Cars.—The well-established rules stated above[14] apply to regulations as to passing street cars. To render the ordinance invalid it must be inconsistent with the state law. An ordinance requiring the operator of a motor vehicle to bring his car to a complete stop not less than a foot from the rear of any street car that is taking on or letting off passengers is not inconsistent with, or repugnant to, a provision of the state law that "in approaching or passing a car of a street railway which has been stopped to allow passengers to alight or embark, the operation of every motor vehicle shall slow down, and, if it is necessary for the safety of the public, he shall bring the said vehicle to a full stop."[15] Nor is an ordinance requiring vehicles to be stopped at a distance of 10 feet in the rear of stopping street cars inconsistent with the provision of a motor vehicle act requiring that a motor vehicle be operated with due care and caution when it overtakes a street car which is stopping to receive or discharge passengers, and that such vehicle shall be brought to a full stop if reasonably necessary for the safety of such passengers.[16]

§ 81. Requirements as to Driving or Stopping on Right Side.—The well-established rules stated above[17] apply to requirements as to traveling or stopping on the right-hand side of the street. Thus, an ordinance excluding vehicles from the left-hand side of the street when going in any given direction, and requiring one leaving a vehicle standing on any street to place it on the right-hand side thereof with reference to the direction in which it fronts, was held not repugnant to the motor vehicle act, which made no provision for changing the law of the road and included municipal highways primarily for the purpose of establishing certain speeds.[18] There was held to be no difference between a statute providing that drivers of vehicles, "wherever practicable, shall travel on the right-hand side of such highway," and an ordinance providing that "the driver of any vehicle at any place upon any street shall turn to the right, and, on all occasions, shall travel on the right-hand side of such street, and as near the right-hand curb thereof as possible," the court stating that it would be absurd to construe the ordinance as requiring such travel on the right-hand side of the street when the conditions are such that it is not practicable and that there was no difference between the ordinance and statute with regard to the rule.[19]

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[13] Annotation: 21 A.L.R. 1203, s. 64 A.L.R. 1000.

[14] See § 68.

[15] Annotation: 21 A.L.R. 1204, s. 64 A.L.R. 1001.

[16] Annotation: 21 A.L.R. 1205, s. 64 A.L.R. 993.

It has been said that such an "ordinance certainly does not attempt to make lawful the performance of any act forbidden by the state law. It follows that a conflict, if any, can exist only upon the theory that the ordinance prohibits that which is affirmatively authorized by the motor vehicle act. In short, the appellants are placed under the necessity of contending that that act affirmatively authorizes motor vehicles to pass a stopping street car in a city whenever the apparent risk involved in so doing would not deter an ordinarily prudent and careful driver. We do not so construe the statute. Where the legislature has assumed to regulate a given course of conduct by prohibitory enactments, a municipality, with subordinate power to act in the matter, may make such new and additional regulations in aid and furtherance of the purpose of the general law as may seem fit and appropriate to the necessity of the particular locality, and which are not in themselves unreasonable."

However, an ordinance providing that a vehicle overtaking a street car stopped to take up or set down passengers shall come to a full stop at a distance of at least 10 feet from the point where passengers are being taken up or set down was held invalid as inconsistent with the motor vehicles act, which provided that in approaching or passing a street car which had been stopped to allow passengers to alight or embark, the operator of every motor vehicle shall slow down, and, if it be necessary for the safety of the public, shall bring the vehicle to a full stop; and which also provided that local authorities should have no power to pass any ordinance in any way respecting motor vehicles or their speed upon or use of the highway, and providing that no ordinances contrary thereto or in any wise inconsistent with the provisions of the article then in force or thereafter enacted should have any force, and also providing that all acts inconsistent with the article containing the regulation relating to passing street cars were expressly repealed. Annotation: 21 A.L.R. 1205, s. 64 A.L.R. 1001.

[17] See § 68.

[18] Annotation: 21 A.L.R. 1206, s. 64 A.L.R. 1002.

§ 82. Regulations Concerning Street Intersections.—The well-established rules stated above[20] apply to regulations at street intersections. An ordinance giving vehicles driven along a certain avenue the right of way at street intersections over those driven along the intersecting streets is not annulled by a state statute which annulled all ordinances regulating or limiting the use or speed of motor vehicles.[1] Moreover, an ordinance providing that vehicles traveling on thoroughfares known as "avenues" should have the right of way over vehicles traveling on thoroughfares known as streets, or other thoroughfares which intersect "avenues," is not invalid as conflicting with a provision of the motor vehicle act that in cities and towns, motor vehicles turning to the right from one street into another shall have the right of way over vehicles traveling on the street into which same are turning, since this provision did not cover a situation where the automobiles approach on different streets intersecting, as at right angles, without turning, but continuing in their course.[2] An ordinance requiring vehicles turning into another street at the right hand to keep "as near the right-hand curb as possible" is not invalid on the ground that it conflicts with a statute requiring travelers to keep to the right on meeting.[3]

§ 83. Regulations as to Parking.—The well-established rules stated above[4] apply to regulations as to parking. A municipality is not deprived of the power to prohibit the parking of automobiles on its congested streets by reason of provisions of the motor vehicle act making it unlawful to permit automobiles to stand near corners, hydrants, or the entrance to theaters, or with machinery running, and forbidding municipalities to exclude them from the free use of highways.[5]

§ 84. Regulations as to Lights.—The well-established rules stated above[6] apply to regulations as to lights. Where the state Constitution confers upon municipal corporations a reasonable control of their streets, the legislature cannot deprive the municipal authorities of the power to prescribe the lights on automobiles which shall be used upon such streets.[7] Where, however, the legislative power of a city was vested in the common council, and the commissioner of public safety was given supervision and control of the government, administration, and discipline of the police and fire departments, with power to adopt such reasonable rules, orders, and regulations not inconsistent with the law as might be reasonably necessary to effect a prompt and efficient exercise of all powers conferred, it was held that the commissioner could not prescribe regulations for automobile lights.[8]

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[19] Annotation: 21 A.L.R. 1206, s. 64 A.L.R. 1002.

[20] See § 68.

[1] Annotation: 21 A.L.R. 1206, s. 64 A.L.R. 1002.

[2] Seager v. Foster, 185 Iowa, 32, 169 N. W. 681, 8 A.L.R. 690.

[3] Hiscock v. Phinney, 81 Wash. 117, 142 P. 461, Ann. Cas. 1916E, 1044.

[4] See § 68.

[5] Pugh v. Des Moines (Pugh v. Crawford) 176 Iowa, 593, 156 N. W. 892, L.R.A. 1917F, 345. In this case the court said: "It cannot be contended that by the enactment of this chapter the state, through its legislature, has taken away from the city all right to regulate the occupancy of the public streets under the power theretofore existing in the city; that it has taken away from it the power to keep it free from nuisance, and open and free to the general public as an avenue of travel."

[6] See § 68.

[7] Annotation: 21 A.L.R. 1211, s. 64 A.L.R. 1004.

§ 85. **Regulations Prohibiting Noxious Gases, Smoke, Steam, etc.**—The well-established rules stated above[9] apply to regulations prohibiting noxious gases, smoke, steam, etc. An ordinance making it unlawful for an owner of a motor vehicle to operate it, or permit it to be operated, on the streets so as to permit any noxious smoke, gas, steam, or other offensive odor to escape therefrom, or so as to discharge any embers, oil, or residue from the fuel used, is not invalid under a state act which provided that owners of motor vehicles should not be limited in the free use of such vehicles.[10]

§ 86. **Regulations as to Nonresidents.**—The well-established rules stated above[11] apply to provisions as to nonresidents. Thus, an ordinance requiring the payment of a license fee by automobile owners using the streets was held invalid in so far as it related to a nonresident owner who had complied with the laws of his own state, in view of the state act providing that no owner of motor vehicles is to be "required to comply with other provisions or conditions as to use of such motor vehicles, except as in this act provided," and a section of the state act which exempted nonresident owners of motor vehicles, who have complied with the laws of their own state with reference to such vehicles, from the payment of a license tax, and this conclusion was held to be true, whether the ordinance was enacted before or after the passage of the statute.[12]

§ 87. **Regulations as to Weight.**—The well-established rules stated above[13] apply to regulations as to weight.[14]

§ 88. **Regulations as to Intoxication of Drivers.**—The well-established rules stated above[15] apply to regulations as to intoxication of drivers. Accordingly, it was held that the offense of driving a motor vehicle in a city while under the influence of intoxicating liquor was not a "municipal affair," within the meaning of the constitutional provision granting to chartered cities the power to enact ordinances relating to "municipal affairs," and providing that such ordinances should prevail over legislative acts inconsistent therewith, and an ordinance making the driving of motor vehicles by one intoxicated merely a misdemeanor was held inconsistent with a statute making such offense a potential felony.[16]

[8] Annotation: 21 A.L.R. 1211, s. 64 A.L.R. 1004.

[9] See § 68.

[10] Annotation: 21 A.L.R. 1211, s. 64 A.L.R. 1004.

[11] See § 68.

[12] Annotation: 21 A.L.R. 1212, s. 64 A.L.R. 1004.

[13] See § 68.

[14] Thus, an ordinance providing that no motor or other vehicle which, with its load, weighs in excess of 15 tons, and that no vehicle bearing in excess of 600 pounds per inch width of tire, should be operated upon any streets, alleys, or avenues of the city, except by special permit of the city manager, and then only conditioned that the owner thereof should pay to the city any damages that might result from the operation of such vehicles, was held in conflict with the good roads law which provided that it was to be liberally construed, and, although it did not in express terms include the streets of cities, towns, and villages, comprehended them in the general term "public road," and which contained provisions as to the width and weight of vehicles which might be lawfully operated upon the highways of the state, and which required the state road commission to prepare a statement showing the amount of money collected for use in state aid of certain ways, including incorporated cities. Annotation: 21 A.L.R. 1212, s. 64 A.L.R. 1005.

[15] See § 68.

[16] Annotation: 21 A.L.R. 1212, s. 64 A.L.R. 1005.

E. Special Privileges to Particular Vehicles or Individuals

§ 89. **Generally.**[17]—Certain motor vehicles engaged in public service, such as police cars, fire engines, ambulances, etc., are frequently exempt from automobile regulations. Thus, by some ordinances and statutes the fire and police apparatus is expressly given the right of way over other vehicles.[1] Such special privileges, where reasonable, are upheld as a valid exercise of the police power.[2] The power of the legislature to grant to a fire and protective association organized, owned, and controlled by fire insurance companies to attend and protect persons and property a right of way in a public street superior to that of citizens generally has been denied under a constitutional provision that no exclusive privileges shall be granted except in consideration of public service.[3]

III. LICENSING AND REGISTRATION OF PRIVATE MOTOR VEHICLES[4]

A. In General

§ 90. **Generally.**—In general, the principles of law controlling the licensing of occupations or privileges[5] govern in regard to the licensing and registration of motor vehicles. Obviously, the statutory enactments of the numerous jurisdictions vary in certain respects. These statutes must be individually studied. An attempt is herein made, however, to formulate general rules of law applicable to the various statutory regulations.

§ 91. **Nature and Purpose.**—The systems of licensing automobiles and the requirement that each machine must carry a registration number conspicuously displayed are precautions taken to furnish a means of identifying the owner. This becomes important in the case of violation of law or injury caused to pedestrians and others traveling upon the streets and highways.[6] Such statutes may also have a secondary purpose—namely, raising revenue.[7]

§ 92. **Conflict between Statutes and Local Regulations.**—The general rules stated above[8] obviously apply to licensing and registration regulations. Due to convenience in classification, the subject of conflicts in such regulations is treated elsewhere in this article.[9]

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[17] As to exemption from speed laws, see supra, § 40.

[1] Balthaser v. Pacific Electric R. Co. 187 Cal. 302, 202 P. 37, 19 A.L.R. 452; Oklahoma R. Co. v. Thomas, 63 Okla. 219, 164 P. 120, L.R.A.1917E, 405.

Annotation: 19 A.L.R. 459, s. 23 A.L.R. 418.

An ordinance providing that police vehicles shall have the right of way in any street and requiring every vehicle upon the approach of a police patrol to draw up as near as practicable to the right-hand curb and remain at a standstill until the police vehicle has passed, but that street cars shall have the right of way between cross streets over other vehicles except as otherwise provided, does not impose an absolute and unconditional duty upon the motorman to stop his street car when meeting a police patrol, but if stopping is necessary to yield the right of way, then the street car must be stopped. Hogan v. Kansas City Public Service Co. — Mo. —, 19 S. W. (2d) 707, 65 A.L.R. 129.

[2] Kidd v. Chissel, 146 Md. 169, 126 A. 82, 38 A.L.R. 20 (valid as to fire apparatus, vehicles of the police department, and ambulances, but invalid as to physicians' cars, there being no provision made for identifying them); Knox v. North New Jersey Street R. Co. 70 N. J. L. 347, 57 A. 423, 1 Ann. Cas. 164.

Annotation: 38 A.L.R. 24; 65 A.L.R. 140.

[3] Louisville R. Co. v. Louisville F. & L. Protective Asso. 151 Ky. 644, 152 S. W. 799, 43 L.R.A.(N.S.) 600, Ann. Cas. 1915A, 89.

[4] As to license fees and taxes, see infra, §§ 113 et seq.

[5] See Licenses [Also 17 R. C. L. p. 470].

[6] State v. Mayo, 106 Me. 62, 75 A. 295, 26 L.R.A.(N.S.) 502, 20 Ann. Cas. 512; People v. Schneider, 139 Mich. 673, 103 N. W. 172, 69 L.R.A. 345, 5 Ann. Cas. 790.

Annotation: 20 Ann. Cas. 516; 69 L.R.A. 345.

For discussion of licensing as regulatory measure, see Re Robinson, 73 Fla. 1068, 75 So. 604, L.R.A.1918B, 1148; Atlantic Coast Line R. Co. v. Weir, 63 Fla. 69, 58 So. 641, 41 L.R.A.(N.S.) 307, Ann. Cas. 1914A, 126.

[7] Annotation: 47 A.L.R. 1103.

[8] See supra, §§ 68 et seq.

B. WHO MAY LICENSE

§ **93. State.**—Experience throughout the country has shown the necessity of a state-wide law as to registration by means of licenses and number plates issued by the state as the only means of controlling the immense volume of automobile traffic. It is a well-established principle of law that a state may enact reasonable licensing and registration regulations. The legislature of each state has the power to require the licensing of every motor vehicle within its boundaries and to establish detailed and reasonable regulations applicable to their use upon the public highways.[10]

§ **94. Municipal Corporations.**—In considering the subject of municipal licensing and registration of motor vehicles, it is of importance to bear in mind that the statutes of the various jurisdictions now make elaborate provisions defining the scope of municipal regulations. It is well settled as a general rule that since municipalities have the power to regulate the use of their streets, they may enact valid rules and regulations for the government of motor vehicles within their precincts, so long as they are not in conflict with, or repugnant to, legislative enactments governing the use of such vehicles.[11] Thus, a city, in the absence of express or implied restrictions imposed by the legislature, may require the taking out of a municipal license before an automobile may be used regularly within its limits.[12]

C. VALIDITY

§ **95. Generally.**—The general principles of constitutional law[13] and those governing the validity of statutes[14] and ordinances[15] obviously apply in determining the validity of enactments relating to the licensing and registration of motor vehicles. Such enactments, when reasonable, are sustained under the police power. Thus, it has been held that a statute requiring the owner of an automobile to file in the office of the secretary of state a duly verified declaration setting forth that he is competent to drive an automobile, together with a written statement containing his name, address, a description of the character of the automobile, the name of the maker, the manufacturer's number, and the horse power of the machine, and also requiring the payment to the secretary of state of a registry fee of one dollar, is not in violation of any provision of the Federal Constitution and is a valid exercise of the police power.[16] For the purpose of imposing a license tax, motor vehicles may properly be placed in a class by themselves, as distinguished from horse-drawn vehicles.[17]

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[9] See supra, §§ 72 et seq.

[10] Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035, 1 L.R.A.(N.S.) 215, 108 Am. St. Rep. 196, 3 Ann. Cas. 487; State v. Mayo, 106 Me. 62, 75 A. 295, 26 L.R.A.(N.S.) 502, 20 Ann. Cas. 512; Com. v. Boyd, 188 Mass. 79, 74 N. E. 255, 108 Am. St. Rep. 464; Re Rogers, 7 East. L. R. (Pr. Edw. Is.) 212, 15 Ann. Cas. 1167.

Annotation: 1 L.R.A.(N.S.) 215; 26 L.R.A.(N.S.) 502; 37 L.R.A.(N.S.) 440; 52 L.R.A.(N.S.) 950; 108 Am. St. Rep. 212; 3 Ann. Cas. 496; 15 Ann. Cas. 1169; 20 Ann. Cas. 516.

[11] See supra, §§ 68 et seq.

[12] People v. Schneider, 139 Mich. 673, 103 N. W. 172, 69 L.R.A. 345, 5 Ann. Cas. 790; Brazier v. Philadelphia, 215 Pa. 297, 64 A. 508, 7 Ann. Cas. 548.

Power to require the registering and numbering of automobiles is conferred upon the city council by charter authority to control, prescribe, and regulate the manner in which the streets shall be used and enjoyed. People v. Schneider, 139 Mich. 673, 103 N. W. 172, 69 L.R.A. 345, 5 Ann. Cas. 790.

[13] See CONSTITUTIONAL LAW [Also 6 R. C. L. p. 1].

[14] See STATUTES [Also 25 R. C. L. p. 750].

[15] See MUNICIPAL CORPORATIONS [Also 19 R. C. L. p. 678].

[16] Annotation: 129 Am. St. Rep. 286; 12 Ann. Cas. 291.

§ 96. Requirement of Payment of Property Taxes as Condition Precedent to Automobile License.—The validity of a statute requiring the payment of the property taxes on an automobile as a condition precedent to the issuing of a license for the operation thereof has been sustained [18] against various constitutional objections, among which are: That such a statute deprives the owner of his property without due process of law;[19] that it deprives him of the right to acquire, possess, and protect property;[20] that it denies to him the equal protection of the law;[21] that it violates the right of uniform taxation;[1] that it infringes fundamental principles of right and justice;[2] that it is a special law;[3] and that it is retrospective in effect.[4]

D. VEHICLES WITHIN SCOPE OF LICENSING OR REGISTRATION PROVISIONS

§ 97. Generally.[5]—Obviously, the vehicles within the scope of licensing or registration enactments are determined by the provisions of such enactments. Registration laws applying to motor vehicles generally include all kinds of vehicles propelled by mechanical power except traction engines and such motor vehicles as run only upon rails or tracks.[6] Motorcycles are usually included within such statutes.[7]

§ 98. Motor Vehicles "for Compensation" or "for Hire."—The problem occasionally arises as to when an automobile or truck is deemed to be operated "for compensation" or "for hire" within the contemplation of a license or tax statute or ordinance. Where a corporation transacts business in which trucks are used in delivering goods to customers without any direct charge for transportation the cost of which is added to the overhead cost of the business, such transactions are not contemplated by a statutory provision intended to apply only to those who transport "for compensation."[8] But transactions in which the owner, delivering goods to customers outside the city, makes a direct charge to them for the cost of transportation are within the contemplation of such a statute.[9] An ordinance imposing a license fee upon persons oper-

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The legislature may require the owner of an automobile to file with the state treasurer an application for registration, containing the name of the maker, manufacturer's number, if any, and character and amount of motive power. Re Schuler, 167 Cal. 282, 139 P. 685, Ann. Cas. 1915C, 706.

[17] Annotation: 52 L.R.A.(N.S.) 951.
See infra, §§ 115 et seq.

[18] State ex rel. Taylor v. Mirabal, 33 N. M. 553, 273 P. 928, 62 A.L.R. 296.

[19] Re Kalana, 22 Haw. 96, Ann. Cas. 1916D, 1094.

[20] Annotation: 62 A.L.R. 304.

[21] Annotation: 62 A.L.R. 304.

[1] Annotation: 62 A.L.R. 305.

[2] Annotation: 62 A.L.R. 305.

[3] Annotation: 62 A.L.R. 305.

[4] Re Kalana, 22 Haw. 96, Ann. Cas. 1916D. 1094.

[5] As to discrimination, see infra, §§ 115 et seq.

[6] People v. Smith, 156 Mich. 173, 120 N. W. 581, 21 L.R.A.(N.S.) 41, 16 Ann. Cas. 607.
Annotation: 16 Ann. Cas. 608.

[7] Annotation: 16 Ann. Cas. 608.
The legislature may provide, by statute, that motorcycles shall not be operated on the public highways of the state until they have been registered. Re Kessler, 26 Idaho, 764, 146 P. 113, L.R.A.1915D, 322, Ann. Cas. 1917A, 228.
Annotation: L.R.A.1915D, 322.

[8] Collins-Dietz-Morris Co. v. State Corp. Commission, 154 Okla. 121, 7 P. (2d) 123, 80 A.L.R. 561.

[9] Ibid.
In holding that the first class of transactions above described is not contemplated by a statutory provision which was intended to apply only to those who transport for "compensation," the Oklahoma court overruled the contention based upon the accounting theory that the expense of transportation, which was first charged to overhead, was later "reflected" in the "delivery price," and declared that the transportation was only for convenience and the natural advantage incident to the delivery of the goods sold. But as to the second class of transactions, the court ruled that since the price of goods delivered outside the city was greater than the price of the

ating motor trucks "for hire or compensation" on city streets has been held not to impose such a fee with respect to trucks operated by a chain grocery concern merely in delivering stock to local stores from its warehouse in another city, no freight being transported for others.[10] So, the use of a truck for the sole purpose of delivering the product of an owner's bakery to his customers has been held not to be within an ordinance requiring payment of a license fee for vehicles "for hire or reward."[11] And the operation of a "drive-it-yourself" business, whereby various makes and styles of cars are rented to persons without any drivers being furnished for them, has been held not contemplated by a statute imposing an additional registration fee upon motor vehicles "used for the transportation or delivery of persons for hire."[12] The operation of a seven-passenger car for funeral purposes, it having been hired by an undertaker and no fare being collected from the persons carried in it, has been held not for hire within an ordinance requiring vehicles carrying passengers for hire to be licensed.[13]

E. Persons Who May or Must Obtain Registration and Name in Which Registered

§ 99. **Generally.**—The motor vehicle laws usually provide for registration by the owner in his name. As construed by the courts, the registration statutes requiring all cars operating upon the highways of the state to be registered in the name of the owner are for the purpose of identification in order that travelers upon the highway may, in case of accident, be able to fix responsibility therefor, although there may also be a secondary purpose of raising revenue.[14] With this in view, it is not surprising that the courts have been strict in their requirement as to the form of the name used to identify the owner.[15] Registration in the name of the owner upon his application, but not completed until after his death, is illegal.[16] Obviously, a registration in the name of one other than the owner under the ordinary form of statute is illegal.[17]

§ 100. **Married Women.**—As indicated in the preceding section,[18] the courts are strict in their requirement as to the form of the name used to identify the owner. A registration in the maiden name of the married owner is held illegal under a statute requiring registration in the name of the owner.[19]

§ 101. **Agents.**—As shown above,[20] the courts are strict in their require-

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same goods sold and not delivered, the seller received direct compensation for the delivery in its trucks, and so was within the statute. Ibid.

[10] Annotation: 80 A.L.R. 574.

[11] Annotation: 80 A.L.R. 575.

[12] Annotation: 80 A.L.R. 575.

[13] Annotation: 80 A.L.R. 575.

An undertaker who used his own automobile in taking families of deceased persons and friends to cemeteries, in connection with funerals which he conducted, and collected compensation for this service in addition to his charges for other services as an undertaker was held to be engaged in the occupation of carrying passengers for hire, within the meaning of an ordinance imposing a license fee for so doing. Annotation: 80 A.L.R. 575.

[14] See § 134.

[15] Annotation: 47 A.L.R. 1103.

[16] Annotation: 47 A.L.R. 1104.

The issuance of the certificate in decedent's name by the registration commission, without notice of his death, will not amount to a legal registration of the car as against his widow, who was also one of the executors of his will. Ibid.

[17] Annotation: 47 A.L.R. 1103.

An automobile registered in the name of another was held illegally registered as against the contention that the registration statute was for the purpose of revenue. The court answered this contention by saying: "It is notorious that one important object of this registration is to identify the owners of every car which uses the highways of the state." Annotation: 47 A.L.R. 1103.

[18] See supra, § 99.

[19] Bacon v. Boston Elev. R. Co. 256 Mass. 30, 152 N. E. 35, 47 A.L.R. 1100.

[20] See supra, § 99.

ment as to the form of the name used to identify the owner. Thus, an automobile registered in the name of a son as a dealer who, as agent for his father, was conducting the business has been held illegally registered.[1]

§ 102. **Corporations.**—A corporation which owns or controls a motor vehicle should register it in the corporate name.[2]

§ 103. **Unincorporated Associations.**—A registration of a car owned by an unincorporated association must be made in the name of the members of the association; a registration in the name of the association is illegal.[3] Even assuming a registration embraces all the members at the time thereof, it is invalidated by changes in the membership, under a statute making the registration expire upon a transfer of ownership.[4] But a registration in a tradename has been sustained.[5]

§ 104. **Partners.**—A partnership which owns or controls a motor vehicle should register it in the partnership name.[6] Registration in the name of the partners where the automobile belongs to the partnership has been held illegal.[7] A truck registered in the firm name of a partnership which had previously been dissolved and a new partnership consisting of different partners formed is illegally registered.[8] So, where an automobile is registered in the name of two partners, and subsequently the interest of the partnership has been transferred to one of the partners, the fact that the partner to whom the car has been transferred was formerly registered as part owner does not make the registration after he acquired sole ownership valid.[9]

§ 105. **Part Owners.**—The fact that an automobile is registered in the name of a person who is only part owner does not invalidate the registration, so long as such part owner in whose name it is registered operates or is present in the car.[10] However, for such registration by a part owner to be lawful, it must be in the name of the part owner operating and having control of the car; otherwise, it would be unlawful.[11]

§ 106. **Tradename.**—It has been held that where an automobile is registered under a tradename under which business is transacted, it is legally registered.[12]

§ 107. **Conditional Buyer and Seller.**—As shown above,[13] the courts are strict in their requirement as to the form of the name used to identify the owner. Registration in the name of a conditional buyer, however, is a valid registration, notwithstanding the statute provides that registration must be in the name of the owner.[14] Also, it may properly be registered in the name of the conditional seller and operated by the buyer.[15]

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[1] Annotation: 47 A.L.R. 1103.

[2] Annotation: 47 A.L.R. 1103.

[3] Annotation: 47 A.L.R. 1103.

[4] Annotation: 47 A.L.R. 1103.

[5] See infra, § 106.

[6] Annotation: 47 A.L.R. 1103.

[7] Annotation: 47 A.L.R. 1103.

[8] Annotation: 47 A.L.R. 1103.

[9] Annotation: 47 A.L.R. 1103.

[10] Annotation: 47 A.L.R. 1104.

[11] Annotation: 47 A.L.R. 1104.

[12] Annotation: 47 A.L.R. 1104. The court said: "The plaintiff's application and the registration followed the name in which he did business. But if registration under a fictitious name adopted for the purpose of concealing identity would not be a compliance with the statute, because the record would not show, or the certificate contain, a descriptive statement by which the true owner could be ascertained, the jury could properly find that the plaintiff was well known in the community by his tradename. If this appeared, the requirements of the statute were satisfied."

[13] See supra, § 99.

[14] Annotation: 47 A.L.R. 1104.

[15] Annotation: 47 A.L.R. 1104.

F. Exemptions

§ 108. Generally.—Statutes governing the registration of motor vehicles in some instances contain exceptions in the case of certain vehicles, the most common of which are those used in, or in connection with, agriculture. The provisions of these exceptions are not uniform, and no general rules of construction can at present be laid down in regard to all of them. A tendency, however, seems manifest from the cases to apply the exemptions of motor vehicles used for farm purposes rather liberally to effectuate the apparent purpose of the legislature.[16] Statutes exist exempting implements of husbandry operated temporarily on the highways, but excepting vehicles for hire;[17] exempting motor vehicles used exclusively in transporting dairy or farm products between the point of production and the primary market;[18] and exempting "agricultural locomotives" and engines used for "agricultural purposes."[19]

§ 109. Governmental Vehicles.—As shown above, certain motor vehicles engaged in public service are frequently exempt from automobile regulations.[20] Statutes relating to licensing and registration frequently exempt public or governmental motor vehicles. There is no unjust and unfair discrimination in exempting from the provisions of an act requiring the licensing and registry of motor vehicles, fire engines, fire trucks, and police patrol wagons, these being governmental agencies maintained by general taxation; road rollers used largely by public authority for road purposes; street cars and vehicles operated upon fixed tracks and already otherwise taxed; motorcycles, and motor bicycles.[1] But a statute exempting municipal property from taxation does not relieve the municipality from the necessity of obtaining a license to operate motor vehicles on the public highways, although the fees are designed in part for raising revenue for governmental purposes, where the licensing statute expressly provides for the exemption of certain other vehicles from its operation.[2]

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[16] Annotation: 91 A.L.R. 423.

It was held that the word "to," as used in a statute providing for a certain license fee "for motor vehicles of up to 20 horse power" and for a larger amount "for motor vehicles of 21 horse power and less than 40 horse power inclusive" was a word of inclusion, and not of "exclusion," and that the statute did not exempt from license fee those motor vehicles which were of 20 horse power or those of 40 horse power, the court stating that one of the purposes of the statute was to require the registration of "all" motor vehicles which should be operated or driven upon the streets or highways. Annotation: 91 A.L.R. 423.

[17] In Allred v. J. C. Engelman, 123 Tex. 205, 61 S. W. (2d) 75, 91 A.L.R. 417, where a statute providing that every owner of a motor vehicle, trailer, or semitrailer used upon the highways should apply for a registration of such vehicle contained a proviso that the owners of farm tractors, farm trailers, farm semitrailers, and implements of husbandry operated or moved temporarily upon the highway, should not be required to be registered, it was held that the exception of "implements of husbandry operated or moved temporarily upon the highway" clearly exempted from the requirements of registration vehicles, other than those expressly exempted, which were designed and used primarily as farm vehicles and which might be operated or moved temporarily upon the highway, and that trucks designed and used exclusively for the purpose of carting water for irrigation on the owner's land and land of others which the owner of the trucks had contracted to irrigate and tank trucks carrying oil and gasoline to tractors in the orchards and fields were "implements of husbandry" within the above exception, although in making their trips they passed along highways which intersected the lands served. The fact that such trucks were used by the owner in performing service agreements with other landowners was held not to render the exemption from registration inapplicable, where the statute provided that the exemption should not apply to any "farm trailer" or "farm semitrailer" when used for hire, since the express statement that the exemption should not apply to these vehicles when used for hire implied that the exemption should apply to all other exempted vehicles, whether used for hire or not. On an earlier appeal of this case in (Tex. Civ. App.) 40 S. W. (2d) 945, the exemption of the trucks in question from registration under the statute was sustained.

[18] **It was held that "points of production,"** as used in a motor vehicle tax statute excepting motor vehicles used exclusively in transporting or delivering dairy or other farm products between the point of production and the primary market, meant the farm where the live stock was prepared for disposal and where milk was produced and agricultural products raised, or where dairy farm products were made, and therefore included cheese factories and creameries where cheese and butter were made by the producers of the milk and cream. Annotation: 91 A.L.R. 424.

The words "dairy or other farm products," as used in the exception meant cheese and butter produced at factories or creameries, but did not include malted, condensed, evaporated, or powdered milk or ice cream. Annotation: 91 A.L.R. 424.

[19] **It was held that any locomotive which was actually used,** or which was intended by the owner to be used, for a purpose excepted by a statute providing for the licensing of every locomotive, but further providing that the enactment should not apply to any "agricultural locomotive," and defining that expression to include "any locomotive used solely for threshing, plowing, or any other agricultural purpose," was not required to be licensed, that a locomotive which had previously been used for haulage purposes and which was purchased by one who intended to use it solely for agricultural purposes was not required to be licensed, and that the purchaser could not be convicted for driving it along the highway from the place of purchase to his premises without a license, notwithstanding the locomotive could not be used for agricultural purposes without alteration. Annotation: 91 A.L.R. 424.

A state law properly exempts from the requirements of registration vehicles owned and operated by the Federal government.[3] However, one contracting to transport United States mail is not absolved from the duty of obtaining state licenses for motor trucks used in the business.[4] Likewise, a taxicab owner using the streets of a city in conveying United States soldiers, for pay from them, to and from a military camp outside the city, under a contract with the commandant of the camp granting a monopoly of the soldier trade and requiring that the automobiles be run on schedules and that the fare be reasonable, was held not exempt from regulations imposing the payment of a license fee upon taxicab owners.[5]

G. Procedure Relating to Licensing and Registration

§ 110. Generally.—The procedure relating to licensing and registration is generally set out in detail in the statutes. The application for the registration must answer the questions propounded to the applicant. Licensing officials handle such applications. Provisions for renewal of registration also are made by such statutes.

H. Registration Cards and License Plates

§ 111. Generally.—In general, the statutes require an applicant for registration to procure a registration card and license plates, and to display the plates on the vehicle.[6] There can now be no doubt that the legislature may properly pass a law requiring every automobile to be registered and to display a registration number in such a manner that it may be plainly visible,[7] and may prohibit the operation of an automobile in a street or other public place unless it complies with such regulations.[8] Such a requirement does not violate the constitutional provision against unreasonable searches, or compel the owner to testify against himself or deprive him of property without due process of law.[9]

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[20] See supra, § 89.

[1] Annotation: 52 L.R.A.(N.S.) 951.

[2] State v. Preston, 103 Or. 631, 206 P. 304, 23 A.L.R. 414.
Annotation: 19 A.L.R. 463, s. 23 A.L.R. 418.

[3] State v. Preston, 103 Or. 631, 206 P. 304, 23 A.L.R. 414.

[4] State v. Wiles, 116 Wash. 387, 199 P. 749, 18 A.L.R. 1163.

[5] Ex parte Marshall, 75 Fla. 97, 77 So. 869, L.R.A.1918C, 944.

[6] Re Schuler, 167 Cal. 282, 139 P. 685, Ann. Cas. 1915C, 706.

[7] Com. v. Boyd, 188 Mass. 79, 74 N. E. 255, 108 Am. St. Rep. 464; People v. Schneider, 139 Mich. 673, 103 N. W. 172, 69 L.R.A. 345, 5 Ann. Cas. 790.
Annotation: 69 L.R.A. 345; 1 L.R.A. (N.S.) 216; 108 Am. St. Rep. 218.

[8] Annotation: 5 Ann. Cas. 793.

[9] People v. Schneider, 139 Mich. 673, 103 N. W. 172, 69 L.R.A. 345, 5 Ann. Cas. 790.

Since the carrying at one time of registration tags of several states would make it difficult quickly to read and note the number belonging to a particular jurisdiction, laws regulating automobiles may provide that the license number obtained in any other state or jurisdiction must be removed while the machine is being used within the confines of the state.[10]

§ 112. Liability of One Lending License Plate to Another.—The view has been taken that a dealer who lends his automobile number plates to enable the borrower to move his car from one town to another for repairs is personally liable for injuries caused by the operation of the car on the highway.[11] This view, while good law in a jurisdiction where the courts hold that an automobile not properly licensed is an outlaw upon the highway, or, in other words, a nuisance, for all injurious consequences resulting from which to third persons, all persons who contribute thereto or participate in the creation thereof are liable, probably would not be generally followed in other jurisdictions which adhere to the general rule that the fact that an automobile which injures a traveler is not properly registered or licensed does not create a liability unless such fact proximately contributed to the accident.[12]

I. LICENSE FEES AND TAXES

1. INTRODUCTORY

§ 113. Generally.[13]—The fees which have been levied against automobiles have either been fees levied under the police power or have been an impost in the nature of a revenue measure. Revenue imposts may be by way of personal property taxes, which are discussed in another title,[14] or they may be excise or license taxes which are intended for revenue purposes and are ordinarily based upon the privilege of operating or using the highways, or as compensation for damage done thereto.[15]

§ 114. Nature of Fees and Taxes.—In general it may be said that if the fee exacted exceeds the amount necessary for the administration of the law, it is an exercise of the power of taxation, or, to express it in other words, a revenue measure. These two purposes may be combined.[16] While the intention of the legislature as to whether the impost is one levied under the police power or is an exercise of the power of taxation is not absolutely controlling, it is an important factor in determining the nature of the license fee.[17]

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[10] Brazier v. Philadelphia, 215 Pa. 297, 67 A. 508, 7 Ann. Cas. 548. It was held in this case, however, that such a state law does not apply to license tags which may be required under an ordinance of one of the cities of the state, and that an ordinance requiring additional tags was not necessarily inconsistent with the state law, and was not repealed thereby.

[11] McDonald v. Dundon, 242 Mass. 229, 136 N. E. 264, 26 A.L.R. 1243.

[12] Worsham Buick Co. v. Isaacs, 121 Tex. 587, 51 S. W. (2d) 277, 86 A.L.R. 232.

Annotation: 86 A.L.R. 236.

In the absence of any statute inflicting a penalty for the loaning of license plates, the lender is not liable criminally for the criminal acts of the borrower, such as a violation of the speed limit. Annotation: 86 A.L.R. 236.

See generally, § 164.

[13] For a general discussion of license fees and taxes on motor carriers, see MOTOR TRANSPORTATION COMPANIES.

As to license taxes on automobile dealers, see LICENSES [Also 17 R. C. L. p. 470].

[14] For a discussion of general rules regarding taxation, see TAXATION [Also 26 R. C. L. p. 1].

[15] As to regulation of motor carriers generally, see MOTOR TRANSPORTATION COMPANIES.

[16] State v. Preston, 103 Or. 631, 206 P. 304, 23 A.L.R. 414.

[17] Vernor v. Secretary of State, 179 Mich. 157, 146 N. W. 338, Ann. Cas. 1915D, 128; Camas Stage Co. v. Kozer, 104 Or. 600, 209 P. 95, 25 A.L.R. 27.

The court, in Vernor v. Secretary of State, 179 Mich. 157, 146 N. W. 338, Ann. Cas. 1915D, 128, said: "There are cases holding that where the law expressly directs that the fund derived from the license fee shall be used for purposes other than

Generally speaking, the modern statutes are revenue measures,[18] although they are not, strictly speaking, property taxes.[19] The term by which the act is designated is not determinative of its character.

These statutes have been variously designated as excise,[20] license,[1] privilege,[2] and wheel taxes,[3] etc.

Some of the courts view the statutes as tax statutes, without considering definitely the subject of the tax. Others view the license fees and taxes now under consideration as imposts on a privilege, as distinguished from taxes on property.[4] Some of the acts expressly levy the tax on the privilege of using the public roads.[5] These taxes are said to be in the nature of a toll for using the highways.[6] They are not, however, tolls in the commonly accepted sense of a toll levied by the proprietor of a highway or bridge for passage thereover.[7] A registration or license fee imposed by statute upon motor vehicles, and used for the maintenance of highways within the state, is not a "toll," within the meaning of an act of Congress forbidding tolls on Federal aid roads.[8]

2. Validity

a. In General

§ 115. Generally.—The power of the state to exact a fee under the police

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defraying the expenses of issuing the license and of regulation, it thereby makes of the fee a tax, and converts what was intended to be a police measure into a revenue law. Berry, Automobiles, § 87; Chicago v. Collins, 175 Ill. 445, 51 N. E. 907, 49 L.R.A. 408, 67 Am. St. Rep. 224; Livingston v. Paducah, 80 Ky. 656; Ellis v. Frazier, 38 Or. 462, 63 P. 642, 53 L.R.A. 454. But the better rule seems to be that the disposition of the fee will not alone determine whether it is a license or a tax. If, upon investigation, the fee is found to be only sufficient to pay the expense that may reasonably be presumed to arise in the supervision and regulation of the automobile licensed, its disposition should not have the effect of converting it into a tax. State ex rel. Troll v. Hudson, 78 Mo. 302. The act we are considering provides for no policing or police regulation. The expense of operating the department, including the furnishing of the lists of owners to the county clerks, will be so inconsiderable, compared with the amount collected, that we must take judicial notice that the great amount of surplus (probably more than half a million dollars) renders the imposition of the license fee or tax so wholly and palpably unreasonable as to invalidate the law as a license measure, and to stamp upon it the intention of imposing a tax instead of a license. The clear purpose of the legislature in exacting so large an amount from the owners of automobiles was to produce a fund for highway purposes under the guise of regulation, which makes it a tax measure, which clearly is not covered by the title of the act. The obvious purpose of the amendment in the Act of 1913, increasing the fees according to horse power, was to increase that fund. There can be no more labor or expense in registering a vehicle of high horse power than in registering one of low power, and the only reasonable purpose in the graduated fee is the increased revenue. This graduated fee according to horse power must be held to be a mere guise or subterfuge to obtain the increased revenue. . . . In our opinion the act is clearly a tax measure when stripped of its guise, and as a tax measure the object is not embraced in the title, and for that reason alone is unconstitutional."

[18] Mark v. District of Columbia, 37 App. D. C. 563, 37 L.R.A.(N.S.) 440.

[19] See infra, §§ 118 et seq.

[20] Mark v. District of Columbia, 37 App. D. C. 563, 37 L.R.A.(N.S.) 440.

[1] Re Kessler, 26 Idaho, 764, 146 P. 113, L.R.A.1915D, 322, Ann. Cas. 1917A, 228.

Some cases designating the fee as a license fee mean an impost made under the police power, and not a tax. Com. v. Boyd, 188 Mass. 79, 74 N. E. 255, 108 Am. St. Rep. 464.

[2] State v. Lawrence, 108 Miss. 291, 66 So. 745, Ann. Cas. 1917E, 322; Camas Stage Co. v. Kozer, 104 Or. 600, 209 P. 95, 25 A.L.R. 27.

[3] Mark v. District of Columbia, 37 App. D. C. 563, 37 L.R.A.(N.S.) 440; Chicago v. Morell, 247 Ill. 383, 93 N. E. 295, 139 Am. St. Rep. 340; Harder's Fire Proof Storage & Van Co. v. Chicago, 235 Ill. 58, 85 N. E. 245, 14 Ann. Cas. 536.

[4] Harder's Fire Proof Storage & Van Co. v. Chicago, 235 Ill. 58, 85 N. E. 245, 14 Ann. Cas. 536; Camas Stage Co. v. Kozer, 104 Or. 600, 209 P. 95, 25 A.L.R. 27.

[5] See statute involved in State v. Lawrence, 108 Miss. 291, 66 So. 745, Ann. Cas. 1917E, 322; Re Hoffert, 34 S. D. 271, 148 N. W. 20, 52 L.R.A.(N.S.) 949.

[6] State v. Lawrence, 108 Miss. 291, 66 So. 745, Ann. Cas. 1917E, 322.

[7] Carley & Hamilton v. Snook, 281 U. S. 66, 74 L. ed. 704, 50 S. Ct. 204, 68 A.L.R. 194.

Annotation: 68 A.L.R. 200.

[8] Carley & Hamilton v. Snook, 281 U. S.

power for the operation of motor vehicles on the streets and highways of the state is well established.[9] The state is not limited to the imposing of fees under the police power; it may levy a tax for revenue purposes,[10] not limited, as in the case of an impost under the police power, to the cost of administering the law.[11]

The state may even impose such a tax upon the motor vehicles of a municipality.[12]

The fact that the statute may be enforced by criminal proceedings,[13] at least by arrest and imprisonment,[14] does not invalidate it.

§ 116. Municipal Fees and Taxes.—The right of the state to delegate to its municipalities or local subdivisions the power to impose a license fee depends upon the form of constitutional provision applicable to the situation. In the absence of a constitutional prohibition, it has been held to have such power.[15] A provision conferring upon the legislature general powers of taxation does not deprive it of power to authorize a municipality to pass such an ordinance.[16] On the other hand, a constitutional provision giving the general assembly power to provide for the payment of license fees on trades, occupations, and professions was held not to confer power to impose a license fee upon motor vehicles not used or let for hire, as such a fee would not be an occupation tax.[17]

§ 117. Local Improvement District Fees and Taxes.—The legislature has no power to authorize a local road improvement district to levy on the use of automobiles in the district a privilege tax to be used for the construction or maintenance of roads.[18] Although a county or municipality may, under appropriate legislation, contribute from its funds to the construction of local

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66, 74 L. ed. 704, 50 S. Ct. 204, 68 A.L.R. 194.

[9] Re Schuler, 167 Cal. 282, 139 P. 685, Ann. Cas. 1915C, 706; State v. Gish, 168 Iowa, 70, 150 N. W. 37, Ann. Cas. 1917B, 135.

One attacking fees required for use of the public highway by a motor vehicle cannot prevail while he admits that some amount is due for the use of the highways, but makes no tender of the amount. Camas Stage Co. v. Kozer, 104 Or. 500, 209 P. 95, 25 A.L.R. 27.

[10] Re Schuler, 167 Cal. 282, 139 P. 685, Ann. Cas. 1915C, 706; Mark v. District of Columbia, 37 App. D. C. 563, 37 L.R.A. (N.S.) 440 (wheel tax); Re Kessler, 26 Idaho, 764, 146 P. 113, L.R.A.1915D, 322, Ann. Cas. 1917A, 228; Chicago v. Morell, 247 Ill. 383, 93 N. E. 295, 139 Am. St. Rep. 340 (wheel tax); Harder's Fire Proof Storage & Van Co. v. Chicago, 235 Ill. 58, 85 N. E. 245, 14 Ann. Cas. 536 (wheel tax); Kane v. State, 81 N. J. L. 594, 80 A. 453, L.R.A.1917B, 553, Ann. Cas. 1912D, 237, affirmed in 242 U. S. 160, 61 L. ed. 222, 37 S. Ct. 30; Re Hoffert, 34 S. D. 271, 148 N. W. 20, 52 L.R.A.(N.S.) 949.

Annotation: 1 L.R.A.(N.S.) 215, s. 37 L.R.A.(N.S.) 440, 52 L.R.A.(N.S.) 950, and L.R.A.1915D, 322; 129 Am. St. Rep. 286.

That a statute combines a police regulation and an exercise of the taxing power does not render it invalid, if it operates uniformly throughout the state. State v. Preston, 103 Or. 631, 206 P. 304, 23 A.L.R. 414.

[11] Kane v. State, 81 N. J. L. 594, 80 A. 453, L.R.A.1917B, 553, Ann. Cas. 1912D, 237, affirmed in 242 U. S. 160, 61 L. ed. 222, 37 S. Ct. 30.

[12] State v. Preston, 103 Or. 631, 206 P. 304, 23 A.L.R. 414.

[13] Mark v. District of Columbia, 37 App. D. C. 563, 37 L.R.A.(N.S.) 440.

Annotation: 37 L.R.A.(N.S.) 440, s. 52 L.R.A.(N.S.) 950, and L.R.A.1915D, 322.

[14] Chicago v. Morell, 247 Ill. 383, 93 N. E. 295, 139 Am. St. Rep. 340.

Annotation: 37 L.R.A.(N.S.) 440, s. 52 L.R.A.(N.S.) 950, and L.R.A.1915D, 322.

[15] Ft. Smith v. Scruggs, 70 Ark. 549, 69 S. W. 679, 58 L.R.A. 921, 91 Am. St. Rep. 100; Applewold v. Dosch, 239 Pa. 479, 86 A. 1070, Ann. Cas. 1914D, 481.

Annotation: 24 A.L.R. 942, s. 68 A.L.R. 200; 87 A.L.R. 549; 1 L.R.A.(N.S.) 215, s. 37 L.R.A.(N.S.) 441, 52 L.R.A.(N.S.) 950, and L.R.A.1915D, 322.

And see infra, § 20.

[16] Harder's Fire Proof, Storage & Van Co. v. Chicago, 235 Ill. 58, 85 N. E. 245, 14 Ann. Cas. 536.

[17] Annotation: 5 A.L.R. 764.

[18] Whaley v. Northern Road Improv. Dist. 152 Ark. 573, 240 S. W. 1, 24 A.L.R. 934.

Annotation: 24 A.L.R. 941, s. 68 A.L.R. 200.

The Arkansas court bases its decision on the ground that the only tax which may be specially imposed for a local improvement is one dependent on or determined by benefits accruing to real property from the improvement. Whaley v. Northern Road Improv. Dist. 152 Ark. 573, 240 S. W. 1, 24 A.L.R. 934.

improvements, it has been held that the funds raised under power of general taxation cannot be turned over to road improvement districts, to be under their exclusive management and control and expended solely for their benefit.[19]

b. As Affected by General Principles of Taxation

§ 118. Generally.—General principles of taxation and the limits existing with reference thereto have been invoked in many cases involving automobile license fees.[20] In the absence of constitutional prohibition, the legislature may exact a tax upon automobiles for the privilege of using the highways, and exempt them from payment of an ad valorem tax.[21]

In the enactment of such statutes the state is governed by the general rules governing the enactment of statutes generally. In many of the states there are constitutional provisions to the effect that no act shall contain more than one subject, which shall be expressed or described in the title.[1] A violation of this provision renders the act invalid.[2] If, according to the object so expressed, the enactment is a police measure and not a revenue measure, it will be held invalid if, in the act itself, the purpose is plainly apparent to enact a revenue measure.[3]

§ 119. Limitations on ad Valorem Taxes.—Provisions for the payment of a fee by those using motor vehicles on the highway are generally held not to be property taxes, but rather, to be in the nature of a license, and therefore to be unaffected by constitutional provisions governing ad valorem taxes,[4] which are taxes upon the true value[5] or "valuation" of property.[6] A statute fixing registration fees according to the horsepower of the automobile used does not impose a property tax.[7]

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[19] Annotation: 68 A.L.R. 209.

[20] See infra, §§ 119 et seq.

[21] Camas Stage Co. v. Kozer, 104 Or. 500, 209 P. 95, 25 A.L.R. 27.

[1] See Statutes [Also 25 R. C. L. p. 834, § 82].

[2] Re Schuler, 167 Cal. 282, 139 P. 685, Ann. Cas. 1915C, 706; Vernor v. Secretary of State, 179 Mich. 157, 146 N. W. 338, Ann. Cas. 1915D, 128.

Annotation: 24 A.L.R. 939, s. 68 A.L.R. 200.

It has been held that a statute requiring that auto transportation companies shall register with the department of law enforcement, and file liability and property damage insurance policies or surety bonds, that permits shall be issued to such companies, that they shall make a monthly report and pay a 5 per cent fee upon their gross earnings, and that such fees shall be paid into the highway fund, with other incidental provisions for the enforcement of the act, and making a violation of it a misdemeanor, did not embrace more than one subject and matters properly connected therewith, and that the subject was expressed in the title, "To Regulate Auto Transportation Companies." Annotation: 68 A.L.R. 208.

For illustration as to titles, see annotation: 52 L.R.A.(N.S.) 956.

[3] Vernor v. Secretary of State, 179 Mich. 157, 146 N. W. 338, Ann. Cas. 1915D, 128.

It has been held, however, that a statute entitled, "An Act to Regulate, License, and Govern the Use of Motor Vehicles," has been held not to be objectionable as relating to two subjects, only one of which was expressed in the title, where it appeared that the statute was not only a police measure, but designed to raise revenue by license fees for the purpose of maintaining public roads. Annotation: 24 A.L.R. 940, s. 68 A.L.R. 200.

The title of the Michigan statute was later amended so as to refer expressly to the levying of specific taxes on motor vehicles, the disposition of such funds, and the exemption of motor vehicles thus taxed from all other taxation. The amended title was held not to be objectionable. Annotation: 24 A.L.R. 941, s. 68 A.L.R. 200.

[4] Camas Stage Co. v. Kozer, 104 Or. 500, 209 P. 95, 25 A.L.R. 27.

Annotation: 5 A.L.R. 759.

[5] Kane v. State, 81 N. J. L. 594, 80 A. 453, L.R.A.1917B, 553, Ann. Cas. 1912D, 237, affirmed on other grounds in 242 U. S. 160, 61 L. ed. 222, 37 S. Ct. 30; State ex rel. Fargo v. Wetz, 40 N. D. 299, 168 N. W. 835, 5 A.L.R. 731.

Annotation: 5 A.L.R. 759.

[6] Re Kessler, 26 Idaho, 764, 146 P. 113, L.R.A.1915D, 322, Ann. Cas. 1917A, 228.

Annotation: 5 A.L.R. 760.

The fact that a tax upon the right to use motor vehicles on the highway is in excess of the cost of policing the highway and is not graduated according to the value of the cars does not bring it into conflict with the constitutional provision that the legislature shall provide revenue by levying a tax by valuation. Re Kessler, 26 Idaho, 764, 146 P. 113, L.R.A.1915D, 322, Ann. Cas. 1917A, 228.

§ 120. Provisions against Double Taxation.—Some of the statutes imposing a license fee or tax upon automobiles expressly declare that the license fee shall be in lieu of other taxation.[8] Others impose the license fee in addition to property taxation. Such a levy is permissible. To constitute double taxation within the prohibition of the Constitution, the same property must be taxed twice, and it is held that that prohibition is not violated by a statute imposing a license or excise tax on motor vehicles upon which an ad valorem tax is also levied.[9] In fact, a tax can be imposed upon automobiles for the privilege of using the streets and highways even though the owners have paid a personal property tax on such cars and also an occupation tax.[10] It is sometimes insisted that the tax must be reasonable,[11] but in other cases it is admitted that the power to tax may go to unreasonable limits.[12] A state is not limited in the imposition of taxes by the number of taxes, provided the total of the taxes levied, if imposed by a single taxing statute, would not transgress the due process clause.[13] A tax by the state for the use of the state highways is not objectionable because the licensee is already paying a municipal tax in the municipality in which it operates.[14]

§ 121. Provisions as to Uniformity and Discrimination.—Not all discrimination or classification is forbidden in taxation.[15] The imposition of a tax on automobiles as a class has uniformly been sustained, even though other kinds of vehicles are not taxed.[16] A classification need not be either logically appropriate or scientifically accurate.[17] It is enough if it is impartial within the class.[18] Equal protection is not denied by such statutes.[19] Moreover, it is

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[7] Kane v. State, 81 N. J. L. 594, 80 A. 453, L.R.A.1917B, 553, Ann. Cas. 1912D, 237, affirmed in 242 U. S. 160, 61 L. ed. 222, 37 S. Ct. 30.

[8] **See statutes** involved in Vernor v. Secretary of State, 179 Mich. 157, 146 N. W. 338, Ann. Cas. 1915D, 128; State ex rel. Fargo v. Wetz, 40 N. D. 299, 168 N. W. 835, 5 A.L.R. 731; Camas Stage Co. v. Kozer, 104 Or. 600, 209 P. 95, 25 A.L.R. 27.

[9] Re Schuler, 167 Cal. 282, 139 P. 685, Ann. Cas. 1915C, 706; Mark v. District of Columbia, 37 App. D. C. 563, 37 L.R.A. (N.S.) 440; Re Hoffert, 34 S. D. 271, 148 N. W. 20, 52 L.R.A.(N.S.) 949.

Annotation: 5 A.L.R. 760; 1 L.R.A.(N.S.) 215, s. 37 L.R.A.(N.S.) 440, 52 L.R.A.(N.S.) 953, and L.R.A.1915D, 322.

[10] Harder's Fire Proof Storage & Van Co. v. Chicago, 235 Ill. 58, 85 N. E. 245, 14 Ann. Cas. 536 (tax contested by a storage and van company).

[11] Mark v. District of Columbia, 37 App. D. C. 563, 37 L.R.A.(N.S.) 440.

[12] Harder's Fire Proof Storage & Van Co. v. Chicago, 235 Ill. 58, 85 N. E. 245, 14 Ann. Cas. 536.

[13] Carley & Hamilton v. Snook, 281 U. S. 66, 74 L. ed. 704, 50 S. Ct. 204, 68 A.L.R. 194.

[14] Ibid.

[15] See TAXATION [Also 26 R. C. L. p. 241, §§ 214 et seq.].

[16] Re Schuler, 167 Cal. 282, 139 P. 685, Ann. Cas. 1915C, 706; Mark v. District of Columbia, 37 App. D. C. 563, 37 L.R.A. (N.S.) 440; State v. Lawrence, 108 Miss. 291, 66 So. 745, Ann. Cas. 1917E, 322; Re Hoffert, 34 S. D. 271, 148 N. W. 20, 52 L.R.A.(N.S.) 949.

Annotation: 5 A.L.R. 761; 1 L.R.A.(N.S.) 215, s. 37 L.R.A.(N.S.) 440, 52 L.R.A.(N.S.) 951, and L.R.A.1915D, 322.

An ordinance imposing on owners and operators of motor cars or trucks a much greater license fee than upon the owners and operators of horse-drawn vehicles was held to make a reasonable classification and not to be unconstitutional. Annotation: 5 A.L.R. 761.

[17] Mark v. District of Columbia, 37 App. D. C. 563, 37 L.R.A.(N.S.) 440.

[18] Mark v. District of Columbia, 37 App. D. C. 563, 37 L.R.A.(N.S.) 440; Iowa Motor Vehicle Asso. v. Railroad Comrs. 207 Iowa, 461, 221 N. W. 364, 75 A.L.R. 1, affirmed without opinion in 280 U. S. 529, 74 L. ed. 595, 50 S. Ct. 151; State v. Lawrence, 108 Miss. 291, 66 So. 745, Ann. Cas. 1917E, 322.

It has been held that the imposition of a license tax upon one privilege, and not upon another, does not create any inequality of taxation when all of the persons engaged in exercising the taxed privilege bear the burden alike or when those following the same calling are divided into classes for the purpose of classification, provided the classification is reasonable and founded upon a real distinction, and not an arbitrary one; and a statute imposing a license tax upon all persons who use motor vehicles upon the public highways, basing the tax on the horse power generally held that a license fee on automobiles is not a tax within the meaning of constitutional provisions requiring uniformity and forbidding discrimination in levying taxes.[20]

Dealers may be placed in a class by themselves.[1] Private owners may be segregated from manufacturers.[2] Manufacturers and vendors may be exempt as to stock kept for sale.[3]

Vehicles for hire may be placed in a separate class.[4] There may be discrimination between common carriers transporting freight on the highway and private motor carriers.[5] The state may single out motor carriers and levy a tax on them not levied on other motor vehicles.[6] In fact, it may go further and impose a fee on carriers on fixed routes[7] or on jitney busses,[8] or it may except owners of trucks who make no direct charge for their services and carriers who operate exclusively within the corporate limits of an incorporated city or town, or within 3 miles thereof.[9] Discrimination may be based upon seating capacity.[10] A distinction may be made between pleasure and business cars.[11] Such statutes do not amount to class legislation.[12] It has been held that a statute imposing a license tax on motor vehicles used for the conveyance of persons on the highway outside the limits of municipalities and exempting vehicles which are used for trade and commercial purposes within said limits does not grant an unconstitutional immunity.[13]

§ 122. Provisions against Local and Special Legislation.—A license fee or tax which operates alike on all motor vehicles in the state is not a local or special law within the prohibitions against such laws contained in the Constitution. In fact, it may, without coming under such condemnation, single out motor carriers.[14]

§ 123. Prohibitions against Interference with Local Taxing Districts.—The state may, in levying license fees upon automobiles for highway purposes, exempt them from other taxation as against a municipality which might otherwise have levied a personal property tax thereon,[15] notwithstanding the

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of the vehicle, has been held valid. Annotation: 5 A.L.R. 762.

[19] Iowa Motor Vehicle Asso. v. Railroad Comrs. 207 Iowa, 461, 221 N. W. 364, 75 A.L.R. 1, affirmed without opinion in 280 U. S. 529, 74 L. ed. 595, 50 S. Ct. 151.

[20] Re Kessler, 26 Idaho, 764, 146 P. 113, L.R.A.1915D, 322, Ann. Cas. 1917A, 228; State v. Lawrence, 108 Miss. 291, 66 So. 745, Ann. Cas. 1917E, 322.
Annotation: 5 A.L.R. 760; 1 L.R.A.(N.S.) 215, s. 37 L.R.A.(N.S.) 440, 52 L.R.A.(N.S.) 950, and L.R.A.1915D, 322.

[1] Re Schuler, 167 Cal. 282, 139 P. 685, Ann. Cas. 1915C, 706.
Annotation: 1 L.R.A.(N.S.) 215, s. 37 L.R.A.(N.S.) 440, 52 L.R.A.(N.S.) 951, and L.R.A.1915D, 322.

[2] Annotation: 5 A.L.R. 761.

[3] See infra, § 137.

[4] Annotation: 1 L.R.A.(N.S.) 215, s. 37 L.R.A.(N.S.) 440, 52 L.R.A.(N.S.) 952, and L.R.A.1915D, 322.

[5] Bekins Van Lines v. Riley, 280 U. S. 80, 74 L. ed. 178, 50 S. Ct. 64.

[6] Iowa Motor Vehicle Asso. v. Railroad Comrs. 207 Iowa, 461, 221 N. W. 364, 75 A.L.R. 1, affirmed without opinion in 280 U. S. 529, 74 L. ed. 595, 50 S. Ct. 151.

[7] Ibid.

[8] Desser v. Wichita, 96 Kan. 820, 153 P. 1194, L.R.A.1916D, 246.

[9] Portland Van & Storage Co. v. Hoss, 139 Or. 434, 9 P. (2d) 122, 81 A.L.R. 1136.
Annotation: 81 A.L.R. 1145.

[10] An ordinance providing for the licensing of motor vehicles of two or more seats, which was valid when passed, was held not to be rendered unconstitutional on the ground of unjust discrimination by the subsequent introduction of motor vehicles of only one seat. Annotation: 5 A.L.R. 762.

[11] Annotation: 5 A.L.R. 761.

[12] Iowa Motor Vehicle Asso. v. Railroad Comrs. 207 Iowa, 461, 221 N. W. 364, 75 A.L.R. 1, affirmed without opinion in 280 U. S. 529, 74 L. ed. 595, 50 S. Ct. 151.

[13] Re Hoffert, 34 S. D. 271, 148 N. W. 20, 52 L.R.A.(N.S.) 949.

[14] Iowa Motor Vehicle Asso. v. Railroad Comrs. 207 Iowa, 461, 221 N. W. 364, 75 A.L.R. 1, affirmed in 280 U. S. 529, 74 L. ed. 595, 50 S. Ct. 151.

[15] State ex rel. Fargo v. Wetz, 40 N. D. 299, 168 N. W. 835, 5 A.L.R. 731.
It has been held that the provision of the Alabama Constitution that the legislature shall not enact any law which will permit any person, firm, corporation, or

whole revenue realized by the license tax is not to be expended on highways in the municipality.[16] It has been held, however, that the state cannot distribute a part of the proceeds thereof to the road funds of the counties from which received, under a constitutional provision prohibiting the legislature from imposing a tax upon the inhabitants and property of counties for county purposes.[17]

A state license fee does not offend a constitutional prohibition against an assessment of property for taxation elsewhere than in the county wherein it is situated, since such provision refers to ordinary ad valorem taxes, and does not include license taxes or fees.[18]

c. As Question Relates to Interstate Commerce

§ 124. Generally.—The state may impose fees upon nonresident motorists using its highways in interstate commerce.[19] It may impose such fees on interstate carriers.[20] This is sometimes made to depend upon failure of Congress to act.[1] The exact scope of the field in which congressional action is exclusive of state action and that which remains within the power of the states are discussed at another point.[2] If the fees assessed by the state are reasonable, no unlawful burden on interstate commerce results.[3] The reasonableness of the state's action is always subject to inquiry so far as it affects interstate commerce and, in that regard, is subordinate to the will of Congress.[4] It seems clear that a statute imposing fees for the use of the state highways, not upon all users, but only upon those users engaged in interstate commerce, must be held unconstitutional and invalid.[5]

§ 125. For Highway Purposes.—Where a state at its own expense furnishes special facilities in the way of roads for the use of those engaged in commerce,

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association to pay a privilege, license, or other tax to the state, and relieve him or it from the payment of all other privilege and license taxes in the state, was intended to prohibit the legislature from enacting a law which would require the payment of one privilege tax or license fee for the benefit of the state alone, to the exclusion of the counties and municipalities, and the section was held not violated by a motor vehicle act providing for the payment of a license or registration fee, although the act provided that these fees should be in lieu of all other privilege licenses which the state or any county or municipality might impose, where the act provided that the revenue derived from the license fees should be divided between the state, the town, and the county in which the licensee resides. Annotation: 5 A.L.R. 763.

[16] State ex rel. Fargo v. Wetz, 40 N. D. 299, 168 N. W. 835, 5 A.L.R. 731.

[17] Re Schuler, 167 Cal. 282, 139 P. 685, Ann. Cas. 1915C, 706.

A section of a motor vehicle act providing that one half of the net receipts under the act should be returned to the counties from which the money was received was held to violate a constitutional provision prohibiting the legislature from imposing a tax upon the inhabitants and property of counties for county purposes.

[18] Annotation: 5 A.L.R. 763.

[19] Buck v. Kuykendall, 267 U. S. 307, 69 L. ed. 623, 45 S. Ct. 324, 38 A.L.R. 286; Kane v. New Jersey, 242 U. S. 160, 61 L. ed. 222, 37 S. Ct. 30; Hendrick v. Maryland, 235 U. S. 610, 59 L. ed. 385, 35 S. Ct. 140; Camas Stage Co. v. Kozer, 104 Or. 600, 209 P. 95, 25 A.L.R. 27. State ex rel. Cronkhite v. Belden, 193 Wis. 145, 211 N. W. 916, 57 A.L.R. 1218.

Annotation: 24 A.L.R. 939, s. 68 A.L.R 208; 82 A.L.R. 1091; Ann. Cas. 1917E, 324.

[20] Interstate Trucking Co. v. Dammann, 208 Wis. 116, 241 N. W. 625, 82 A.L.R. 1080.

Annotation: 82 A.L.R. 1091. See MOTOR TRANSPORTATION COMPANIES.

[1] "**In the absence of Federal legislation covering the subject,** a state may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles,—those moving in interstate commerce as well as others. And to this end it may require the registration of such vehicles and the licensing of their drivers, charging therefor reasonable fees graduated according to the horse power of the engines,—a practical measure of size, speed, and difficulty of control." Hendrick v. Maryland, 235 U. S. 610, 59 L. ed. 385, 35 S. Ct. 140.

[2] See COMMERCE [Also 5 R. C. L. p. 702, § 15].

[3] Kane v. New Jersey, 242 U. S. 160, 61 L. ed. 222, 37 S. Ct. 30; Hendrick v. Maryland, 235 U. S. 610, 59 L. ed. 385, 35 S. Ct. 140.

[4] Hendrick v. Maryland, 235 U. S. 610, 59 L. ed. 385, 35 S. Ct. 140.

[5] Annotation: 68 A.L.R. 208.

interstate as well as intrastate, it may exact compensation therefor.[6] Common carriers for hire who make the highways their place of business may properly be charged a tax for such use not required of persons generally, and this rule applies to carriers engaged exclusively in interstate commerce,[7] at least in the absence of action by Congress inhibiting such fees.[8] The amount of the charges and the method of collection are primarily for determination by the state itself; and so long as they are reasonable and are fixed according to some uniform, fair, and practical standard, they constitute no burden on interstate commerce.[9] It is clearly within the discretion of the state to determine whether the compensation for the use of its highways by automobiles shall be determined by way of a fee, payable annually or semiannually, or by a toll based on mileage or otherwise.[10] Such fees must, however, be reasonable.[11] They will be presumed to be reasonable in the absence of a contrary showing.[12]

§ 126. Graduated Fees.—The fees which the state may charge may be graduated according to horse power,[13] since this is a practical measure of size and of the wear and tear of the vehicle on the highways and streets.[14]

3. Amount of Tax

a. In General

§ 127. Generally.—The amount of the license fee or tax depends upon its nature. A fee imposed as a police regulation [15] is different in this respect from one imposed under the power of taxation.[16]

§ 128. Under Police Power.—The amount of the fee which may be levied under the police power is limited to that necessary to the administration of the law;[17] or, as sometimes expressed, the amount must not be disproportionate to the cost of issuing the license and the regulation of the business to which it applies.[18] The amount of the fee rests to a certain extent in the sound discretion of the legislature, which takes into consideration all the circumstances and necessities of the case.[19] It will be presumed that the amount of the fee is reasonable unless the contrary appears upon the face of the law itself or is established by proper evidence.[20] The fact that revenue is incidentally derived does not invalidate the law as a police regulation if such revenue is not so disproportionate as to make the fee charged unreasonable.[1]

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[6] Buck v. Kuykendall, 267 U. S. 307, 69 L. ed. 623, 45 S. Ct. 324, 38 A.L.R. 286; Kane v. New Jersey, 242 U. S. 160, 61 L. ed. 222, 37 S. Ct. 30; Hendrick v. Maryland, 235 U. S. 610, 59 L. ed. 385, 35 S. Ct. 140.

[7] Clark v. Poor, 274 U. S. 554, 71 L. ed. 1199, 47 S. Ct. 702; Camas Stage Co. v. Kozer, 104 Or. 600, 209 P. 95, 25 A.L.R. 27.

The fact that all of the tax is not used for maintenance and repair of the highways, but that some of it is used for defraying the expenses of the commission in the administration or enforcement of the act and some for other purposes is immaterial so far as the rights of the carrier are concerned, for inasmuch as the tax is assessed for a proper purpose, and is not objectionable in amount, the use to which the proceeds are put is not a matter which concerns the carrier. Clark v. Poor, 274 U. S. 554, 71 L. ed. 1199, 47 S. Ct. 702.

See Motor Transportation Companies.

[8] Camas Stage Co. v. Kozer, 104 Or. 600, 209 P. 95, 25 A.L.R. 27.

[9] Hendrick v. Maryland, 235 U. S. 610, 59 L. ed. 385, 35 S. Ct. 140; Camas Stage Co. v. Kozer, 104 Or. 600, 209 P. 95, 25 A.L.R. 27.

[10] Kane v. New Jersey, 242 U. S. 160, 61 L. ed. 222, 37 S. Ct. 30.

[11] Carley & Hamilton v. Snook, 281 U. S. 66, 74 L. ed. 704, 50 S. Ct. 204, 68 A.L.R. 194; Camas Stage Co. v. Kozer, 104 Or. 600, 209 P. 95, 25 A.L.R. 27.

[12] Camas Stage Co. v. Kozer, 104 Or. 600, 209 P. 95, 25 A.L.R. 27.

[13] Hendrick v. Maryland, 235 U. S. 610, 59 L. ed. 385, 35 S. Ct. 140.

A nonresident automobile owner cannot complain of a discrimination under the provisions of a state statute for licensing motor vehicles because the fees are graduated according to engine power where the power of the car owned by him does not appear. Ibid.

As to graduated fees generally, see infra, §§ 130 et seq.

[14] Hendrick v. Maryland, 235 U. S. 610, 59 L. ed. 385, 35 S. Ct. 140.

[15] See infra, § 128.

[16] See infra, § 129.

[17] Re Schuler, 167 Cal. 282, 139 P. 685, Ann. Cas. 1915C, 706; Re Kessler, 26 Idaho, 764, 146 P. 113, L.R.A.1915D, 322, Ann. Cas. 1917A, 228; Iowa Motor Vehicle Asso. v. Railroad Comrs. 207 Iowa, 461, 221 N. W. 364, 75 A.L.R. 1, affirmed in 280 U. S. 529, 74 L. ed. 595, 50 S. Ct. 151.

Annotation: 1 L.R.A.(N.S.) 216. s. 37 L.R.A.(N.S.) 440, 52 L.R.A.(N.S.) 951, and L.R.A.1915D, 322.

[18] Vernor v. Secretary of State, 179 Mich. 157, 146 N. W. 338, Ann. Cas. 1915D, 128.

§ 129. **Under Power of Taxation.**[2]—The amount of the fee which may be levied for revenue purposes is largely within the control of the legislature. The legislature has plenary authority, subject to constitutional limitations, to determine the amount and the terms of the payment of taxes on motor vehicles.[3] It is not limited, as is the imposition of a fee under the police power, to the expense of administration.[4] In fact, the amount may be so great as to be prohibitive.[5] There is nothing which requires the state to make the amount of the fee dependent upon the extent of the use of the highway by the licensee.[6] The state may reasonably regulate the manner and extent of the use of its public highways by common carriers, and the quantum of the privilege tax for use of the highways need not necessarily be limited to the actual cost of such regulation, but may include compensation for the use of highways and provision for anticipated repairs and improvements thereon.[7] Fees established for the privilege of using motor vehicles on the highways will be presumed to be reasonable if nothing to the contrary appears on the face of the law itself or is established by evidence.[8]

b. Graduated Fees

§ 130. **Generally.**[9]—In the enactment of a police regulation, there can be no graduation of the fee, since there can be no more labor or expense in registering a vehicle of high horse power or greater weight than in registering one of low power or lesser weight.[10] But in the levying of a tax or license fee which is a revenue measure, the impost may be graduated.[11] The fees may be graduated according to the propensity of the vehicles to injure or destroy the public highways.[12] Those vehicles with respect to which such tendency is slight or nonexistent may be exempted.[13] Individual owners may be segregated from manufacturers and a different rate imposed on each class.[14]

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[19] Ibid.
Annotation: 52 L.R.A.(N.S.) 953, s. L.R.A.1915D, 322.

[20] Vernor v. Secretary of State, 179 Mich. 157, 146 N. W. 338, Ann. Cas. 1915D, 128.

[1] Ibid.
The view has been taken that the imposition of such a fee is not necessarily a revenue measure although it is in excess of the necessary expense of regulation and control. Annotation: 5 A.L.R. 764.

[2] As this matter relates to interstate commerce, see supra, §§ 124 et seq.

[3] Kane v. State, 81 N. J. L. 594, 80 A. 453, L.R.A.1917B, 553, Ann. Cas. 1912D, 237, affirmed in 242 U. S. 160, 61 L. ed. 222, 37 S. Ct. 30.
Annotation: 1 L.R.A.(N.S.) 215, s. 37 L.R.A.(N.S.) 440, 52 L.R.A.(N.S.) 954, and L.R.A.1915D, 322.
In Kane v. State, 81 N. J. L. 594, 80 A. 453, L.R.A.1917B, 553, Ann. Cas. 1912D, 237, affirmed in 242 U. S. 160, 61 L. ed. 222, 37 S. Ct. 30, it was held that there was no unconstitutional interference with interstate commerce effected by a statute imposing upon automobiles passing through the state, together with those owned and used in the state, a license tax for revenue purposes, the proceeds of which were applied to the upkeep of the highway.

[4] Re Kessler, 26 Idaho, 764, 146 P. 113, L.R.A.1915D, 322, Ann. Cas. 1917A, 228; Re Hoffert, 34 S. D. 271, 148 N. W. 20, 52 L.R.A. (N.S.) 949.

[5] Desser v. Wichita, 96 Kan. 820, 153 P. 1194, L.R.A.1916D, 246.

[6] Carley & Hamilton v. Snook, 281 U. S. 66, 74 L. ed. 704, 50 S. Ct. 204, 68 A.L.R. 194.

[7] Buck v. Kuykendall, 267 U. S. 307, 69 L. ed. 623, 45 S. Ct. 324, 38 A.L.R. 286; Iowa Motor Vehicle Asso. v. Railroad Comrs. 207 Iowa, 461, 221 N. W. 364, 75 A.L.R. 1, affirmed in 280 U. S. 529, 74 L. ed. 595, 50 S. Ct. 151.

[8] Camas Stage Co. v. Kozer, 104 Or. 600, 209 P. 95, 25 A.L.R. 27.

[9] In interstate commerce, see supra, § 126.

[10] Vernor v. Secretary of State, 179 Mich. 157, 146 N. W. 338, Ann. Cas. 1915D, 128.

[11] Annotation: 1 L.R.A.(N.S.) 215, s. 37 L.R.A.(N.S.) 440, 52 L.R.A.(N.S.) 952, and L.R.A.1915D, 322.
As it relates to interstate commerce, see supra, § 126.

[12] Carley & Hamilton v. Snook, 281 U. S.

§ 131. Based on Weight.—A fee which is a revenue measure may be graduated according to the weight of the vehicle.[15]

§ 132. Based on Horse Power.—A fee which is a revenue measure may be graduated according to the horse power of the vehicle,[16] irrespective of value.[17] To graduate it in this manner does not violate the guaranty of due process.[18] It is said, however, in some cases that the owner has a right to be heard on the determination of the horse power.[19]

§ 133. Based on Seating Capacity.—A fee which is a revenue measure may be varied according to the seating capacity of the vehicle.[20]

4. Purpose of Tax

§ 134. Generally.—The state may impose a tax upon motor vehicles using the highways of the state for general revenue purposes.[1] There is nothing in the Federal Constitution which requires a state to apply such fees for the benefit of those who pay them.[2]

§ 135. Highway Purposes.— The state may levy a tax for highway purposes on motor vehicles using such highways.[3] And it may likewise authorize

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66, 74 L. ed. 704, 50 S. Ct. 204, 68 A.L.R. 194; Re Kessler, 26 Idaho, 764, 147 P. 113, L.R.A.1915D, 322, Ann. Cas. 1917A, 228.

[13] Carley & Hamilton v. Snook, 281 U. S. 66, 74 L. ed. 704, 50 S. Ct. 204, 68 A.L.R. 194.

[14] Annotation: 5 A.L.R. 761.

[15] Carley & Hamilton v. Snook, 281 U. S. 66, 74 L. ed. 704, 50 S. Ct. 204, 68 A.L.R. 194.

[16] Re Schuler, 167 Cal. 282, 139 P. 685, Ann. Cas. 1915C, 706; Re Kessler, 26 Idaho, 764, 147 P. 113, L.R.A.1915D, 322, Ann. Cas. 1917A, 228; Kane v. State, 81 N. J. L. 594, 80 A. 453, L.R.A.1917B, 553, Ann. Cas. 1912D, 237, affirmed in 242 U. S. 160, 61 L. ed. 222, 37 S. Ct. 30.

Annotation: 5 A.L.R. 761; 1 L.R.A.(N.S.) 215, s. 37 L.R.A.(N.S.) 440, 52 L.R.A.(N.S.) 952, and L.R.A.1915D, 322, 59 L. ed. 385.

A statute prescribing that the amount of the fee or tax is dependent on the horse power of the motor, which is determined according to a rating established by the national association of licensed automobile manufacturers, is valid even though the rating is defective, in that it does not take into consideration the length of the stroke of the piston and the valve equipment, as this is a matter for the legislature to determine, and it is not for the courts to review the reasonableness of the method adopted in the absence of a showing that it is wholly arbitrary. State ex rel. Fargo v. Wetz, 40 N. D. 299, 168 N. W. 835, 5 A.L.R. 731.

[17] Re Kessler, 26 Idaho, 764, 147 P. 113, L.R.A.1915D, 322, Ann. Cas. 1917A, 228; Kane v. State, 81 N. J. L. 594, 80 A. 453, L.R.A.1917B, 553, Ann. Cas. 1912D, 237, affirmed in 242 U. S. 160, 61 L. ed. 222, 37 S. Ct. 30.

[18] Re Schuler, 167 Cal. 282, 139 P. 685, Ann. Cas. 1915C, 706.

[19] Ibid.

[20] Mark v. District of Columbia, 37 App. D. C. 563, 37 L.R.A.(N.S.) 440, 59 L. ed. 385.

Annotation: 5 A.L.R. 762.

See also Motor Transportation Companies.

[1] Carley & Hamilton v. Snook, 281 U. S. 66, 74 L. ed. 704, 50 S. Ct. 204, 68 A.L.R. 194; Harder's Fire Proof Storage & Van Co. v. Chicago, 235 Ill. 58, 85 N. E. 245, 14 Ann. Cas. 536.

Other acts that have been sustained have apparently been general revenue measures. See Mark v. District of Columbia, 37 App. D. C. 563, 37 L.R.A.(N.S.) 440; Chicago v. Morell, 247 Ill. 383, 93 N. E. 295, 139 Am. St. Rep. 340.

[2] Carley & Hamilton v. Snook, 281 U. S. 66, 74 L. ed. 704, 50 S. Ct. 204, 68 A.L.R. 194.

[3] Carley & Hamilton v. Snook, 281 U. S. 66, 74 L. ed. 704, 50 S. Ct. 204, 68 A.L.R. 194; Clark v. Poor, 274 U. S. 554, 71 L. ed. 1199, 47 S. Ct. 702; Buck v. Kuykendall, 267 U. S. 307, 69 L. ed. 623, 45 S. Ct. 324, 38 A.L.R. 286; Re Schuler, 167 Cal. 282, 139 P. 685, Ann. Cas. 1915C, 706; Re Kessler, 26 Idaho, 764, 147 P. 113, L.R.A.1915D, 322, Ann. Cas. 1917A, 228; Iowa Motor Vehicle Asso. v. Railroad Comrs. 207 Iowa, 461, 221 N. W. 364, 75 A.L.R. 1, affirmed without opinion in 280 U. S. 529, 74 L. ed. 595, 50 S. Ct. 151; State v. Lawrence, 108 Miss. 291, 66 So. 745, Ann. Cas. 1917E, 322 (privilege tax for using the roads); State ex rel. Fargo v. Wetz, 40 N. D. 299, 168 N. W. 835, 5 A.L.R. 731; Re Hoffert, 34 S. D. 271, 148 N. W. 20, 52 L.R.A.(N.S.) 949.

Annotation: 24 A.L.R. 937, s. 68 A.L.R. 200.

In some jurisdictions an amendment to the state Constitution permits an ad valorem tax on automobiles for raising a fund to construct or maintain public highways. Annotation: 24 A.L.R. 942, s. 68 A.L.R. 200; Ann. Cas. 1917E, 324.

a municipality to levy such a tax.[4] The fact that the tax is devoted to a specific purpose does not invalidate it.[5] Thus, it may tax a carrier for hire even though such carrier pays a tax to the municipality in the state and operates principally there, though partly outside the municipal limits.[6] Taxation in such a case does not violate the due process clause of the Federal and state Constitutions.[7]

In the absence of constitutional limitations, the state legislature has the power, also, to authorize a city or county to impose automobile license fees to be used in the improvement or maintenance of their streets or roads.[8]

5. EXEMPTIONS

§ 136. Generally.—The power of exemption is very broadly stated. In graduating the amount of the fees,[9] the state may exempt vehicles weighing less than a certain number of pounds, although their loaded weight may be much more than that of vehicles not exempt.[10] Such an exemption does not infringe the equal protection clause of the Fourteenth Amendment to the Federal Constitution and a similar provision of a state Constitution.[11]

§ 137. Of Persons.—The state may exempt any class of persons.[12] Manufacturers and vendors may be exempted as to stock kept for sale.[13] Nonresidents may be exempted,[14] at least for a limited period.[15] In the computation of the time during which a nonresident is permitted to operate his automobile without a license on the highways of the state after entering it, the days on which he runs the machine across the boundary into other states, returning the same day, and those in which the machine is in a repair shop should not be excluded.[16]

J. FAILURE TO COMPLY WITH LICENSING AND REGISTRATION PROVISION

1. IN GENERAL

§ 138. Generally.—The effect of one's failure to comply with licensing and

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As to the relationship to interstate commerce, see supra, § 125.

[4] Chicago v. Morell, 247 Ill. 383, 93 N. E. 295, 139 Am. St. Rep. 340; Harder's Fire Proof Storage & Van Co. v. Chicago, 235 Ill. 58, 85 N. E. 245, 14 Ann. Cas. 536.

Annotation: 24 A.L.R. 938, s. 68 A.L.R. 200.

[5] Carley & Hamilton v. Snook, 281 U. S. 66, 74 L. ed. 704, 50 S. Ct. 204, 68 A.L.R. 194.

[6] Ibid.

[7] Ibid.

[8] Harder's Fireproof Storage & Van Co. v. Chicago, 235 Ill. 58, 85 N. E. 245, 14 Ann. Cas. 536.

The legislature has plenary power as to the subjects and objects from which it will exact revenue, except as it is limited by the Constitution; and a constitutional provision giving the legislature power to provide such revenue as is necessary by levying a tax by valuation, and giving it power to tax peddlers, auctioneers, etc., by general law, uniform as to the class upon which it operates, and providing further that the specification of objects and subjects of taxation shall not deprive the legislature of the power to require other objects or subjects to be taxed in such manner as may be consistent with the principles of taxation of the Constitution, has been held not to deprive the legislature of power to authorize a municipality to pass an ordinance regulating the use of its streets by vehicles and imposing a license tax on such vehicles for revenue purposes. Ibid.

[9] See supra, §§ 130 et seq.

[10] Carley & Hamilton v. Snook, 281 U. S. 66, 74 L. ed. 704, 50 S. Ct. 204, 68 A.L.R. 194.

[11] Ibid.

[12] Re Schuler, 167 Cal. 282, 139 P. 685, Ann. Cas. 1915C, 706.

[13] Annotation: 5 A.L.R. 761.

[14] Annotation: 37 L.R.A.(N.S.) 441, s. 52 L.R.A.(N.S.) 951; Ann. Cas. 1917E, 324.

See also infra, § 137.

[15] Re Schuler, 167 Cal. 282, 139 P. 685, Ann. Cas. 1915C, 706; State v. Lawrence, 108 Miss. 291, 66 So. 745, Ann. Cas. 1917E, 322.

Annotation: Ann. Cas. 1917E, 324.

Nonresidents may be exempt from the duty of registering their automobiles and paying fees therefor for a period of three months. Re Schuler, 167 Cal. 282, 139 P. 685, Ann. Cas. 1915C, 706.

[16] Dudley v. Northampton Street R. Co. 202 Mass. 443, 89 N. E. 25, 23 L.R.A.(N.S.) 561.

registration provisions depends to a large extent upon the terms of the particular statutes involved. A person guilty of a violation may be subjected to criminal liability[17] or such violation may affect merely his civil rights and liabilities.

2. EFFECT UPON CIVIL RIGHTS AND LIABILITIES

a. UPON RIGHT TO RECOVER FOR INJURIES

§ 139. Generally.—There is a difference of opinion as to the right of one who sustain injuries to his person or property by the negligence of another while using or riding in an unlicensed or unregistered automobile to recover for such injuries. According to the weight of authority, recovery in such a case is not precluded where the failure to register in compliance with the statute has no causal connection with the injury.[18] The fact that a bus, though properly licensed to operate upon city streets, had no authority to carry passengers for hire, which it was attempting to do when injured by another's negligence, does not deprive its owner of the right to recover the damages occasioned by the negligent injury.[19] One who does an unlawful act is not thereby placed outside the protection of the law; to have this effect, the unlawful act must have some causal connection with the injury complained of.[20]

§ 140. Massachusetts Rule.—A rule in conflict with the general rule above stated originated in Massachusetts, where a statute providing that automobiles should be registered, and that "except as otherwise provided, . . . no automobile or motorcycle shall . . . be operated upon any public highway unless registered as above provided," has been held to render unlicensed automobiles outlaws on the highway, so that their occupants are entitled to no other right than that of being exempt from reckless, wanton, or wilful injury. Such an occupant is not entitled to recover upon a showing of want of ordinary care.[1] This rule has been followed in a few other states.[2] The doctrine does not, however, preclude a recovery resulting from wilful, wanton, or reckless conduct of another.[3] The operation of an unregistered motor vehicle on a highway cannot be said as a matter of law to be wilful, wanton, or reckless conduct so as to render the operator liable to another within this rule.[4]

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[17] For discussion of the liability of one lending license plates to another, see supra, § 112.

As to criminal liability, see infra, § 799.

[18] Atlantic Coast Line R. Co. v. Weir, 63 Fla. 69, 58 So. 641, 41 L.R.A.(N.S.) 307, Ann. Cas. 1914A, 126 (railroad crossing accident); Lockridge v. Minneapolis & St. L. R. Co. 161 Iowa, 74, 140 N. W. 834, Ann. Cas. 1916A, 158 (railroad crossing accident); Armstead v. Lounsberry, 129 Minn. 34, 151 N. W. 542, L.R.A.1915D, 628; Standard Auto Ins. Asso. v. Neal, 199 Ky. 699, 251 S. W. 966, 35 A.L.R. 1468; Pratt v. Western Bridge & Constr. Co. 116 Neb. 553, 218 N. W. 397, 58 A.L.R. 527; Chambers v. Minneapolis, St. P. & S. Ste. M. R. Co. 37 N. D. 377, 163 N. W. 824, Ann. Cas. 1918C, 954; Maryland Ref. Co. v. Duffy, 94 Okla. 16, 220 P. 846, 35 A.L.R. 52; Speight v. Simonsen, 115 Or. 618, 239 P. 542, 43 A.L.R. 1149 (motorcycle); Gilman v. Central Vermont R. Co. 93 Vt. 340, 107 A. 122, 16 A.L.R. 1102; Southern R. Co. v. Vaughan, 118 Va. 692, 88 S. E. 305, L.R.A.1916E, 1222, Ann. Cas. 1918D, 842; Switzer v. Sherwood, 80 Wash. 19, 141 P. 181, Ann. Cas. 1917A, 216 (motorcycle); Godfrey v. Cooper, 46 Ont. L. Rep. 565, 10 B. R. C. 134, 51 D. L. R. 455.

Annotation: 16 A.L.R. 1108, s. 35 A.L.R. 62, 38 A.L.R. 1038, 43 A.L.R. 1153, 54 A.L.R. 374, 58 A.L.R. 532, 61 A.L.R. 1190, 78 A.L.R. 1028, and 87 A.L.R. 1469; L.R.A.1916E, 1225; 18 Ann. Cas. 240; Ann. Cas. 1914A, 128; Ann. Cas. 1917A, 225; Ann. Cas. 1918D, 847; 10 B. R. C. 151.

It is not a defense to an action for damages to another, growing out of the negligence of a contractor constructing highways and culverts under a contract with a county, that the injured person was, at the time of the accident, operating or driving an unlicensed automobile upon a highway in violation of the Nebraska statute. Pratt v. Western Bridge & Constr. Co. 116 Neb. 553, 218 N. W. 397, 58 A.L.R. 527.

In Gilman v. Central Vermont R. Co. 93 Vt. 340, 107 A. 122, 16 A.L.R. 1102, the court, though recognizing that the Vermont statute was copied from that of Massachusetts, refused to place on it the construction that the courts of that state had, or to hold the operator of an unregistered automobile a trespasser on the highway and not entitled to recover, or to deprive the violator of a right of action for a negligent injury to the machine by another.

[19] Klinkenstein v. Third Ave. R. Co. 246 N. Y. 327, 158 N. E. 886, 54 A.L.R. 369.

[20] Atlantic Coast Line R. Co. v. Weir, 63 Fla. 69, 58 So. 641, 41 L.R.A.(N.S.) 307, Ann. Cas. 1914A, 126; Lockridge v. Minneapolis & St. L. R. Co. 161 Iowa, 74, 140 N. W. 834, Ann. Cas. 1916A, 158; Armstead v. Lounsberry, 129 Minn. 34, 151 N. W. 542, L.R.A. 1915D, 628; Maryland Ref. Co. v. Duffy, 94 Okla. 16, 220 P. 846, 35 A.L.R. 52.

§ 141. Right of Unlicensed Operator.—The fact that the operator of an automobile has no operator's license, as required by statute, does not, according to the majority view, bar recovery for an injury to him through the negligence of another where the lack of such license has no causal connection with the injury.[5] Mere violation of a statute forbidding the operation of a motorcycle on the highway without a license does not raise an inference of negligence which will prevent recovery for personal injuries negligently inflicted by another.[6]

An infant operating a motorcycle on a public highway in violation of a statute which imposes a penalty therefor, and which by its terms is conclusively controlling on the punishment for its violation, is not a trespasser in the sense that he is precluded from recovering damages for personal injuries negligently inflicted upon him by another to which his youth in no way contributed.[7]

Even in Massachusetts, where the owner or operator of the unlicensed automobile cannot recover, the operator who has no license is not precluded from recovery by that fact alone;[8] at least one who has employed an unlicensed person to operate the car is not precluded from recovery.[9]

On the contrary, the view has been taken that the driving of an automobile by an unlicensed person in violation of the statute expressly providing that no person shall operate a motor vehicle upon any highway in the state unless licensed is causal and precludes recovery for injuries sustained by such driver in a grade-crossing collision with a railroad train.[10] Driving an automobile without the license required by statute is conclusive proof, and not merely evidence, of legal fault; no question is raised for the jury.[11]

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[1] Bacon v. Boston Elev. R. Co. 256 Mass. 30, 152 N. E. 35, 47 A.L.R. 1100; Conroy v. Mather, 217 Mass. 91, 104 N. E. 487, 52 L.R.A.(N.S.) 801; Dudley v. Northampton Street R. Co. 202 Mass. 443, 89 N. E. 25, 23 L.R.A.(N.S.) 561.

Annotation: 47 A.L.R. 1103.

Where an automobile is not legally registered by a married woman, the owner, and the statute requiring registration provides that violation thereof shall not prevent recovery by a guest unless it is shown that he knew or had reasonable cause to know of such violation, her husband, who was riding with her at the time of the collision with an electric car, is not entitled to recover for personal injuries where it is shown that he knew or had reasonable cause to know that the car was not legally registered. Bacon v. Boston Elev. R. Co. 256 Mass. 30, 152 N. E. 35, 47 A.L.R. 1100.

[2] Annotation: 16 A.L.R. 1108, s. 35 A.L.R. 62, 38 A.L.R. 1038, 43 A.L.R. 1153, 54 A.L.R. 374, 58 A.L.R. 532, 61 A.L.R. 1190, 78 A.L.R. 1028, and 87 A.L.R. 1469; 25 L.R.A.(N.S.) 734; L.R.A.1916E, 1225; Ann. Cas. 1914A, 128; Ann. Cas. 1918D, 851; 10 B. R. C. 153.

[3] Potter v. Gilmore, 282 Mass. 49, 184 N. E. 373, 87 A.L.R. 1462.

[4] Ibid.

[5] Lindsay v. Cecchi, 3 Boyce (Del.) 133, 80 A. 523, 35 L.R.A.(N.S.) 699; Standard Auto Ins. Asso. v. Neal, 199 Ky. 699, 251 S. W. 966, 35 A.L.R. 1468; Armstead v. Lounsberry, 129 Minn. 34, 151 N. W. 542, L.R.A. 1915D, 628; Corbett v. Scott, 243 N. Y. 66, 152 N. E. 467, 46 A.L.R. 1064; Wilson v. Bittner, 129 Or. 122, 276 P. 268, 64 A.L.R. 132; Speight v. Simonsen, 115 Or. 618, 239 P. 542, 43 A.L.R. 1149 (motorcycle); Southern R. Co. v. Vaughan, 118 Va. 692, 88 S. E. 305, L.R.A.1916E, 1222, Ann. Cas. 1918D, 842.

Annotation: 16 A.L.R. 1113, s. 35 A.L.R. 62, 38 A.L.R. 1038, 43 A.L.R. 1153, 54 A.L.R. 377, 58 A.L.R. 532, 61 A.L.R. 1191, 78 A.L.R. 1029, and 87 A.L.R. 1471; 23 L.R.A.(N.S.) 561, s. 25 L.R.A.(N.S.) 734, 35 L.R.A.(N.S.) 699, 41 L.R.A.(N.S.) 307, 52 L.R.A.(N.S.) 801, L.R.A.1915D, 628, L.R.A.1916E, 1225, and 10 B. R. C. 157.

In Wilson v. Bittner, 129 Or. 122, 276 P. 268, 64 A.L.R. 132, the Oregon court followed the general rule by holding that a one-eyed motorcyclist who drove without a required special permit and sustained injuries to his person by the negligence of another while so doing was not precluded from recovering where his noncompliance with the statutory requirement had no causal connection with the injury.

[6] Corbett v. Scott, 243 N. Y. 66, 152 N. E. 467, 46 A.L.R. 1064.

[7] Ibid.

Annotation: 46 A.L.R. 1067.

[8] Annotation: 16 A.L.R. 1108, s. 35 A.L.R. 62, 38 A.L.R. 1038, 43 A.L.R. 1153, 54 A.L.R. 374, 58 A.L.R. 532, 61 A.L.R. 1190, 78 A.L.R. 1028, 87 A.L.R. 1469, and 10 B. R. C. 157.

[9] Conroy v. Mather, 217 Mass. 91, 104 N. E. 487, 52 L.R.A.(N.S.) 801.

Annotation: 16 A.L.R. 1108, s. 35 A.L.R. 62, 38 A.L.R. 1038, 43 A.L.R. 1153, 54 A.L.R. 374, 58 A.L.R. 532, 61 A.L.R. 1190, 78 A.L.R. 1028, 87 A.L.R. 1469, and 10 B. R. C. 157.

§ 142. Right to Recover against Municipality.—The same difference of opinion that exists as to the right to recover against a tort-feasor generally exists as to the right to recover against a municipality. According to the weight of authority, the fact that an automobile is not registered as required by statute, or the fact that the operator is not licensed as so required, does not preclude a recovery for personal injuries or property damage caused by a defect or obstruction in the street, where such failure has no causal connection with the injury.[12] In other jurisdictions, however, the view is taken that the owner or operator of an unregistered machine has no right to operate the same upon the public streets and highways, and therefore the municipality owes him no duty to keep the ways safe for his travel. It is, therefore, not liable to him for injuries.[13] A guest in an unregistered automobile cannot, although he is ignorant of the fact that the car is unregistered, recover damages from the town for personal injuries due to defects in the highway.[14]

§ 143. Under Express Statutory Provision as to Liability.—In some states statutes expressly deny a right of recovery for personal injuries sustained while riding in an unregistered motor vehicle. Obviously, where the statutes of a jurisdiction contain express provisions as to civil liability, these provisions govern.[15]

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[10] Johnson v. Boston & M. R. Co. 83 N. H. 350, 143 A. 516, 61 A.L.R. 1178.

Annotation: 61 A.L.R. 1190, s. 78 A.L.R. 1028, and 87 A.L.R. 1469.

The New Hampshire court refused to extend the decision in Johnson v. Boston & M. R. Co. 83 N. H. 350, 143 A. 516, 61 A.L.R. 1178, so as to prevent recovery for the death of a passenger in a car driven by an unlicensed operator. The court, after refusing to consider the machine and its occupants under such circumstances as outlaws or trespassers, considered the doctrines of assumption of risk, joint enterprise, ratification, and joint wrongdoers, as possible theories barring recovery, finding each one of them to be insufficient for that purpose.

[11] Johnson v. Boston & M. R. Co. 83 N. H. 350, 143 A. 516, 61 A.L.R. 1178.

[12] Hemming v. New Haven, 82 Conn. 661, 74 A. 892, 25 L.R.A.(N.S.) 734, 18 Ann. Cas. 240; Clark v. Hampton, 83 N. H. 524, 145 A. 265, 61 A.L.R. 1171.

Annotation: 16 A.L.R. 1108, s. 35 A.L.R. 62, 38 A.L.R. 1038, 43 A.L.R. 1153, 54 A.L.R. 374, 58 A.L.R. 532, 61 A.L.R. 1190, 78 A.L.R. 1028 and 87 A.L.R. 1469.

[13] McCarthy v. Leeds, 115 Me. 134, 98 A. 72, L.R.A.1916E, 1212; Feeley v. Melrose, 205 Mass. 329, 91 N. E. 306, 27 L.R.A.(N.S.) 1156, 137 Am. St. Rep. 445; Hanley v. Poultney, 100 Vt. 172, 135 A. 713, 54 A.L.R. 371.

Annotation: 16 A.L.R. 1108, s. 35 A.L.R. 62, 38 A.L.R. 1038, 43 A.L.R. 1153, 54 A.L.R. 374, 58 A.L.R. 532, 61 A.L.R. 1190, 78 A.L.R. 1028 and 87 A.L.R. 1469.

In McCarthy v. Leeds, 115 Me. 134, 98 A. 72, L.R.A.1916E, 1212, where a statute provided that all motor vehicles should be registered by the owner or person in control thereof, and that no motor vehicle should be operated by a resident of the state upon any highway, town way, etc., unless registered, as required by the act, and imposed a penalty for a violation of the statute, it was held that the owner of an automobile which was registered under the number of the dealer from whom the owner had shortly before purchased it could not recover for injuries to himself and property, sustained by reason of defects in a bridge over which he was passing, it being held that the owner was prohibited by the statute from using the unregistered machine on the highway, and that the defendant town owed him no duty to keep the way safe for his travel, but that his rights were only those of a trespasser upon the land of another.

In another action growing out of the same accident that caused the injury in the McCarthy Case, supra, it was held that a town was not liable for the death, because of a defective bridge, of a child who was riding in an unregistered automobile, where the statutes required highways to be kept safe for travelers, and forbade the use of any motor vehicle on the highway unless it was registered, the court holding that a person in an unlicensed automobile is not a traveler within the meaning of the statute. 116 Me. 275, 101 A. 448, L.R.A.1918D, 671.

Travelers in an automobile cannot hold a municipal corporation liable for injuries due to a defect in the highway, if the automobile was not registered as required by statute, although they were ignorant of that fact. Feeley v. Melrose, 205 Mass. 329, 91 N. E. 306, 27 L.R.A.(N.S.) 1156, 137 Am. St. Rep. 445.

[14] Hanley v. Poultney, 100 Vt. 172, 135 A. 713, 54 A.L.R. 371.

b. Upon Liability for Negligence

§ **144. Generally.**—By the weight of authority, the fact that a motor vehicle is not licensed or registered as required by statute will not charge the owner or operator with liability for injury or damage caused by its operation on the highway, where the failure to obtain a license has no causal connection with the injury or damage.[16]

§ **145. Massachusetts Rule.**—A few cases hold the owner or operator of the unlicensed machine absolutely liable for injuries caused thereby.[17] Such cases take the view that the unlicensed machine is a nuisance.[18] A guest may, in such a case, recover of his host.[19] Though the operation of the unlicensed car is evidence of negligence, the liability under this view is independent of any negligence.[20] Contributory negligence of the plaintiff, however, is a defense.[1]

§ **146. Liability of Unlicensed Operator, or Owner of Car Operated by Unlicensed Driver.**—The fact that the driver of the automobile did not have a license will not, per se, render the owner liable for damages inflicted by his car, in the absence of a causal connection between the lack of a license and the injury; the liability in such case depends upon whether or not there was actual negligence in the operation of the car.[2] This is true although the violation of the statute may be regarded as negligence per se.[3] The mere operation by a minor of a motor vehicle, contrary to statute, is not such negligence as will deprive him of the right to show contributory negligence on the part of one injured by his act.[4] His act is not negligence per se.[5] Even in jurisdictions which take the view that operation of an unlicensed car renders the owner liable irrespective of negligence, the operation by an unlicensed driver does not, per se, render the owner or operator liable for injuries.[6] The absence of a license is admissible as evidence of the operator's negligence, but it does not establish liability as a legal result.[7] This is true where a car, registered in the state where the accident occurred, was being operated by a driver unlicensed there, even though he was licensed in another state.[8] The operator is not a trespasser upon the highway.[9]

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[15] Annotation: 16 A.L.R. 1108, s. 35 A.L.R. 62, 38 A.L.R. 1038, 43 A.L.R. 1153, 54 A.L.R. 374, 58 A.L.R. 532, 61 A.L.R. 1190, 78 A.L.R. 1028 and 87 A.L.R. 1469.

[16] Black v. Moree, 135 Tenn. 73, 185 S. W. 682, L.R.A.1916E, 1216.

Annotation: 16 A.L.R. 1117, s. 35 A.L.R. 68, 38 A.L.R. 1038, 43 A.L.R. 1153, 54 A.L.R. 382, 58 A.L.R. 532, 61 A.L.R. 1190, 78 A.L.R. 1031, and 87 A.L.R. 1473.

The mere fact that an automobile which is being driven along the highway is not registered under the provisions of a statute making such failure a misdemeanor punishable by fine does not render the owner liable for injury to the occupant of a vehicle overturned when the animal drawing it became frightened at the automobile, if the absence of registry had no connection with the accident, although the statute also provides that there shall be a lien upon the automobile for any damages for injury to person or property caused by running it in violation of the provisions of the act, there being provisions with respect to speed and conduct of the driver to which such provision could apply. Black v. Moree, 135 Tenn. 73, 185 S. W. 682, L.R.A.1916E, 1216.

[17] Balian v. Ogassin, 277 Mass. 525, 179 N. E. 232, 78 A.L.R. 1021; Brown v. Alter, 251 Mass. 223, 146 N. E. 691, 38 A.L.R. 1036; Koonovsky v. Quellette, 226 Mass. 474, 116 N. E. 243, Ann. Cas. 1918B, 1146.

Annotation: 16 A.L.R. 1117, s. 35 A.L.R. 68, 38 A.L.R. 1038, 43 A.L.R. 1153, 54 A.L.R. 382, 58 A.L.R. 532, 61 A.L.R. 1190, 78 A.L.R. 1031, and 87 A.L.R. 1473.

In McDonald v. Dundon, 242 Mass. 229, 136 N. E. 264, 26 A.L.R. 1243, it was held that an automobile carrying a dealer's license plate and operated by a purchaser in whose name the car was not registered was not legally registered, and therefore was a nuisance on the highway, constituting the one operating it a trespasser and also entailing liability on the dealer for injuries caused by its operation.

[18] Balian v. Ogassin, 277 Mass. 525, 179 N. E. 232, 78 A.L.R. 1021; Brown v. Alter, 251 Mass. 223, 146 N. E. 691, 38 A.L.R. 1036; Koonovsky v. Quellette, 226 Mass. 474, 116 N. E. 243, Ann. Cas. 1918B, 1146.

Annotation: 16 A.L.R. 1108, s. 35 A.L.R. 62, 38 A.L.R. 1038, 43 A.L.R. 1153, 54 A.L.R. 374, 58 A.L.R. 532, 61 A.L.R. 1190, 78 A.L.R. 1028, and 87 A.L.R. 1469.

The driver or assenting owner is liable for all the direct injury resulting from such use, although the injury was not the result of an act of negligence. Koonovsky v. Quellette, 226 Mass. 474, 116 N. E. 243, Ann. Cas. 1918B, 1146.

[19] Balian v. Ogassin, 277 Mass. 525, 179 N. E. 232, 78 A.L.R. 1021.

An amendment of the Massachusetts statute, to the effect that its violation shall not constitute a defense unless the injured person was the owner or operator of the vehicle operated in violation thereof, or unless he or the owner knew or had cause to know of the violation, is largely relied on in holding that the defense that an injured infant participated in the illegal operation of the unregistered car, the car being in the name of a part owner, could not avail, even upon the assumption that the infant was a guest, inasmuch as the infant was an innocent participant and, accordingly, not a trespasser upon the highway. Balian v. Ogassin, 277 Mass. 525, 179 N. E. 232, 78 A.L.R. 1021.

[20] Balian v. Ogassin, 277 Mass. 525, 179 N. E. 232, 78 A.L.R. 1021.

[1] Brown v. Alter, 251 Mass. 223, 146 N. E. 691, 38 A.L.R. 1036.

[2] Lindsay v. Cecchi, 3 Boyce (Del.) 133, 80 A. 523, 35 L.R.A.(N.S.) 699.

c. Car Equipped with Improper License Plates

§ 147. Generally.—The general rule is that the owner or operator of a motor vehicle is not charged with liability or precluded from recovering for injuries or damages sustained while operating it on the highway by the fact that such vehicle is equipped with improper license plates or is being used in pursuits or for purposes not authorized by the statute under which the license plates were issued.[10] The same principle governs here as governs in the case of absence of license plates. There being no causal connection with the injury or damage, there is no liability or preclusion from recovery. A dealer who permits his automobile bearing his license plates to be used for a purpose not authorized by the statute under which such plates were issued is not liable in damages for personal injuries resulting from the negligent operation of the car.[11] The act of the dealer is not, in such a case, the proximate cause of the injury.[12]

In jurisdictions adhering to the Massachusetts rule, however, there is a liability upon one who lends his plates to another, for injuries caused by the operation of the car carrying the plates.[13] Likewise, in jurisdictions adhering to this rule the owner or operator is precluded from recovering for injuries or damages sustained as the result of its operation on the highway.[14]

Annotation: 16 A.L.R. 1117, s. 35 A.L.R. 68, 38 A.L.R. 1038, 43 A.L.R. 1153, 54 A.L.R. 382, 58 A.L.R. 532, 61 A.L.R. 1190, 78 A.L.R. 1031, and 87 A.L.R. 1473.

[3] Lindsay v. Cecchi, 3 Boyce (Del.) 133, 80 A. 523, 35 L.R.A.(N.S.) 699.

[4] Hopkins v. Droppers, 184 Wis. 400, 198 N. W. 738, 36 A.L.R. 1156.

[5] Ibid.

Violation of a statute subjecting a minor operating a motor vehicle when unaccompanied by parent or guardian to fine and imprisonment is negligence per se. Hopkins v. Droppers, 184 Wis. 400, 198 N. W. 738, 36 A.L.R. 1156. Annotation: 16 A.L.R. 1117, s. 35 A.L.R. 68, 38 A.L.R. 1038, 43 A.L.R. 1153, 54 A.L.R. 382, 58 A.L.R. 532, 61 A.L.R. 1190, 78 A.L.R. 1031, and 87 A.L.R. 1473.

[6] McMahon v. Pearlman, 242 Mass. 367, 136 N. E. 154, 23 A.L.R. 1467; Bourne v. Whitman, 209 Mass. 155, 95 N. E. 404, 35 L.R.A.(N.S.) 701.

Some language in Johnson v. Boston & M. R. Co. 83 N. H. 350, 143 A. 516, 61 A.L.R. 1178, indicates a stronger view to the effect that the unlicensed operator is liable. See this case in § 141, supra.

[7] McMahon v. Pearlman, 242 Mass. 367, 136 N. E. 154, 23 A.L.R. 1467.

[8] Kenyon v. Hathaway, 274 Mass. 47, 174 N. E. 463, 73 A.L.R. 156.

Annotation: 73 A.L.R. 162.

See § 617, infra, as to evidence of negligence.

[9] McMahon v. Pearlman, 242 Mass. 367, 136 N. E. 154, 23 A.L.R. 1467.

[10] Annotation: 86 A.L.R. 236.

[11] Worsham Buick Co. v. Isaacs, 121 Tex. 587, 51 S. W. (2d) 277, 86 A.L.R. 232.

Annotation: 86 A.L.R. 236.

See supra, § 112.

[12] Worsham Buick Co. v. Isaacs, 121 Tex. 587, 51 S. W. (2d) 277, 86 A.L.R. 232.

[13] § 112, supra.

[14] Feeley v. Melrose, 205 Mass. 329, 91 N. E. 306, 27 L.R.A.(N.S.) 1156, 137 Am. St. Rep. 445.

Annotation: 86 A.L.R. 236.

K. NONRESIDENTS

§ 148. Generally.[15]—In the absence of prohibitory Federal legislation, the states may enact police regulations of a reasonable nature respecting the use of their highways by nonresident operators of motor vehicles, and such regulations may include prohibition of such use in the absence of a license from the state.[16] A law licensing automobiles does not necessarily violate the Federal Constitution in requiring the registration of machines of nonresidents, provided that it is not discriminatory in its operation.[17]

Not all discrimination is forbidden, however; a distinction may be made between commercial vehicles operated for hire and those transporting the property of their owners.[18]

§ 149. Exemptions.—It is now customary for a state to permit for limited periods the use within its boundaries of unregistered machines which have been properly registered in the home state.[19] Reciprocal provisions are contained in many state statutes basing the exemption of nonresidents upon the condition that the state of the nonresident make a similar provision as to residents of the former state. These provisions have been sustained.[20] No distinction as to the validity of such a statute can be based upon its application to nonresidents driving into the state and those driving through.[1]

A question of construction exists as to who is a resident within the meaning of these statutes. This question is largely one of fact in the individual case.[2]

§ 150. Nonresidents of Municipalities.—The local authorities frequently have power to lay a license tax upon automobiles of residents of the municipality, and upon persons residing outside of the corporate limits who employ their machines in furtherance of business or occupations carried on within the city limits, but they do not have the right to levy such tax on motor vehicles of nonresidents whose business or pleasure casually carries them into or through the city, since this would be in derogation of the public right of user of the highways of the state,[3] and might result in compelling an owner of an automobile to obtain a license not only from the authorities of the place where his business had its headquarters, but also from every neighboring town into which his casual engagements might call him. The legislature, however, has the power to provide by law for the imposition of such burdensome requirements whereby local licenses must everywhere be obtained.[4]

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[15] As to licensing operators generally, see infra, §§ 151 et seq.

For a discussion of license tax as affected by interstate commerce clause, see §§ 124 et seq.

[16] Hendrick v. Maryland, 235 U. S. 610, 59 L. ed. 385, 35 S. Ct. 140; Kane v. New Jersey, 242 U. S. 159, 61 L. ed. 222, 37 S. Ct. 30; Pawloski v. Hess, 250 Mass. 22, 144 N. E. 760, 35 A.L.R. 945; Camas Stage Co. v. Kozer, 104 Or. 600, 209 P. 95, 25 A.L.R. 27; Interstate Trucking Co. v. Dammann, 208 Wis. 116, 241 N. W. 625, 82 A.L.R. 1080.

Annotation: 82 A.L.R. 1091.

[17] Kane v. State, 81 N. J. L. 594, 80 A. 453, Ann. Cas. 1912D, 237.

See CONSTITUTIONAL LAW [Also 6 R. C. L. p. 1].

[18] Interstate Trucking Co. v. Dammann, 208 Wis. 116, 241 N. W. 625, 82 A.L.R. 1080.

Annotation: 82 A.L.R. 1092.

[19] See supra, §§ 108, 109.

[20] Interstate Trucking Co. v. Dammann, 208 Wis. 116, 241 N. W. 625, 82 A.L.R. 1080.

Annotation: 82 A.L.R. 1093.

[1] Kane v. New Jersey, 242 U. S. 160, 61 L. ed. 222, 37 S. Ct. 30, affirming 81 N. J. L. 594, 80 A. 453, L.R.A.1917B, 553, Ann. Cas. 1912D, 237.

[2] Annotation: 82 A.L.R. 1094.

A teacher who resides in the state during the school year, or about nine months, and who spends her summer vacation of the remaining part of the year at the home of her parents in another state is not a nonresident of the first state. Annotation: 82 A.L.R. 1094.

A foreign corporation having a place of business in the state is not a nonresident. Annotation: 82 A.L.R. 1097.

The tendency is to be less lenient in the case of commercial vehicles than in the case of privately owned vehicles. Annotation: 82 A.L.R. 1097.

Some of the statutes expressly provide the number of days which the nonresident may operate his car on the highways of the state. Annotation: 82 A.L.R. 1094.

[3] White Oak Coal Co. v. Manchester, 109 Va. 749, 64 S. E. 944, 132 Am. St. Rep. 943.

IV. LICENSING AND REGISTRATION OF OPERATORS

A. IN GENERAL

§ 151. **Generally.**—The right to operate motor vehicles in public places is not a natural and unrestrained right, but a privilege subject to reasonable regulations in the interest of the public under the police power of the state. The police power has been exercised in many states by requiring chauffeurs and other operators of motor vehicles to obtain a license as a condition precedent to such operation. In general, the rules of law governing public regulation and control of motor vehicles[5] and licensing and registration[6] apply to regulations relating to the licensing and regulation of operators of automobiles.

The various statutes set out certain qualifications which an individual must possess before he will be entitled to operate a motor vehicle. These qualifications may relate to skill, competency, age,[7] character, etc. Provision is also made for specified classes of operators such as chaffeurs and beginners. To entitle an unlicensed person driving an automobile to the protection of a statute permitting the operation of the machine by an unlicensed person if riding with or accompanied by a licensed chauffeur or operator, there must be knowledge on the part of both parties of the existence of a relation like that of operator without a license, and licensed chauffeur or operator accompanying him, but if such knowledge does exist, the operator will be protected, although it was not expected that one would exercise any supervision over the other if the operator was in fact competent.[8]

Some statutes prohibit certain driving by certain persons such as infants under a certain age, intoxicated persons, etc.[9]

The effect of failure to comply with licensing and registration provisions is discussed elsewhere in this article.[10]

§ 152. **Validity of Regulations.**—Obviously, the general principles of law governing the constitutionality of regulation[11] and the validity of statutes[12] and ordinances[13] apply to enactments relating to the licensing and regulation of operators of motor vehicles. The state has power to require licenses as a condition precedent to the operation of the automobile on the streets and highways of the state.[14] The issuance or revocation of automobile drivers' permits is an exercise of the police power to regulate the use of the public highways in the interest of the public safety and welfare.[15]

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[4] White Oak Coal Co. v. Manchester, 109 Va. 749, 64 S. E. 944, 132 Am. St. Rep. 943.

Annotation: 1 L.R.A.(N.S.) 218, 108 Am. St. Rep. 219.

[5] See supra, §§ 15 et seq.

[6] See supra, §§ 90 et seq.

[7] **Charter authority to license and regulate hackmen,** draymen, drivers, and all others pursuing like occupations, does not empower a municipality to forbid children under a specified age to operate automobiles on its streets. Ex parte Epperson, 61 Tex. Crim. Rep. 237, 134 S. W. 685, 37 L.R.A. (N.S.) 303.

An ordinance which, while not purporting to fix an age limit for operators of automobiles, makes it unlawful for any owner or custodian of a motor vehicle to permit a minor under eighteen years of age to operate it upon the streets of the city, may properly be regarded as fixing an age limit. United States Fidelity & G. Co. v. Guenther, 281 U. S. 34, 74 L. ed. 683, 50 S. Ct. 165.

[8] Bourne v. Whitman, 209 Mass. 155, 95 N. E. 404, 35 L.R.A.(N.S.) 701.

[9] See statute involved in Hopkins v. Droppers, 184 Wis. 400, 198 N. W. 738, 36 A.L.R. 1156.

As to conflicts between state and local regulations, see §§ 68 et seq.

[10] See supra, §§ 138 et seq.

[11] See CONSTITUTIONAL LAW [Also 6 R. C. L. p. 1].

[12] See STATUTES [Also 25 R. C. L. p. 750].

[13] See MUNICIPAL CORPORATIONS [Also 19 R. C. L. p. 678].

[14] Re Cardinal, 170 Cal. 519, 150 P. 348, L.R.A.1915F, 850.

Annotation: 71 A.L.R. 616.

The granting or refusing of such licenses or permits may not be arbitrarily done. Nor may they be granted to some or refused to others of like qualifications under like circumstances and conditions.[16]

B. Regulations as to Nonresidents

§ 153. Generally.—It is well settled that the state, under the police power, has the right to require licenses from nonresidents for the operation of motor vehicles on its highways and to charge a reasonable fee therefor.[17] The absence of Federal legislation upon the subject leaves the states free to prescribe uniform regulations reasonably necessary for public safety and order with respect to the operation upon the highway of motor vehicles moving in interstate commerce, and to that end they may require the registration of such vehicles and the licensing of their drivers, charging therefor reasonable fees graduated according to the horse power of the engine.[18] The statutes usually exempt nonresident drivers from their operation for a limited time. Some such statutes exempt from their requirements only residents of a state which requires operators' licenses, who have complied with such requirement. Such a statute does not deprive of the equal protection of the laws residents of states where laws do not require operators' licenses.[19] The statutes of some states exempt only residents of a state, the laws of which grant like exemption to the residents of the former states.[20] The absence from a statute of any reciprocal provision by which nonresidents whose cars are duly registered in their home states are given, for a limited period, free use of the highways in return for similar privileges granted to residents of the enacting state, does not involve an unconstitutional discrimination against nonresidents, where the annual fees prescribed are not so large as to be unreasonable, and where any resident owner would be subjected to the full annual charge for the use of the highways for any period, however brief.[1]

The absence from an automobile operators' license law of a provision exempting nonresidents will not render the law discriminatory.[2]

§ 154. Construction.—The construction of licensing statutes is governed by the general rules governing the construction of statutes generally.[3]

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[15] Thompson v. Smith, 155 Va. 367, 154 S. E. 579, 71 A.L.R. 604.

[16] Ibid.

[17] Kane v. New Jersey, 242 U. S. 159, 61 L. ed. 222, 37 S. Ct. 30; Hendrick v. Maryland, 235 U. S. 610, 59 L. ed. 385, 35 S. Ct. 140; State v. Chandler, 131 Me. 262, 161 A. 148, 82 A.L.R. 1389, appeal dismissed in 287 U. S. 572, 77 L. ed. 502, 53 S. Ct. 116.
Annotation: 82 A.L.R. 1392.

[18] Kane v. State, 242 U. S. 160, 61 L. ed. 222, 37 S. Ct. 30; Hendrick v. Maryland, 235 U. S. 610, 59 L. ed. 385, 35 S. Ct. 140.
Annotation: 82 A.L.R. 1392.

[19] State v. Chandler, 131 Me. 262, 161 A. 148, 82 A.L.R. 1389, appeal dismissed in 287 U. S. 572, 77 L. ed. 502, 53 S. Ct. 116.
Annotation: 71 A.L.R. 616.

[20] Annotation: 71 A.L.R. 616.

[1] Kane v. State, 242 U. S. 160, 61 L. ed. 222, 37 S. Ct. 30.

[2] State v. Chandler, 131 Me. 262, 161 A. 148, 82 A.L.R. 1389, appeal dismissed in 287 U. S. 572, 77 L. ed. 502, 53 S. Ct. 116.

[3] An act of Congress providing that motor vehicles owned or operated by persons not legal residents of the District of Columbia, but who have complied with the laws of the state of their legal residence requiring the registration of motor vehicles or licensing of operators thereof, should not be required to comply with such laws and regulations of the District, if the state in which the owner or operator of such motor vehicle has his legal residence extends the same privilege to a motor vehicle owned or operated by legal residents of the District, was held to relate to drivers' permits as well as the licensing of motor vehicles.
Annotation: 82 A.L.R. 1392, 1393.

It has been held that a resident of the District of Columbia who failed to show that he had complied with the laws in force within the District with respect to registering motor vehicles and licensing operators, or that he had applied to the Mary-

§ 155. Effect of Driving after Exemption Expires.—The fact that a nonresident motorist who was licensed to drive in the state of his residence operates a car in another state for more than the period for which a nonresident is authorized to drive without obtaining a license is not a private wrong rendering him liable in a civil action.[4]

§ 156. Holder of Nonresident's License Driving Resident's Car.—The fact that an operator licensed under the provisions of another state is driving the car of a resident in the state where the accident occurs does not make the driving illegal,[5] at least it does not deprive him of the right to recover for injuries resulting from negligence.[6]

C. Revocation and Reinstatement of Licenses or Permits

§ 157. Generally.—The statutes regulating the granting of operators' licenses or drivers' permits usually provide for their revocation. It is competent for the legislature to prescribe the conditions under which the privilege of operating an automobile on the public highways may be exercised.[7] The fact that the license or permit was granted under a statute or ordinance which stated that it should be perpetual unless revoked as provided in such statute or ordinance, and which contained no provision for revocation, does not preclude revocation under a provision introduced by subsequent amendment.[8]

A license to operate an automobile is not property, but a mere privilege, the suspension of which does not deprive the licensee of his property without due process of law.[9] The licenses or permits may not be revoked arbitrarily.[10]

The authority to revoke cannot be delegated to an official without prescribing what shall constitute grounds for revocation.[11]

§ 158. Revocation for Nonpayment of Judgment.—The power of the state to deprive a person of a license to operate a motor vehicle until he has satisfied a prior judgment against him in an action for damages resulting from the operation of a motor vehicle is generally sustained.[12]

§ 159. Operating during Period of Revocation.—The statutes usually pro-

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land commissioner for a local identifying tag or marker, which were prerequisite under the Maryland law to a limited use of the highways without cost by residents of other states, could not complain that residents of the District of Columbia were not included among those to whom this privilege is granted. Hendrick v. Maryland, 235 U. S. 610, 59 L. ed. 385, 35 S. Ct. 140.

[4] Annotation: 82 A.L.R. 1394.

The theory is that the person licensed to drive by another state is treated as one sufficiently certified to be competent and therefore may drive his duly registered car in the state for the time fixed by statute. The provisions plainly indicate that the legislature deemed the matter of public safety to be sufficiently provided for by a license to operate issued by any state. The other provisions requiring a local license for the nonresident operator under other circumstances are almost entirely concerned with the revenue features of the law. It is true that their observance may afford some aid in the matter of identification, but that alone is not sufficient to show that there was a legislative purpose to class violators with those deemed incompetent. The reasons which led to the conclusion that the legislature intended to make unlicensed driving a civil wrong do not apply here. The situation of the driver licensed in another state falls rather within the class of those whose violation of the statute is prohibited for other reasons than protection from careless or incompetent driving. Annotation: 82 A.L.R. 1394.

[5] See Kenyon v. Hathaway, 274 Mass. 47, 174 N. E. 463, 73 A.L.R. 156. See supra, § 146.

[6] Annotation: 82 A.L.R. 1396.

[7] Annotation: 71 A.L.R. 616.

Depriving a minor of his license to drive an automobile is a sufficient penalty for his driving the car recklessly. State ex rel. Berry v. Superior Ct. 139 Wash. 1, 245 P. 409, 45 A.L.R. 1530.

[8] Thompson v. Smith, 155 Va. 367, 154 S. E. 579, 71 A.L.R. 604.

[9] Annotation: 71 A.L.R. 616.

[10] Thompson v. Smith, 155 Va. 367, 154 S. E. 579, 71 A.L.R. 604.

[11] Ibid.

[12] Annotation: 71 A.L.R. 617.

There is, however, some dispute as to this. Annotation: 71 A.L.R. 616.

vide that an operator whose license has been revoked cannot thereafter validly operate a car during the period of such suspension. One who operates a car in the state within the unexpired period of suspension of his operator's permit may be convicted of operating in violation of a statute which makes it an offense to operate a car within a specified time after the revocation of his permit, even though he has in the meantime moved to another state and has there procured a motor vehicle registration card and automobile license tags and, while temporarily in the state of his former residence, has driven his automobile on which were such tags.[13] And this is true notwithstanding the state of his former residence dispensed with the requirement of an operator's license in favor of nonresidents who had procured a permit or license from a state granting like exemption to residents of the former state.[14]

§ 160. Reinstatement.—The statutes usually provide for the reinstatement of licenses or permits that have been revoked. A judge of a municipal court, when acting upon an application for reinstatement of an automobile driver's permit which has been revoked, is acting in an administrative capacity, and not in a judicial one.[15]

V. INJURIES FROM OPERATION

A. INTRODUCTION

§ 161. Generally.—The field of injuries resulting from the operation of motor vehicles is one of the most important in the law of this subject. Primarily, the questions here arising are questions of negligence. It is the application of well-settled principles to the factual situations created by the use of motor vehicles. While the subject of negligence is thus treated in its application to motor vehicles, the reader will have frequent occasion to refer to the article on negligence for a broader and more comprehensive discussion of the rules applicable to that subject.[16]

B. NEGLIGENCE

§ 162. Generally.—"Negligence" is the word ordinarily used in common-law terminology to express the foundation of civil liability for injury to person or property where such injury is not the result of premeditation and formed intention.[17] A cause of action for a personal injury negligently inflicted consists of the duty of care owed to the plaintiff, its breach, and the consequent injury.[18] The well-established principles of the law of negligence obviously apply to the numerous factual situations created by the advent and development of motor vehicles. The effectiveness of these principles as applied to a new and unforeseen factual setting is a tribute to the adaptability and elasticity of the common law.

It is essential to the existence of negligence that there be some fault on the part of the person sought to be held liable; no liability exists for an unavoidable accident.[18a]

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[13] District of Columbia v. Fred, 281 U. S. 49, 74 L. ed. 694, 50 S. Ct. 163.

[14] District of Columbia v. Fred, 281 U. S. 49, 74 L. ed. 694, 50 S. Ct. 163, holding that the accused in such case is not prosecuted for operating without a license.
Annotation: 82 A.L.R. 1395.

[15] Thompson v. Smith, 155 Va. 367, 154 S. E. 579, 71 A.L.R. 604.

[16] See NEGLIGENCE [Also 20 R. C. L. p. 1].

[17] See NEGLIGENCE [Also 20 R. C. L. p. 6].

[18] Ford v. Maney, 251 Mich. 461, 232 N. W. 393, 70 A.L.R. 1315.

[18a] **The issue of unavoidable accident is not raised** when there is no evidence tending to prove that the injury resulted from some cause other than the negligence of one of the parties, as for example in an action in which plaintiff claims that defendant's truck struck an automobile driv-

§ 163. Violation of Statute or Ordinance.—The general rules relating to the violation of statutes and ordinances as to negligence [19] obviously apply to injuries arising from the operation of automobiles.

Where the statute itself provides as to the effect of its violation, the provision thereof governs. But where it does not so provide, differing views have been taken. In some jurisdictions the violation of a statute or ordinance is deemed negligence per se; [20] in other jurisdictions it depends upon the nature of the statute or ordinance. The violation of a statute which imposes a specific requirement to do or to omit to do a definite act is negligence per se,[21] while the violation of a statute which merely imposes a rule of conduct is not.[1]

In order that the violation constitute negligence, it must be shown that the obligation imposed was for the benefit of the person alleging injury.[2] Some statutes, especially those prescribing a penalty for their violation, are viewed as penal and as having no effect upon civil rights and liabilities. Hence, the violation of such a statute has no bearing upon the question of negligence.[3]

In many states a distinction is drawn between the violation of a statute and the violation of an ordinance.

The effect of the violation of statutes and ordinances pertaining to the operation of motor vehicles is discussed in detail herein under the subdivision devoted to a consideration of specific regulations.[4]

§ 164. Proximate Cause.—The well-established rule of law that in order to maintain an action for negligence, the injury of which the plaintiff complains must have been the natural and probable consequence of a wrongful act or omission [5] which is not too remote [6] obviously applies to automobile accidents.[7]

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en by the plaintiff and caused it to collide with another automobile parked at the curb, in which defendant merely presented evidence to show that the truck driver was not negligent and that plaintiff was negligent, and there was no evidence that the street was rough, or the pavement wet, and no suggestion of anything that might have caused the automobile to skid into the automobile parked at the curb, and no evidence of congestion of traffic or of the existence of any obstacle that might have obstructed plaintiff's view of the parked automobile. Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S. W. (2d) 944, 97 A.L.R. 1513.

[19] See NEGLIGENCE [Also 20 R. C. L. p. 38 §§ 33 et seq.].

[20] **The wilful violation by the owner of an automobile of a statute** making it unlawful for any owner of a motor vehicle to permit a person under sixteen years of age to operate the same and prescribing a punishment therefor is negligence rendering the owner liable in damages for injuries resulting from such operation where the other elements of actionable negligence are present, even though such statute is penal in its nature and silent as to liability for damages resulting from its violation. Walker v. Klopp, 99 Neb. 794, 157 N. W. 962, L.R.A.1916E, 1292.

Violation of a municipal ordinance making it unlawful to drive an automobile past a standing car which is receiving or discharging passengers is negligence per se rendering the person guilty thereof liable for an injury to a person free from contributory negligence directly and proximately caused thereby. Schell v. Du Bois, 94 Ohio St. 93, 113 N. E. 664, L.R.A.1917A, 710. But see Heidle v. Baldwin, 118 Ohio St. 375, 161 N. E. 44, 58 A.L.R. 1186.

[21] Heidle v. Baldwin, 118 Ohio St. 375, 161 N. E. 44, 58 A.L.R. 1186.

[1] Ibid.

The simple violation of a statute or ordinance does not of itself constitute wilful and wanton negligence. Higbee Co. v. Jackson, 101 O. S. 75, 128 N. E. 61, 14 A.L.R. 131.

[2] **In an action by a passenger** in a hired automobile to recover for injuries received when the driver turned the car to the left to pass another automobile going in the same direction near a bend in the road and failed to make the turn and went over a bank, it was held that a failure to obey a traffic statute or ordinance requiring vehicles, when turning at a street crossing, to keep to the right of the intersection of the center of the highway, is not negligence per se unless the complaining party is one for whose benefit the statute or ordinance was enacted, and that since the object of such a provision was to protect travelers and vehicles upon the highway and to avoid collisions, it was inapplicable under the facts of the case. Annotation: 6 A.L.R. 321.

[3] See NEGLIGENCE [Also 20 R. C. L. p. 42, § 36].

[4] See §§ 224, 304 et seq.

[5] See NEGLIGENCE [Also PROXIMATE CAUSE, 22 R. C. L. p. 106].

[6] Eklof v. Waterston, 132 Or. 479, 285 P. 201, 68 A.L.R. 1002.

[7] O'Malley v. Eagan, 43 Wyo. 233, 2 P. (2d) 1063, 77 A.L.R. 582, rehearing denied in 43 Wyo. 350, 5 P. (2d) 276, 77 A.L.R. 597.

A negligent act cannot be said to be the proximate cause of an accident unless the accident could have been avoided in the absence thereof.[8] Speed, in order to be the basis of a recovery for negligent injuries, must be the proximate cause of the injuries.[9]

When the proximate cause of an injury is not the act of the operator of an automobile, but that of strangers meddling with his machine, which he has left standing in the highway, the owner of the machine is relieved of liability, since the intervention of the act of third parties exempts him from responsibility, although no one would have been injured if he had not left the car unattended in the street.[10]

The driver of an automobile is also relieved from liability when the proximate cause of an injury is the negligence of the person injured, although the exemption from responsibility in such cases is usually referred to as being due to the contributory negligence of the injured person.[11]

When once a chain of events has been started due to the negligence of the operator of an automobile, he may be held responsible for all mishaps which are properly the proximate result of his unlawful conduct.[12] The fact that other happenings causing or contributing toward an injury intervened between the violation of a statute or ordinance and the injury does not necessarily make the result so remote that no action can be maintained. The test is to be found not in the number of intervening events or agents, but in their character and in the natural and probable connection between the wrong done and the injurious consequence.[13]

In determining what constitutes proximate cause, the same principles apply where the alleged negligence consists of a violation of a statutory duty as where it consists of the violation of a nonstatutory duty.[14] It is well settled that the violation of a statute or ordinance, to result in liability for injury to person or property, must be a proximate cause of such injury.[15]

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[8] Ibid.

[9] Larsen v. Webb, 332 Mo. 370, 58 S. W. (2d) 967, 90 A.L.R. 67; Bloom v. Bailey, 292 Pa. 348, 141 A. 150, 57 A.L.R. 585; Eichman v. Buchheit, 128 Wis. 385, 107 N. W. 325, 8 Ann. Cas. 435; O'Malley v. Eagan, 43 Wyo. 233, 2 P. (2d) 1063, 77 A.L.R. 582, rehearing denied in 43 Wyo. 350, 5 P. (2d) 276, 77 A.L.R. 597.

Annotation: 58 A.L.R. 265.

[10] Annotation: 108 Am. St. Rep. 216.

As to parking generally, see infra, §§ 334, 338.

[11] Cumberland Teleph. & Teleg. Co. v. Yeiser, 141 Ky. 15, 131 S. W. 1049, 31 L.R.A. (N.S.) 1137.

Annotation: 31 L.R.A.(N.S.) 1137.

[12] Upton v. Windham, 75 Conn. 288, 53 A. 660, 96 Am. St. Rep. 197.

The negligence of the driver of an automobile struck by another automobile at a street intersection and thrown out of its course so that it strikes a pedestrian near the curb is not the sole cause of the resulting injury, but such injury must be deemed to have been caused by the concurrent negligence of both drivers. McDonald v. Robinson, 207 Iowa, 1293, 224 N. W. 820, 62 A.L.R. 1419.

The driver of an automobile whose negligence caused or contributed to a passenger's injuries is responsible even though another also contributed thereto. Lange v. Affleck, 160 Md. 695, 155 A. 150, 79 A.L.R. 1274.

A driver of an automobile negligently colliding with another car is not exonerated from any part of the damage to such car by reason of the fact that, because of the excessive speed with which it was traveling, it could not be brought under control in time to prevent it from running off the road and overturning, where no negligence on the part of the driver of the second car is found. Mahoney v. Beatman, 110 Conn. 184, 147 A. 762, 66 A.L.R. 1121.

Annotation: 66 A.L.R. 1134.

[13] Linberg v. Stanto, 211 Cal. 771, 297 P. 9, 75 A.L.R. 555; Milbury v. Turner Centre System, 274 Mass. 358, 174 N. E. 471, 73 A.L.R. 1070.

[14] Larsen v. Webb, 332 Mo. 370, 58 S. W. (2d) 967, 90 A.L.R. 67.

[15] Meese v. Goodman, 167 Md. 658, 176 A. 621, 98 A.L.R. 480.

It was held. in Corbett v. Scott, 243 N. Y. 66, 152 N. E. 467, 46 A.L.R. 1064, that while one seeking to recover for injuries received on his motorcycle was prima facie guilty of negligence in operating the motorcycle while under the age of sixteen years, in violation of a state statute, the jury might find him free from contributory negligence if his immature age in no way contributed to the happening of the accident.

One who permits his car to be operated in violation of a city ordinance at a prohibited rate of speed and without sounding the horn by one who was not a lawful chauffeur is not, merely because of this

Specific holdings relative to proximate cause will be found scattered throughout this article under the various factual situations herein stated.[16]

C. Measure of Care Required

1. Fundamental Principles

§ 165. Generally.—Although automobiles are comparatively recent in use, there is nothing novel in the principles of law to be applied with respect to travel in them on the highways.[17] It is a well-established principle of law, even in the absence of statutory requirements, that the operator of a motor vehicle must exercise ordinary, reasonable, or due care—that is, that degree of care and caution which an ordinarily careful and prudent person would exercise under the same or similar circumstances.[18] Negligence is failure to exercise reasonable care [19]—that is, the care which the ordinary, reasonable man would use under the circumstances.[20] Obviously, the care required of a motorist is controlled by, and depends upon, the place, circumstances, conditions, and surroundings. There is no arbitrary or fixed rule. A statute or ordinance which, without regard to care or negligence or the violation of specific regulations, undertakes to forbid the running of an automobile so as to inflict damage or injury, or, more specifically, so as to collide with other vehicles or with persons, is unconstitutional in that it is unreasonable and oppressive.[1] There are two divergent theories upon the question of defining the measure of care which is required to obviate the charge of negligence. According to one theory, care is divided into three degrees: (1) Slight care, (2) ordinary care, and (3) extraordinary care. According to the other theory, the care which must be exercised to avoid the charge of negligence is always ordinary care—that is, the care which ordinarily prudent persons exercise in the same or similar circumstances. The care which ordinarily prudent persons thus exercise obviously depends upon the circumstances. For example, an ordinarily prudent person driving through a street in which children are playing would drive slower and have his car under better control than he would when driving through a street which was to all appearances clear or in which

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violation of the ordinance, liable to one struck and injured by the car, unless there is a direct relation of cause and effect between the violation and the injury inflicted. Elmendorf v. Clark, 143 La. 971, 79 So. 557, L.R.A.1918F, 802.

If the violation by the defendant's automobile of an ordinance requiring vehicles turning at street intersections to keep to the right of the center of the intersection did not contribute directly to a collision with a motorcycle, or if the negligent operation of the motorcycle was the sole proximate cause of the death of one riding thereon, the defendant cannot be held liable. Annotation: 6 A.L.R. 321.

[16] As to the responsibility of a negligent driver for damages immediately inflicted by another car, see § 352.

[17] House v. Cramer, 134 Iowa, 374, 112 N. W. 3, 10 L.R.A.(N.S.) 655, 13 Ann. Cas. 461.
Annotation: 13 Ann. Cas. 461.

[18] White Swan Laundry Co. v. Wehrhan, 202 Ala. 87, 79 So. 479, citing R. C. L.; Carter v. Brown, 136 Ark. 23, 206 S. W. 71, citing R. C. L.; Rozycki v. Yantic Grain & Products Co. 99 Conn. 711, 122 A. 717, 37 A.L.R. 582; Giles v. Voiles, 144 Ga. 853, 88 S. E. 207, citing R. C. L.; Devine v. Brunswick-Balke-Collender Co. 270 Ill. 504, 110 N. E. 780, Ann. Cas. 1917B, 887; Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035, 108 Am. St. Rep. 196, 3 Ann. Cas. 487; Fisher v. Fletcher, 191 Ind. 529, 133 N. E. 834, 22 A.L.R. 1392; Indiana Springs Co. v. Brown, 165 Ind. 465, 74 N. E. 615, 1 L.R.A.(N.S.) 238, 6 Ann. Cas. 656; Weil v. Kreutzer, 134 Ky. 563, 121 S. W. 471, 24 L.R.A.(N.S.) 557; Tudor v. Bowen, 152 N. C. 441, 67 S. E. 1015, 136 Am. St. Rep. 836, 21 Ann. Cas. 646; Leach v. Asman, 130 Tenn. 510, 172 S. W. 303, citing R. C. L.; Deputy v. Kimmell, 73 W. Va. 595, 80 S. E. 919, 51 L.R.A. (N.S.) 989, Ann. Cas. 1916E, 656.
Annotation: 14 A.L.R. 1178, s. 67 A.L.R. 313; 24 A.L.R. 507, s. 47 A.L.R. 703, and 62 A.L.R. 970; 48 L.R.A.(N.S.) 948; Ann. Cas. 1916E, 661.

[19] Crowley v. Chicago, B. & Q. R. Co. 204 Iowa, 1385, 213 N. W. 403, 53 A.L.R. 964.

[20] Hewlett v. Schadel (C. C. A. 4th) 68 F. (2d) 502, 91 A.L.R. 743; Wittstruck v. Lee, 62 S. D. 290, 252 N. W. 874, 92 A.L.R. 1361.

[1] Ticknor v. Seattle-Renton Stage Line, 139 Wash. 354, 247 P. 1, 47 A.L.R. 252.

only adults were seen.[2] The one theory would characterize the care exercised in driving through a street in which children were playing as extraordinary care. The other would characterize such care as ordinary care under the circumstances. The latter theory has been adopted in the discussion herein.

§ 166. **Duty to Keep Car under Control.**—It is a general rule of law that part of the duty of an operator of a motor vehicle is to keep his machine always under control so as to avoid collision with vehicles, pedestrians, and other persons properly using the highway.[3] The mere fact, however, that one owns an automobile does not make such person responsible, much less solely responsible, for every injury caused by it.[4] Whether or not an automobile is to be adjudged under control depends on the test or standard used and the particular circumstances and conditions surrounding the case. The cases defining the expression have varied in their forms of definition. Some say that "having a car under control" is practically synonymous with "operating the car with due care."[5] A considerable number of cases hold that a car is under control if it can be stopped quickly.[6] In other cases a car is considered under control when the driver is attentive and anticipating the possible requirement of a sudden turn or stop to avoid a collision.[7] And it has been held that the test of "having a car under control" is the ability to avoid colliding with another who is using the highway and exercising proper care and caution on his own part.[8]

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[2] **Degrees of negligence do not exist.** Wittstruck v. Lee, 62 S. D. 290, 252 N. W. 874, 92 A.L.R. 1361.

[3] Snyder v. Campbell, 145 Miss. 287, 110 So. 678, 49 A.L.R. 1402; Thrapp v. Meyers, 114 Neb. 689, 209 N. W. 238, 47 A.L.R. 585; Zandras v. Moffett, 286 Pa. 477, 133 A. 817, 47 A.L.R. 699; Lauson v. Fond du Lac, 141 Wis. 57, 123 N. W. 629, 25 L.R.A.(N.S.) 40, 135 Am. St. Rep. 30.

Annotation: 1 L.R.A.(N.S.) 227, 108 Am. St. Rep. 214; 4 Ann. Cas. 398; 13 Ann. Cas. 464.

As to duty to anticipate the presence of others, see infra, § 168.

In an early case it was held that a chauffeur was negligent in taking his hands from the steering wheel to adjust his hat while the car was running 30 miles an hour, although the road was level, smooth, and straight. O'Bierne v. Stafford, 87 Conn. 354, 87 A. 743, 46 L.R.A.(N.S.) 1183.

Negligence on the part of an automobile driver is shown where there is evidence that he was incompetent and was operating a car with four wheel brakes, with which he was not accustomed, for practice, and that, after having driven a short distance and while traveling about 40 miles an hour, he turned the wheels to avoid an object and jammed on the brakes, which resulted in the car overturning. Kerr v. Haug Motors, 39 Manitoba L. R. 238, 16 B. R. C. 838.

[4] Ouellette v. Superior Motor & Mach. Works, 157 Wis. 531, 147 N. W. 1014, 52 L.R.A.(N.S.) 299.

[5] Molin v. Wark, 113 Minn. 190, 129 N. W. 383, 41 L.R.A.(N.S.) 346.

Annotation: 28 A.L.R. 952.

[6] Carruthers v. Campbell, 195 Iowa, 390, 192 N. W. 138, 28 A.L.R. 949; Raymond v. Sauk County, 167 Wis. 125, 166 N. W. 29, L.R.A.1918F, 425.

Annotation: 28 A.L.R. 953.

In Carruthers v. Campbell, 195 Iowa, 390, 192 N. W. 138, 28 A.L.R. 949, the record showed that the highway intersection was so screened that neither driver discovered the other until they were within a few feet of meeting, and it further appeared that the charge that the plaintiff did not have his car under control was unfounded. The court, in affirming the judgment for the plaintiff, defined the term "having his car under control" as driving at such a rate of speed and having the mechanism and power of the car so closely in hand that the car may be brought to a stop with a reasonable degree of celerity. This does not mean that the car can be stopped or turned aside instantly under any and all circumstances.

[7] Annotation: 28 A.L.R. 957.

[8] Brown v. Des Moines Steam Bottling Works, 174 Iowa, 715, 156 N. W. 829, 1 A.L.R. 835; Savoy v. McLeod, 111 Me. 234, 88 A. 721, 48 L.R.A.(N.S.) 971.

Annotation: 28 A.L.R. 958.

In Savoy v. McLeod, 111 Me. 234, 88 A. 721, 48 L.R.A.(N.S.) 971, the record showed that there was ample room for the defendant to have guided his machine safely past the team which the plaintiff was driving if he had been paying proper attention to the rights of the plaintiff. Instead of waiting for the team to turn over to the right, the defendant, overtaking the team, attempted to pass and came into collision. The court held that if the car had been under control, the accident could have been avoided.

In Brown v. Des Moines Steam Bottling Works, 174 Iowa, 715, 156 N. W. 829, 1 A.L.R. 835, it appeared that the driver did not slacken his speed, was looking to one side, had but one hand on the steering wheel, and was suddenly diverted from his course by an obstacle in the highway so

§ 167. Duty to Maintain Lookout.—It is a well-established rule that the operator of a motor vehicle must keep a reasonably careful lookout so that he may be able to avoid collisions with persons or vehicles upon the highway.[9] He is liable for running down a boy standing in, or moving diagonally across, the street ahead of him and unaware of his peril if he fails to see the boy and avoid a collision because he permitted his attention to be diverted in another direction.[10]

§ 168. Duty to Anticipate Presence of Others.—It is a general rule of law that an operator of a motor vehicle has no right to assume that the road is clear, but that under virtually all circumstances and at all times, he must be reasonably vigilant and must anticipate and expect the presence of others.[11] One driving an automobile along a public highway at night is bound to anticipate the presence of pedestrians upon it.[12] Accordingly, the fact that he did not know that anyone was on the highway is no excuse for conduct which would have amounted to recklessness if he had known that another vehicle or person was approaching.[13] Drivers of motor vehicles must be specially watchful in anticipation of the presence of others at places where other vehicles are constantly passing, and where men, women, and children are liable to be crossing, such as corners at the intersection of streets, or near street cars from which passengers may have alighted or may be about to alight, or in other similar places or situations where people are likely to fail to observe an approaching automobile.[14] Accordingly, it may be the duty of the driver of an automobile, when he has occasion to turn the corner of a street, to slow down the machine in anticipation of the presence of persons in the highway at the street crossing.[15] If a person is standing in the highway, the driver of an automobile must notice him and take care not to injure him; a failure to see a

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that his car ran up on the sidewalk and struck a pedestrian. The court held that the driver was under a duty to have the car under such control that it would not unreasonably or unnecessarily become a peril to people along the highway, saying: "The jury might well have found that if the defendant had his automobile under such perfect control as he should have had on a public street, and was giving reasonable attention to it, he might have avoided the collision with the flange at the switching point, or, having collided with it, might have stopped the same in time to have avoided the injury complained of."

[9] Johnson v. Coey, 237 Ill. 88, 86 N. E. 678, 21 L.R.A.(N.S.) 81; Riccio v. Ginsberg, 49 R. I. 32, 139 A. 652, 62 A.L.R. 967; Mosso v. E. H. Stanton Co. 75 Wash. 220, 134 P. 941, L.R.A.1916A, 943; Cunnien v. Superior Iron Works Co. 175 Wis. 172, 184 N. W. 767, 18 A.L.R. 667.

[10] Burvant v. Wolfe, 126 La. 787, 52 So. 1025, 29 L.R.A.(N.S.) 677.

[11] White Swan Laundry Co. v. Wehrhan, 202 Ala. 87, 79 So. 479, citing R. C. L.; Bona v. S. R. Thomas Auto Co. 137 Ark. 217, 208 S. W. 306, citing R. C. L.; Zarzana v. Neve Drug Co. 180 Cal. 32, 179 P. 203, 15 A.L.R. 401; Southall v. Smith, 151 La. 967, 92 So. 402, 27 A.L.R. 1194; Ulmer v. Pistole, 115 Miss. 485, 76 So. 522, citing R. C. L.; Lee v. Donnelly, 95 Vt. 121, 113 A. 542, citing R. C. L.; Lauson v. Fond du Lac, 141 Wis. 57, 123 N. W. 629, 25 L.R.A.(N.S.) 40, 135 Am. St. Rep. 30.

Annotation: 14 A.L.R. 1177; 1 L.R.A. (N.S.) 227; 4 L.R.A.(N.S.) 949; 108 Am. St. Rep. 214; 4 Ann. Cas. 398; 13 Ann. Cas. 464.

[12] Hatzakorzian v. Rucker-Fuller Desk Co. 197 Cal. 82, 239 P. 709, 41 A.L.R. 1027.

Annotation: 14 A.L.R. 1177.

[13] State v. Campbell, 82 Conn. 671, 74 A. 927, 135 Am. St. Rep. 293, 18 Ann. Cas. 236; Weil v. Kreutzer, 134 Ky. 563, 121 S. W. 471, 24 L.R.A.(N.S.) 557; Southall v. Smith, 151 La. 967, 92 So. 402, 27 A.L.R. 1194.

Annotation: 24 L.R.A.(N.S.) 557.

[14] White Swan Laundry Co. v. Wehrhan, 202 Ala. 87, 79 So. 479, citing R. C. L.; Minor v. Mapes, 102 Ark. 351, 144 S. W. 219, 39 L.R.A.(N.S.) 214; Reaugh v. Cudahy Packing Co. 189 Cal. 335, 208 P. 125, citing R. C. L.; Southall v. Smith, 151 La. 967, 92 So. 402, 27 A.L.R. 1194; Flynt v. Fondren, 122 Miss. 248, 84 So. 188, citing R. C. L.; Ulmer v. Pistole, 115 Miss. 485, 76 So. 522, citing R. C. L.; Paulsen v. Klinge, 92 N. J. L. 99, 104 A. 95, citing R. C. L.; Minor v. Stevens, 65 Wash. 423, 118 P. 313, 42 L.R.A. (N.S.) 1178.

Annotation: 24 L.R.A.(N.S.) 558; 25 L.R.A.(N.S.) 41; 42 L.R.A.(N.S.) 1178; 4 Ann. Cas. 398.

[15] Gregory v. Slaughter, 124 Ky. 345, 99 S. W. 247, 8 L.R.A.(N.S.) 1228, 124 Am. St. Rep. 402.

Annotation: 4 L.R.A.(N.S.) 1131; 24 L.R.A.(N.S.) 558; 13 Ann. Cas. 464.

pedestrian in the street may amount to negligence.[16] Obviously, when a car is traveling silently on the wrong side of the road close to the curb, the person in control of the car should be observant of pedestrians who are traveling on the sidewalk and who may step into the street in front of the car.[17] The duty to anticipate the presence of others applies to private lanes which are open to the public use, and reasonable care must be taken in operating an automobile in such a lane not to injure a person who, as a mere licensee, may be driving a horse and carriage through the lane as a short cut between two highways.[18] Where a wagon or other vehicle obscures or obstructs the view of a street crossing when the presence thereon of others may reasonably be anticipated, extra vigilance and caution are required of the driver of an automobile in order to prevent injury to persons on such crossing.[19]

§ 169. Presumption that Others Will Exercise Due Care.—The duty of care between persons using the highway is mutual, and each person may assume that others traveling on the highway will comply with this obligation.[20] He may assume that other persons will obey the law of the road.[1]

§ 170. Youth of Operator.—It is the general view that the youth of the person whose acts or omissions are being scrutinized is a fact to be taken into consideration in determining the reasonableness of his conduct.[2] The fact that a minor is licensed to operate an automobile under a statute prohibiting the operation of a motor vehicle without a license, providing for the issuance of a license upon application and proof to the satisfaction of the commissioner that the applicant is a proper person to receive it, and forbidding the issuance of a license to any person under sixteen years of age, does not conclusively establish that his capacity to exercise care is the same as that of an adult.[3] It has been held that an intelligent young person may be responsible for punitive damages the same as an adult person.[4]

2. EMERGENCY RULE

§ 171. Generally.—An automobile driver who, by the negligence of another and not by his own negligence, is suddenly placed in an emergency and compelled to act instantly to avoid a collision or injury is not guilty of negligence if he makes such a choice as a person of ordinary prudence placed in such a position might make, even though he did not make the wisest choice and one that would have been required in the exercise of ordinary care, but for the emergency.[5] Nor, if he so acts under these circumstances, is he guilty of contributory negligence,[6] at least, negligence or contributory negligence on his part cannot be found as a matter of law.[7] Where the situation of peril arises because of the driver's own negligence, the emergency rule cannot be invoked in his behalf.[8] Moreover, the emergency rule does not apply if the driver is not in a position of sudden peril, even though he mistakenly thinks he is because he does not use his sense of sight to see what is plainly observable.[9]

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[16] Fitzgerald v. Norman (Mo.) 252 S. W. 43, citing R. C. L.; Deitchler v. Ball, 99 Wash. 483, 170 P. 123, citing R. C. L.; Stephenson v. Parton, 89 Wash. 653, 155 P. 147, citing R. C. L.

Negligence of one driving an automobile at night in not discovering a cow on the road until within 15 feet of it may be found from the fact that his headlights were in good condition and lighted the whole road for a distance of 18 or 20 rods. Bombard v. Newton, 94 Vt. 354, 111 A. 510, 11 A.L.R. 1402.

[17] Annotation: 24 L.R.A.(N.S.) 557.

[18] Annotation: 1 L.R.A.(N.S.) 228.

[19] Deputy v. Kimmell, 73 W. Va. 595, 80 S. E. 919, 51 L.R.A.(N.S.) 989, Ann. Cas. 1916E, 656.

[20] Annotation: 4 Ann. Cas. 398.

A person operating an automobile has the right to act upon the assumption that every person whom he meets will also exercise ordinary care and caution according to the circumstances, and will not negligently or recklessly expose himself to danger, but rather, will make an attempt to avoid it; but when an operator of a motor vehicle has had time to realize, or, by the exercise of proper care and watchfulness, should realize, that a person whom he meets is in a somewhat helpless condition or apparently unable to avoid the approaching machine, he must exert himself to avoid a collision. Weil v. Kreutzer, 134 Ky. 563, 121 S. W. 471, 24 L.R.A.(N.S.) 557.

[1] Murphy v. Hawthorne, 117 Or. 319, 244 P. 79, 44 A.L.R. 1397.

[2] Annotation: 73 A.L.R. 1277.

[3] Charbonneau v. MacRury, 84 N. H. 501, 153 A. 457, 73 A.L.R. 1266.

[4] Levin v. Goodman, 107 N. J. Eq. 473, 153 A. 476, 73 A.L.R. 1278.

The sudden emergency doctrine is not an exception to the general rule; the question is whether the defendant acted as an ordinarily prudent and careful person would have done under the same circumstances, and the emergency is one of the circumstances contemplated by the rule. If the defendant's course was one that an ordinarily prudent and careful driver put in such a position might have taken, he is relieved from liability; otherwise he is not. The driver's own judgment or impulse is not in any situation, emergent or otherwise, the law's criterion. The driver is exonerated if the course which he takes in an emergency is one which might fairly be chosen by an intelligent and prudent person.[10] If the skidding of a car is the proximate cause of a collision, the owner or operator of the vehicle with which it came into collision is not liable even though he may have been negligent in some respects.

§ 172. Accidents Near Street Cars.—The emergency rule[11] applies to accidents occurring near street cars. An error of judgment on the part of the driver of an automobile, suddenly confronted with an emergency in that a street car was almost upon him as he entered a street intersection, in attempting to cross rather than to stop, does not necessarily constitute negligence.[12] However, where a person operating an automobile upon a street crossing a car track proceeded, on the assumption that an approaching car was not going to stop at a regular stopping place, until it was too late to stop his automobile and avoid a collision with one alighting from the car, it was held that the driver of the automobile was guilty of negligence and could not invoke the emergency rule to relieve him from liability.[13]

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[5] Payne v. Shotwell (C. C. A. 3d) 273 F. 806, writ of certiorari denied in 257 U. S. 653, 66 L. ed. 418, 42 S. Ct. 94; Bragdon v. Kellogg, 118 Me. 42, 105 A. 433, 6 A.L.R. 669; Lange v. Affleck, 160 Md. 695, 155 A. 150, 79 A.L.R. 1274; Landry v. Hubert, 100 Vt. 268, 137 A. 97 (later appeal in 101 Vt. 111, 141 A. 593, 63 A.L.R. 396); Allen v. Schultz, 107 Wash. 393, 181 P. 916, 6 A.L.R. 676; Ritter v. Johnson, 163 Wash. 153, 300 P. 518, 79 A.L.R. 1270; Olson v. Hermansen, 196 Wis. 614, 220 N. W. 203, 61 A.L.R. 1243; O'Malley v. Eagan, 43 Wyo. 233, 2 P. (2d) 1063, 77 A.L.R. 582, rehearing denied in 43 Wyo. 350, 5 P. (2d) 276, 77 A.L.R. 597.

Annotation: 6 A.L.R. 680, s. 27 A.L.R. 1197, and 79 A.L.R. 1278.

[6] Lehigh Valley R. Co. v. Kilmer (C. C. A. 2d) 231 F. 628, writ of certiorari denied in 242 U. S. 627, 61 L. ed. 535, 37 S. Ct. 13; Dickinson v. Erie R. Co. 81 N. J. L. 464, 81 A. 104, 37 L.R.A.(N.S.) 150.

Annotation: 6 A.L.R. 680, s. 27 A.L.R. 1197, 79 A.L.R. 1278.

[7] Payne v. Shotwell (C. C. A. 3d) 273 F. 806, writ of certiorari denied in 257 U. S. 653, 66 L. ed. 418, 42 S. Ct. 94.

Annotation: 27 A.L.R. 1197, s. 79 A.L.R. 1278.

[8] Southall v. Smith, 151 La. 967, 92 So. 402, 27 A.L.R. 1194; Landry v. Hubert, 100 Vt. 268, 137 A. 97, later appeal in 101 Vt. 111, 141 A. 593, 63 A.L.R. 396; Ritter v. Johnson, 163 Wash. 153, 300 P. 518, 79 A.L.R. 1270; Allen v. Schultz, 107 Wash. 393, 181 P. 916, 6 A.L.R. 676; Chaney v. Moore, 101 W. Va. 621, 134 S. E. 204, 47 A.L.R. 800; Bentson v. Brown, 186 Wis. 629, 203 N. W. 380, 38 A.L.R. 1417.

Annotation: 6 A.L.R. 680, s. 27 A.L.R. 1197, and 79 A.L.R. 1278.

Where subsequent negligence upon the part of the defendant has been set up and has been answered by a plea of concurrent subsequent contributory negligence, it has been held that the fact that the plaintiff was in a place of danger by reason of his own original negligence does not bar the application of the emergency rule. Annotation: 27 A.L.R. 1200.

One is liable for injuries inflicted upon another by extricating himself from a perilous situation in which he had placed himself by his own negligence. Allen v. Schultz, 107 Wash. 393, 181 P. 916, 6 A.L.R. 676.

An automobile driver cannot put himself in a position where, in order to save himself, he must injure someone else. Southall v. Smith, 151 La. 967, 92 So. 402, 27 A.L.R. 1194.

[9] Annotation: 79 A.L.R. 1282.

[10] Annotation: 79 A.L.R. 1283.

The emergency rule does not, as a matter of law, relieve the driver of an automobile, suddenly confronted with an emergency, from the charge of negligence; the question is for the jury to determine whether, under the evidence and the law with regard to sudden emergency, ordinary care was exercised; an instruction is properly refused which, after purporting to state the general rule of law applicable to a sudden emergency, in attempting to apply the rule to the facts of the case, informed the jury that the action of the driver of the car, as outlined in the instruction, "would not constitute negligence." Annotation: 79 A.L.R. 1284.

[11] See supra, § 171.

§ 173. Accidents at Railroad Crossings.—The emergency rule[14] applies to accidents at railroad crossings, as, for example, where a car is shut on a railroad crossing by the closing of the gates,[15] and to other miscellaneous situations.[16]

It is not necessarily negligence for the driver in an emergency after seeing an approaching train, to attempt to cross ahead of it;[17] or, when he is partly over a track, to reverse;[18] or to stall his engine on the track;[19] or to fail to stop and jump from his car when in close proximity to an approaching train.[20]

§ 174. Accidents at Street or Highway Intersections.—The emergency rule[1] applies to accidents at street or highway intersections.[2] Turning to the left in an emergency, in an attempt to avoid a collision with the plaintiff's car, which turned a corner on the wrong side of the street,[3] or to avoid a collision with a boy on roller skates, who, without warning, suddenly turned in front of the automobile,[4] is not negligence,[5] even though turning to the left is a violation of a statute or ordinance.

Just when an emergency exists within the meaning of the rule presents a question dependent upon the facts of the individual case.[6]

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[12] Annotation: 27 A.L.R. 1201, s. 79 A.L.R. 1285.

[13] Allen v. Schultz, 107 Wash. 393, 181 P. 916, 6 A.L.R. 676.

[14] See supra, § 171.

[15] Annotation: 6 A.L.R. 684, s. 27 A.L.R. 1203, and 79 A.L.R. 1288.

[16] Annotation: 79 A.L.R. 1289.

[17] In Lehigh Valley R. Co. v. Kilmer (C. C. A. 2d) 231 F. 628, writ of certiorari denied in 242 U. S. 627, 61 L. ed. 535, 37 S. Ct. 13, where there was evidence that although the plaintiff stopped, looked, and listened, he did not see or hear the engine until his automobile was on the track, and he then opened up the throttle and attempted to cross, the court stated that what he did after he got upon the track was not a matter of controlling importance, and that in such a case, where one suddenly finds himself put in peril, he is excusable if he makes an unwise decision as to what he should do.

In Payne v. Shotwell (C. C. A. 3d) 273 F. 806, certiorari denied in (1921) 257 U. S. 653, 66 L. ed. 418, 42 S. Ct. 94, where the plaintiff stopped his automobile fifty yards from the railroad crossing where the view was unobstructed, and, seeing no approaching train, then permitted it to coast slowly and under full control toward the crossing, until a train which gave no signal was so close upon him that in attempting to cross ahead of it his car was struck, the court held that the question of his contributory negligence, in view of the sudden emergency with which he was confronted, was one for the jury.

[18] Annotation: 6 A.L.R. 683.

[19] Annotation: 27 A.L.R. 1203, s. 79 A.L.R. 1288.

[20] Dickinson v. Erie R. Co. 81 N. J. L. 464, 81 A. 104, 37 L.R.A.(N.S.) 150.

Annotation: 6 A.L.R. 683, s. 27 A.L.R. 1203, and 79 A.L.R. 1288.

[1] See supra, § 171.

[2] Lange v. Affleck, 160 Md. 695, 155 A. 150, 79 A.L.R. 1274.

[3] Bragdon v. Kellogg, 118 Me. 42, 105 A. 433, 6 A.L.R. 669.

[4] Annotation: 27 A.L.R. 1204, s. 79 A.L.R. 1289.

[5] Annotation: 27 A.L.R. 1204, s. 79 A.L.R. 1289.

[6] **It has been held that there was not such an emergency** as relieved the defendant of liability as matter of law for injury to one riding with him, as the result of a collision between automobiles at a street intersection, where there was evidence that the defendant might have avoided the accident by turning a little further to the right, instead of to the left toward the other car, that the view was unobstructed, and that the driver of the other car had slowed down to make a left-hand turn and might have been waiting for the defendant, who had the right of way, to pass before completing the turn. Lange v. Affleck, 160 Md. 695, 155 A. 150, 79 A.L.R. 1274.

The mere fact that as an automobile approaches a side street another car appears "of a sudden" at the intersection, on the right of the driver of the first car, does not create an emergency, within the emergency rule. Annotation: 79 A.L.R. 1294.

§ 175. Accidents at Intersection of Highway and Private Way.—The emergency rule[7] applies to accidents at the intersection of a highway and private way. Thus, it has been held that the driver of an automobile was not guilty of negligence as a matter of law in swerving to the left side of the road instead of continuing on the right-hand side of the road, to avoid colliding with an automobile over which he had the right of way, which suddenly emerged from an obscured private driveway on his right, although, had he done so, the accident probably would not have occurred.[8]

§ 176. Meeting and Passing Other Vehicles.—The emergency rule[9] may justify a violation of traffic regulations in meeting and passing cars.[10] One who is driving an automobile along the right side of a street and sees another automobile approaching him on the same side of the street cannot be declared negligent as a matter of law in attempting to turn and pass to the left when he discovers that the other car, which is almost upon him, apparently does not intend to turn out.[11] One is not negligent as a matter of law in attempting to stop, instead of passing to the left, when he is suddenly confronted in the nighttime by a car parked on the wrong side of the road.[12] And it has been held that an automobile driver cannot be found negligent in applying his brakes when in imminent danger of collision with a car coming from the opposite direction on the wrong side of the road, which he is endeavoring to avoid by turning to the left, although if he had not checked his speed he might have escaped collision with the other car.[13]

Not all situations create an emergency within the meaning of the rule.[14]

The doctrine that in order to invoke the emergency rule, a party relying thereon must be without fault, was applied where an automobile driver proceeding at 30 miles an hour, two car lengths behind another car which made an emergency stop, turned to the left, thereby colliding with an on-coming car, it being held that the driver of an automobile is required to keep such distance from the car ahead of him and maintain such observation thereof that an emergency stop may safely be made. It was held, accordingly, that the driver could not avoid responsibility for his conduct in turning to the left merely on the ground that he exercised his best judgment when confronted with the sudden danger.[15]

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[7] See supra, § 171.

[8] Annotation: 27 A.L.R. 1205, s. 79 A.L.R. 1294.

[9] See supra, § 171.

[10] Annotation: 27 A.L.R. 1206, s. 79 A.L.R. 1295, 1297.

The driver of an automobile, who attempted to pass to the left of a standing lumber wagon, and, when confronted with an on-coming car, turned back to the right, behind the wagon, with the result that a piece of lumber penetrated the windshield and struck a passenger in the automobile, may be excused in the emergency. Landry v. Hubert, 100 Vt. 268, 137 A. 97 (later appeal in 101 Vt. 111, 141 A. 593, 63 A.L.R. 396), holding that it was not erroneous to reject an instruction on the doctrine of imminent peril which omitted an essential element, that the emergency must not have been brought about, in whole or in part, by the driver's own fault.

[11] Wallace v. Bergius [1915] S. C. 205, 52 Scot. L. R. 130, 7 B. R. C. 692—Ct. of Sess.

Annotation: 27 A.L.R. 1207, s. 79 A.L.R. 1295.

[12] Annotation: 27 A.L.R. 1206, s. 79 A.L.R. 1295.

[13] O'Malley v. Eagan, 43 Wyo. 233, 2 P. (2d) 1063, 77 A.L.R. 582, rehearing denied in 43 Wyo. 350, 5 P. (2d) 276, 77 A.L.R. 597.

Annotation: 79 A.L.R. 1297.

[14] **It was held that there was no emergency or imminent danger shown,** at least such as would relieve the defendant of negligence as matter of law, where, in traveling at night along a highway with which she was familiar, defendant failed to observe an approaching automobile until it was about 25 or 30 feet away, and then, although the roadway was sufficiently wide for the cars to pass and the other car was on its own side of the road and its lights were not blinding, the defendant suddenly turned to the right, precipitating the car into a gulch and injuring the plaintiff, who was a passenger therein. Annotation: 79 A.L.R. 1300.

[15] Ritter v. Johnson, 163 Wash. 153, 300 P. 518, 79 A.L.R. 1270.

§ 177. Miscellaneous Applications.—The emergency rule[16] has been held to apply in various cases of a miscellaneous nature involving alleged negligence of automobile drivers.[17] For example, the rule may relieve of the charge of negligence a driver who has driven on the sidewalk to avoid another vehicle.[18]

The qualification of the general rule where the situation of peril arises because of the driver's own negligence, to the effect that the emergency rule cannot be invoked in his behalf, was applied where the defendant's truck collided with a horse which was being ridden along the highway by the plaintiff, on the latter's extreme right-hand side of the road, and the alleged emergency, consisting in the shying and turning of the animal as the truck approached, was due to the fact that the truck was proceeding on the wrong side of the highway, dangerously close to the horse, causing it to become frightened and fear for its own safety.[19] Also, in an action for death of a workman on a highway as the result of a collision with the defendant's automobile, it was held that in view of the dangerous rate of speed at which it was shown the defendant had operated the car, notwithstanding danger signs, he could not avoid responsibility on the ground that he was confronted by a sudden emergency, since he had created the emergency.[20]

3. Physical Disability of Operator

§ 178. Generally.—The fact that one has a physical defect will not, in itself, render him liable for an injury resulting from the operation of an automobile, or prevent his recovering for an injury, where the defect is not such as to render the operation of the car by him negligence.[1] The fact that he has lost the sight of one eye, if it does not greatly impair his vision,[2] or that he is crippled,[3] does not, as a matter of law, incapacitate him from driving. The question is usually one of fact in each case.[4]

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[16] See supra, § 171.

[17] **For example,** it has been applied where a mechanic in a garage lost control of an automobile when the accelerator stuck (the mechanic not knowing of the defect of the accelerator, which had been installed by the owner and was not an equipment intended for the car), and his foot slipped from the brake pedal which had become wet, with the result that, in the sudden and unforeseeable emergency, he ran the car against the door frame of the garage, injuring the plaintiff (Annotation: 79 A.L.R. 1301); where the driver of an automobile going at a rate of 35 or 40 miles an hour, at night, suddenly was confronted by an excavating machine left by a road contractor unlighted on the driver's right-hand side of the road, and attempted to go around it instead of applying his brakes, but struck the machine, which was about 40 feet away when he first discovered it (Annotation: 79 A.L.R. 1301, 1302); and where the driver of a truck could have avoided an accident through the truck's striking a sled on which a boy was coasting, by driving a few feet further in a certain direction instead of attempting to stop his car, the court saying that the driver was not chargeable with negligence for failure to adopt the most judicious course as disclosed by subsequent events (Annotation: 79 A.L.R. 1302).

[18] Annotation: 6 A.L.R. 686, s. 27 A.L.R. 1205, 79 A.L.R. 1295.

[19] Annotation: 79 A.L.R. 1302, 1303.

[20] Chaney v. Moore, 101 W. Va. 621, 134 S. E. 204, 47 A.L.R. 800.

In Olson v. Hermansen, 196 Wis. 614, 220 N. W. 203, 61 A.L.R. 1243, it appeared that an emergency was created by the sudden appearance of dogs in the highway in front of the automobile. The driver swerved to the right to avoid striking the dogs, which jumped from behind a car parked on the lefthand side of the road. It was held that the driver, in view of the emergency, could not be held liable for injury to, or death of, guests in the car, which tipped over.

[1] Wilson v. Bittner, 129 Or. 122, 276 P. 268, 64 A.L.R. 132.

Annotation: 64 A.L.R. 136.

[2] Wilson v. Bittner, 129 Or. 122, 276 P. 268, 64 A.L.R. 132.

[3] Annotation: 64 A.L.R. 137.

[4] Annotation: 64 A.L.R. 139.

A refusal to give an instruction to the effect that if the jury believed from the evidence that the plaintiff was injured by the unskilfulness of the defendant in the operation of his car, whether such unskilfulness was due to inexperience in driving or to his physical condition, the plaintiff was entitled to a verdict, was held not prejudicial error, where there was evidence that the defendant had driven his car for four months, covering in that time about three thousand miles, and that while he could not operate the foot brake in the usual manner, he could and did operate it by hand, having provided a suitable attachment to the brak-

§ 179. Effect of Knowledge or Lack of Knowledge of Disability.—Whether or not an individual has knowledge of physical defects or infirmities rendering it dangerous for him to operate a motor vehicle is frequently of considerable importance in determining his liability. One who knows that he is physically unfit to operate an automobile on the highway, as, for example, that he is subject to attacks of such a character as will prevent his operating an automobile as a reasonably prudent man would do, and nevertheless undertakes to drive on the highway, should be held liable for an injury resulting when he sustains an attack while driving, by reason of which he loses control of the car and causes injury to another.[5] Certainly physical infirmities of which a driver of an automobile has knowledge will not relieve him from exercising the care required of an ordinarily prudent person.[6]

Where, however, the driver has no knowledge or intimation of any physical infirmity, and becomes incapacited without warning, he cannot be held liable for any injury resulting from the operation of his car while he is so incapacitated.[7] He must show that the accident was caused by reason of this sudden incapacity.[8]

§ 180. Falling Asleep.—In an ordinary case, one cannot go to sleep while driving an automobile without having relaxed the vigilance which the law requires, i. e., without having been negligent. The choice of keeping awake or ceasing from driving lies with him.[9] The mere fact that one driving an automobile permits himself to go to sleep justifies an inference of negligence sufficient to make a prima facie case in favor of one injured by the car while he is in that condition, if no circumstances tending to excuse or justify his conduct are proved.[10] It is recognized that there may be circumstances under which falling asleep is not negligence.[11]

Whether or not going to sleep is negligence rendering a person liable for injury caused by his car while he was running it in that condition is a question of fact upon consideration of all the circumstances, including the fact that sleep does not come upon one without warning of its approach.[12]

§ 181. Driving while Intoxicated.—The intoxication of one who voluntari-

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ing mechanism which permitted its effectual operation in that manner. Annotation: 64 A.L.R. 137.

[5] Annotation: 64 A.L.R. 137; 11 B. R. C. 1045.

[6] Annotation: 64 A.L.R. 138.

[7] Slattery v. Haley, 52 Ont. L. Rep. 95, 11 B. R. C. 1036, [1923] 3 D. L. R. 156.

Annotation: 64 A.L.R. 138; 11 B. R. C. 1045.

In Slattery v. Haley, 52 Ont. L. Rep. 95, 11 B. R. C. 1036, [1923] 3 D. L. R. 156, one who, unaccompanied, was driving his automobile on a city street, supposing himself in perfect health, but who, without any preliminary symptoms or warning, became unconscious and fell back in his car, was held not liable, under an act giving a right of action when death is caused by "wrong'ful act, neglect, or default," for the death of a child, killed by the automobile which, when left without any guidance, ran upon the sidewalk, since the use of the highway was lawful, and in order to create liability, negligence must be shown, and in order to create liability for an act which is not wilful and intentional, it must be shown to have been the conscious act of the defendant's volition,—he must have done that which he ought not to have done, or omitted that which he ought to have done, as a conscious being.

[8] Meyers v. Tri-State Auto. Co. 121 Minn. 68, 140 N. W. 184, 44 L.R.A.(N.S.) 113.

[9] Bushnell v. Bushnell, 103 Conn. 583, 131 A. 432, 44 A.L.R. 785.

Annotation: 64 A.L.R. 136.

[10] Bushnell v. Bushnell, 103 Conn. 583, 131 A. 437, 44 A.L.R. 785.

[11] Ibid.

In Bushnell v. Bushnell, 103 Conn. 583, 131 A. 437, 44 A.L.R. 785, the court said: "Certainly, in all reason, he who, stricken by paralysis, or seized by an epileptic fit, still continues with his hands upon the wheel of the automobile he is driving, and unconscious, so directs it as to cause its collision with another, cannot be held negligent for the way in which he controls it; and no more can he who exercises a like direction after he has been overtaken by sleep. In such a case, the question must be, Was the defendant negligent in permitting himself to fall asleep?"

[12] Bushnell v. Bushnell, 103 Conn. 583, 131 A. 437, 44 A.L.R. 785.

ly drinks liquor furnishes no excuse for his negligent operation of an automobile so as to cause injury to another. He is held to the same degree of care as a sober man in the same circumstances.[13] It is within the police power of a state to create a conclusive presumption of negligence on the part of one driving an automobile while in a state of intoxication. Such a statute is considered to create a conclusive presumption of negligence, not as a principle of evidence, but for the purpose of creating, defining, and regulating rights on highways.[14] It is held to be negligence per se to violate a statute making it a misdemeanor to drive a motor vehicle while in an intoxicated condition. Civil liability for violating a statute of that kind does not exist unless the violation of the statute is the proximate cause of the injury for which suit is brought.[15]

D. Measure of Care Required re Persons

1. In General

§ 182. Generally.—The application of the general principles of negligence as they relate to persons in particular situations will now be considered. It is fundamental that toward persons in various situations the operator of a motor vehicle must exercise ordinary, reasonable, or due care. This depends upon the place, circumstances, conditions, and surroundings in which the person is situated. Statutory requirements may modify this rule.

§ 183. Motorist Engaged about Automobile on Highway.—The driver of a vehicle approaching a person engaged about an automobile in the highway owes such person the duty of exercising reasonable care to avoid injuring him.[16] A driver who, without observing whether the way is clear, attempts to pass a truck which the driver thereof has stopped at the extreme right of the traveled portion of the road for the purpose of examining a tire, and who, in order to avoid a collision with an on-coming car, deliberately drives his car into the truck, causing it to run against the driver thereof as he is cranking it and to injure him, is, as a matter of law, guilty of negligence.[17]

It is not the rule that a driver of an automobile must stop his automobile or check his speed every time he sees a red light on the highway, at risk of being chargeable with negligence; whether or not negligence can be predicated from such a failure must always depend on the circumstances. An approaching driver may rightfully assume that a red light at one side of the highway marks the limit of danger and that the other side of the highway is clear; it is only when the light blocks the highway, or is so placed as to indicate that the passage is so narrow as not to afford a safe passage within the speed limit, that he is chargeable with negligence if he does not approach with his vehicle under control.[18] The question whether such care has been used in any particular case depends upon the facts and circumstances which are made to appear, and is generally one of fact, for the determination of the jury.[19]

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[13] Powell v. Berry, 145 Ga. 696, 89 S. E. 753, L.R.A.1917A, 306.
Annotation: L.R.A.1917A, 306.

[14] Packard v. O'Neil, 45 Idaho, 427, 262 P. 881, 56 A.L.R. 317.
Annotation: 56 A.L.R. 327.

[15] Annotation: 56 A.L.R. 327.

[16] Daughraty v. Tebbets, 122 Me. 397, 120 A. 354, 34 A.L.R. 1507; Grain v. Gordon, 280 Pa. 576, 124 A. 737, 34 A.L.R. 1511.
Annotation: 25 A.L.R. 134, s. 34 A.L.R. 1513 and 61 A.L.R. 1159.

In Daughraty v. Tebbets, 122 Me. 397, 120 A. 354, 34 A.L.R. 1507, in an action to recover for the death of an automobilist who had stopped his car on the right-hand side of the highway, obtained a pail of water for his radiator, and was about to recross the road and return the empty pail when he was struck by defendant's car, which was traveling in the same direction, it was held that the operator of a car approaching a stationary car or team should be charged with the duty of observing whether any person or persons are connected with the standing vehicle, and should have his car or team under such control as to avoid an accident with any person or persons who may be around about such car or team, or who attempt to cross the road in front of the on-coming car, provided such person or persons are themselves in the exercise of due care.

Where defendants at nighttime ran their car into a chain stretched from a wrecking car to a car which had run off the edge of the highway, causing injury to the operator of the wrecking car, it was held that it was the duty of the defendants to exercise ordinary care in driving their automobile on the highway, both in keeping a lookout for people who might be endangered by them, and in having the car under reasonable control. Annotation: 61 A.L.R. 1160.

Where plaintiff's intestate was killed by defendant's automobile as she stepped around the front of plaintiff's standing automobile to open a gate on the opposite side of the road, the court held that the fact that a car stops in plain view should put the driver of another car upon notice that he should proceed with caution. Annotation: 61 A.L.R. 1161.

[17] Annotation: 61 A.L.R. 1159.

§ 184. **Reciprocal Duties of Automobile Drivers and Riders on Bicycles.**—A person operating an automobile and one riding a bicycle owe to each other the duty to use reasonable care to avoid collision.[20] A bicycle rider must be vigilant under all circumstances and keep a proper lookout for automobiles, and he may be guilty of contributory negligence in approaching a much traveled intersecting city street, and looking only once for approaching vehicles, where, had he exercised more care, he might have avoided the automobile which struck him.[1] Riding a bicycle along a public highway within a few feet of a truck which obscures the view of the road ahead is not negligence per se.[2] A person so riding is bound to exercise the care of an ordinarily prudent person when the truck stops suddenly without warning; he cannot be charged with negligence as a matter of law in turning to the left, in order to pass the truck, directly into the path of an automobile coming from the opposite direction of the presence of which he is ignorant.[3]

It is not necessarily negligence for a person riding a bicycle along a street in front of an automobile to attempt to cross the road in front of the machine, if it is so far behind him that it may reasonably be expected that the driver will see him, and can and will, by the exercise of proper care, so manage the machine as to avoid a collision; the question of negligence is one for the jury under all the circumstances of the case.[4] The driver of an automobile has the right to turn it about, using any part of the street for this purpose, subject, however, to the right of others to use the street, and in the event of a collision with a bicycle while making such a turn, a statute declaring the law of the road and making it the duty of all vehicles to keep to the right does not apply so as to establish negligence on the part of the driver.[5]

The question of negligence in such cases is usually one for the jury.[6]

§ 185. **Duty to Children.**[7]—The driver of an automobile is not an insurer against injuries to children from the operation of the car.[8] He is bound to exercise ordinary, reasonable, or due care towards children as well as towards adults.[9] The age, maturity, and intelligence of the child is a circumstance to be considered in determining whether or not the driver has exercised such care. Actually, in certain instances, the driver may be required to exercise greater care towards children than towards adults, but this greater care is, in one sense, but "ordinary" care, namely, that degree of care which a man of ordinary prudence would exercise under the circumstances.[10] He must exercise greater caution in order to avoid danger to children whom he may see, or, by the exercise of reasonable care, should see, on or near the highway.[11]

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[18] Annotation: 61 A.L.R. 1162.

When a vehicle is stopped substantially in the middle of the highway, with sufficient space on either side for other vehicles to pass in safety, a driver approaching from the rear may make use of the unoccupied portion of the roadway on either side of the standing vehicle, exercising such care as the circumstances require. A driver exercising due care is not liable for the death of a person who suddenly stepped into his path from the protection of a standing car. Grein v. Gordon, 280 Pa. 576, 124 A. 737, 34 A.L.R. 1511.

[19] Daughraty v. Tebbets, 122 Me. 397, 120 A. 354, 34 A.L.R. 1507.

Annotation: 25 A.L.R. 134, s. 34 A.L.R. 1513 and 61 A.L.R. 1159.

[20] Calahan v. Moll, 160 Wis. 523, 152 N. W. 179, L.R.A.1916A, 744.

[1] Annotation: 28 L.R.A.(N.S.) 944; Ann. Cas. 1916E, 675.

[2] Simpson v. Snellenburg, 96 N. J. L. 518, 115 A. 403, 24 A.L.R. 503.

[3] Ibid.

[4] Rogers v. Phillips, 206 Mass. 308, 92 N. E. 327, 24 L.R.A.(N.S.) 944. And see BICYCLES [Also 3 R. C. L. p. 782].

[5] Annotation: 28 L.R.A.(N.S.) 944.

[6] Simpson v. Snellenburg, 96 N. J. L. 518, 115 A. 403, 24 A.L.R. 503.

[7] **Numerous sections of this article** deal with the driver's duty towards children. For example, see infra, §§ 198 et seq., discussing a driver's duty to children suddenly darting into path of car. See also infra, § 213, as to a driver's duty to children between crossings.

See, for a discussion of children as trespassers, § 246, infra.

§ 186. —Children Playing in Street.—Ordinarily it is the duty of a person operating an automobile in a street in which there is a group of children playing, not only to bring his automobile under control, but to give warning of his approach and to manage his car, keeping in mind the risk that children may not exercise the care for their own protection that adults are expected to exercise.[12] The question of liability for injury to a child, for example, playing ball in the street, is not subject to any hard and fast rule. There is a reciprocal duty on the part of the driver and the child.[13] Upon the driver there rests the duty, after discovering the presence of the child, to proceed with that degree of care that a careful man would exercise when faced with such a situation.[14]

2. Pedestrians

a. In General

§ 187. Generally.—It is a well-established rule of law that even in the absence of statutory requirements, the operator of a motor vehicle must exercise ordinary, reasonable, or due care towards pedestrians.[15] The drivers of automobiles must share the streets with pedestrians,[16] and each person on the highway must so exercise his right to use it as not to injure others[17] and must exercise such caution as an ordinarily prudent person would exercise under like circumstances.[18] In other words, the rights of pedestrians and motor vehicles in a public street are equal, and each is obliged to act with due regard to the movements of the other.[19]

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[8] Annotation: 65 A.L.R. 197; L.R.A.1918A, 245.

[9] Annotation: L.R.A.1918A, 245.

[10] Deputy v. Kimmell, 73 W. Va. 595, 80 S. E. 919, 51 L.R.A.(N.S.) 989, Ann. Cas. 1916E, 656.

It cannot be said as a matter of law that there was no negligence on the part of the operator of an automobile, who struck some small boys in a street, where he saw the boys about to cross the street where the accident happened before he turned into it from another street on which he was traveling, and, although a wagon obstructed his view to a certain extent, after his first sight he must have known that they would probably be at the crossing when he reached it, and where the evidence further shows that he was looking at some property owned by him instead of paying attention to the operation of his car. Deputy v. Kimmell, 73 W. Va. 595, 80 S. E. 919, 51 L.R.A.(N.S.) 989, Ann. Cas. 1916E, 656.

A driver who, on approaching a crowded crossing in an automobile, observes the position of a child looking away from the car, is not justified in attempting to drive the car across, unless a prudent person would have done so under the same circumstances. Crawford v. McElhinney, 171 Iowa, 606, 154 N. W. 310, Ann. Cas. 1917E, 221.

[11] Albert v. Munch, 141 La. 686, 75 So. 513, L.R.A.1918A, 240; Deputy v. Kimmell, 73 W. Va. 595, 80 S. E. 919, 51 L.R.A.(N.S.) 989, Ann. Cas. 1916E, 656.

Annotation: L.R.A.1918A, 245; Ann. Cas. 1916E, 667.

[12] Annotation: 14 A.L.R. 1181, s. 67 A.L.R. 317.

See also, infra, § 194.

[13] Annotation: 44 A.L.R. p. 1304.

[14] Annotation: 44 A.L.R. p. 1304.

The fact that a sixteen-year-old boy is playing football in the street does not relieve the operator of an automobile from exercising due care, and after seeing the child, the operator is bound to proceed with that measure of caution that a careful man facing such a situation would exercise. Annotation: 44 A.L.R. 1304.

[15] As to contributory negligence of pedestrians, see §§ 446 et seq.

[16] Minor v. Mapes, 102 Ark. 351, 144 S. W. 219, 39 L.R.A.(N.S.) 214; Gregory v. Slaughter, 124 Ky. 345, 99 S. W. 247, 8 L.R.A. (N.S.) 1228, 124 Am. St. Rep. 402.

[17] Hennessey v. Taylor, 189 Mass. 583, 76 N. E. 224, 3 L.R.A.(N.S.) 345, 4 Ann. Cas. 396.

Annotation: 3 L.R.A.(N.S.) 345; 4 Ann. Cas. 398; 13 Ann. Cas. 464.

See also HIGHWAYS, STREETS AND SIDEWALKS [Also 13 R. C. L. p. 1].

§ 188. Pedestrians under Disability.—The diligence and care required of the operators of automobiles vary in respect of persons of different ages or physical condition.[20] The driver of an automobile is bound to anticipate that he may meet infirm persons on a public street and to have his car under such control as will enable him to avoid injury by slowing up or, if necessary, stopping.[1] It is asserted that drivers owe a special care to aged, infirm, blind, and drunken pedestrians, particularly at intersections where pedestrians observing police regulations have the right of way.[2] This "special care" is ordinary care, under the circumstances, as the term "ordinary care" is used in this article.[3] A driver who observes or, in the exercise of reasonable diligence, ought to know, that a pedestrian is blind must use care commensurate with the danger involved,[4] and similarly, if he observes a drunken man in the street, he is bound to exercise the same degree of reasonable care that he would in the case of a child or helpless person.[5]

§ 189. Pedestrians on Sidewalk.—The general rule of law that even in the absence of statutory requirements, the operator of a motor vehicle must exercise ordinary, reasonable, or due care applies to situations where persons on the sidewalk are injured by motor vehicles.[6] Where the driver of an automobile, because of excessive speed, careless driving, or other negligent conduct, injures a pedestrian on the sidewalk, recovery may be had for the injuries resulting from such conduct.[7] Pedestrians are entitled to the right of way on the sidewalk of a city, and one backing an automobile over the sidewalk must do it in such a way that everybody may traverse the same in confidence and safety. He must take such precaution in driving that in no event or situation conceivable to an intelligent man, would he run over and injure a child using the sidewalk; anything short of this constitutes negligence on the part of the driver of the car.[8] Liability is based on negligence, however, and in the absence of a showing of negligence on the part of the driver of a motor vehicle, there can be no recovery by the person injured.[9] Since, however, the sidewalk is a safety zone from vehicles, an injury from a vehicle incurred there is deemed to be prima facie evidence of negligence on the part of the driver.[10] This rule applies to a diversity of factual situations.[11]

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[18] Minor v. Stevens, 65 Wash. 423, 118 P. 313, 42 L.R.A.(N.S.) 1178.

Annotation: 42 L.R.A.(N.S.) 1178.

[19] Deputy v. Kimmell, 73 W. Va. 595, 80 S. E. 919, 51 L.R.A.(N.S.) 989, Ann. Cas. 1916E, 656.

Annotation: 67 A.L.R. 97, s. 93 A.L.R. 551.

Both the person having the management of the automobile and the traveler on foot are required to use such reasonable care, circumspection, prudence, and discretion as the circumstances require, an increase of care being required where there is an increase of danger; "and both are bound to the reasonable use of all their senses for the prevention of accident, and the exercise of all such reasonable caution as ordinarily careful and prudent persons would exercise under like circumstances." Annotation: 67 A.L.R. 98.

[20] Deputy v. Kimmell, 73 W. Va. 595, 80 S. E. 919, 51 L.R.A.(N.S.) 989, Ann. Cas. 1916E, 656.

[1] Annotation: 62 A.L.R. 578.

The fact that the driver of an automobile, who struck a pedestrian while backing his automobile out across the sidewalk, did not know that the plaintiff was somewhat deaf and her sight impaired does not militate in his favor nor in any way minimize his responsibility for the accident and his liability therefor, and it is beside the question that he was sounding his horn since, aside from giving such a warning, it was incumbent upon him to proceed across the sidewalk cautiously so as to avoid running over pedestrians rightfully proceeding thereon. Annotation: 62 A.L.R. 578, 579.

[2] Annotation: 62 A.L.R. 578.

[3] See supra, § 165.

[4] Weinstein v. Wheeler, 127 Or. 406, 271 P. 733, 62 A.L.R. 574.

[5] Annotation: 62 A.L.R. 578.

[6] Annotation: 1 A.L.R. 840, s. 75 A.L.R. 559.

[7] Linberg v. Stanto, 211 Cal. 771, 297 P. 9, 75 A.L.R. 555; Brown v. Des Moines Steam Bottling Works, 174 Iowa, 715, 156 N. W. 829, 1 A.L.R. 835.

[8] Annotation: 75 A.L.R. 560.

§ 190. —Injury in Attempt to Avoid Collision.—If the operator of a motorcar is negligent in bringing about a collision or in his conduct thereafter, the collision is no defense to the claim of a third person, a pedestrian on the sidewalk, for injuries received as the result of the collision.[12] But where the evidence shows that the automobile was driven on the sidewalk by the impact of another car in such a way that the driver could not avoid the accident, and that at the time of the impact the car was not going at an excessive rate of speed and had the right of way, the view is taken that the operator is not liable for injuries sustained by a pedestrian who, while on the sidewalk, was struck by the car.[13]

§ 191. Pedestrians Colliding with Side of Car.—The few cases that have passed upon the question have generally held that the owner or driver of an automobile is not liable for injuries to a pedestrian received when such pedestrian collided with the side of the automobile, either upon the ground that the driver is not guilty of negligence,[14] or upon the ground that the injured pedestrian was guilty of contributory negligence.[15] If, however, the driver of an automobile could, by the exercise of ordinary care, have discovered the peril of a pedestrian, crossing the street in such manner as to be likely to come in contact with the vehicle, and oblivious of his danger, in time, by the exercise of ordinary diligence, to have avoided the collision, the driver or owner of the automobile may be held liable.[16]

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[9] Annotation: 1 A.L.R. 840, s. 75 A.L.R. 565.

The driver of an automobile about to turn from the highway across a sidewalk into a private driveway after dark, when the machine is traveling at low speed and his headlights are burning, cannot be found to be negligent in failing to sound his horn to warn pedestrians of his approach, if, in his judgment, the course of his lights upon the ground is adequate for that purpose. Henderson v. O'Leary, 177 Wis. 130, 87 N. W. 994, 24 A.L.R. 942.

[10] Linberg v. Stanto, 211 Cal. 771, 297 P. 9, 75 A.L.R. 555.

Annotation: 1 A.L.R. 849, s. 75 A.L.R. 573.

[11] Annotation: 1 A.L.R. 844, s. 75 A.L.R. 565.

In Brown v. Des Moines Steam Bottling Works, 174 Iowa, 715, 156 N. W. 829, 1 A.L.R. 835, it appeared that the defendant's auto truck struck a frog or curve in a street railway track, which suddenly diverted it from its course, so that the steering wheel was thrown out of the driver's hands and the car ran on the sidewalk and struck a pedestrian thereon. It also appeared that the driver had frequently crossed the street railway tracks at this point, and with the same truck. The court held the owner of the machine liable for the injuries sustained by the pedestrian, on the ground that the driver permitted the truck to be diverted from its main course of travel on the street, to the sidewalk, without any warning of its approach to those rightfully congregated there, and further held that it becomes the duty of one operating a vehicle on a public highway, in a thickly populated part of a city, to exercise reasonable care to see that he has the vehicle under control, and so to manage it that it will not unreasonably or unnecessarily imperil the safety of others on the public highway.

The owner of an automobile, who negligently left it standing unoccupied and unattended on a street railway track while he went to a near-by store, where, during his absence it was struck by a street car and thrown against the curb and sidewalk, injuring a person cleaning the sidewalk, is liable for the personal injuries sustained. Annotation: 1 A.L.R. 840.

The driver of a car, who parks it on a street grade, is, as a reasonable person, bound to anticipate that if the car gets loose, it will coast down the hill, and that third parties will run out into the street and try to stop it, especially if the abandoned car is going slowly; and where the defendant's negligence is the proximate cause of an injury to one struck by the car while he was standing on the sidewalk, he cannot escape liability on the ground that a third person who attempted to stop the car changed its course. Annotation: 75 A.L.R. 561.

The owner of a motor vehicle is liable for injuries inflicted upon a person standing on the sidewalk, who was struck by overhanging tires carried on the running board of the car. Annotation: 1 A.L.R. 840.

The owner of an automobile was held liable for the death of a boy, where it appeared that the driver turned from the line on which he had crossed the street, with such speed, near the curb, that the rear part of the car slued and projected over the sidewalk, striking the boy who was standing thereon. Annotation: 1 A.L.R. 840.

[12] Linberg v. Stanto, 211 Cal. 771, 297 P. 9, 75 A.L.R. 555.

Annotation: 75 A.L.R. 566.

[13] Annotation: 75 A.L.R. 566.

[14] Annotation: 25 A.L.R. 1513.

[15] Annotation: 25 A.L.R. 1513, 1514.

See generally, §§ 446 et seq.

§ 192. Pedestrian Falling and Being Struck by Automobiles.—In cases involving liability for injuries to pedestrians who, after falling in the street, are struck by motor vehicles, the fundamental principle that in order that liability be incurred the driver must have been negligent applies.[17]

§ 193. Traffic Officers.—Drivers of automobiles owe a traffic officer the same duty that they owe other pedestrians.[18] In an action to recover for an injury to a mounted traffic officer, a verdict for the plaintiff was sustained; evidence that the driver of a truck disregarded a traffic signal at a busy street intersection and drove the truck into a mounted traffic officer with such violence that the horse and rider were knocked down and injured is sufficient to sustain a verdict for such officer.[19]

§ 194. Persons Working on Streets or Highways.—The operator of an automobile on the streets and highways is bound to observe extraordinary conditions existing along the way, and when warned, by a sign or otherwise, that workmen are engaged ahead in repairing the road, he must give notice of his approach and attempt to pass the place where the workmen are so employed at such rate of speed, and at all times have his car under such control, as to avoid injuring workmen so engaged.[20] A street sweeper is lawfully upon the roadway, and when he is performing his duty, in plain view, the driver of any vehicle is bound to take notice of him and to exercise the care enjoined by law upon the drivers of such vehicles not to injure him.[1]

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[16] Hornbuckle v. McCarty, 295 Mo. 162, 243 S. W. 327, 25 A.L.R. 1508, holding the driver of an auto truck guilty of negligence in a case involving the injuring of a small boy who walked against the side of the truck while he was crossing the street upon the crosswalk. In this case the driver swung around the corner from an intersecting street and, as he was making the turn, looked backward and continued so to look until the collision; had he looked in the direction in which he was going, he could have seen the boy approaching the truck and that he was wholly oblivious of the approach of the machine. The driver approached the crosswalk without giving any warning and without changing the direction or speed of the truck.

[17] Annotation: 62 A.L.R. 1339.

This section is restricted to cases where the pedestrian has fallen in the street for some cause unconnected with the operation of the motor vehicle. Thus, it is held that the driver of an automobile, running it a short distance behind another car, just before dark, and with his view wholly obstructed by the automobile directly in front of him, is not negligent in striking a prostrate pedestrian who has fallen upon the street at a point other than a regular crossing and who cannot be seen by the driver of the second car in time to avoid the accident, though the driver of the preceding car, having an unobstructed view, is able to turn aside and avoid an accident at the signal of a third person. Varano v. Goodman, 294 Pa. 274, 144 A. 74, 62 A.L.R. 1337. The court adopted the view that the accident was unavoidable.

Where the plaintiff, in an intoxicated condition, wandered over a public highway at night in search of a tire, on the outskirts of a city where automobiles travel almost exclusively, and the preponderance of the evidence indicated that he was struck by defendant's automobile while lying in the roadway, the court said: "It is argued, and we are aware of some authorities in support of the contention, that an automobile or other motor-driven vehicle, if properly equipped with brakes and lights, and if carefully driven, should be stopped within the range of vision at which objects can be seen on the road ahead. We do not now, nor have we in previous decisions, approved of this doctrine. Defendant, in the instant case, was driving at a lawful and reasonable rate of speed; he appears to have made every possible effort to avoid the accident. It is not shown that his lights or brakes were defective, or that he failed to see the plaintiff when he should have seen him, that is, within sufficient time to avoid hitting him. Plaintiff was not dragged after being hit, and the fact that the car was stopped before it had passed over from plaintiff's body indicates that the car was well under brakes before reaching or striking plaintiff. . . . We are satisfied from the evidence that defendant in this case was free from negligence, and that such cannot be said of the plaintiff." Annotation: 62 A.L.R. 1339, 1340.

However, a finding that the driver of an automobile was negligent in running over and killing the decedent who, in order to protect herself from injury that might result from a runaway team, a moment before had jumped from her buggy and was lying prostrate in the highway, was held to be sustained by the evidence, where it appeared that a person who was aware of the presence of decedent in the street made every effort to cause him to stop his car, and, though aware of such efforts, defendant failed to heed them. Annotation: 62 A.L.R. 1340.

[18] Annotation: 92 A.L.R. 1518.

[19] Annotation: 92 A.L.R. 1519.

b. PEDESTRIANS SUDDENLY DARTING OR STEPPING INTO PATH OF CAR

(1) ADULTS

§ 195. Driver's Duty Generally.—The law requires of the operator of an automobile the exercise of reasonable care toward pedestrians; he is not, however, an insurer, and where a pedestrian is standing in a place of safety and apparently sees an approaching automobile, the driver has the right to assume that the pedestrian will remain in the place of safety until the car has passed and will not suddenly step into a place of danger.[2] This assumes that the car is being lawfully operated. The fact that a pedestrian came into the path of the car suddenly and so close that the driver could not stop and avoid striking him will not excuse the driver, where the car was being driven at an unreasonable rate of speed under the circumstances.[3]

§ 196. Pedestrian Coming from behind or around Vehicle or Alighting Therefrom.—A driver of an automobile is not bound to anticipate that a pedestrian may suddenly run from behind a parked automobile into his car, or into the path of it, or do the same in alighting from a car, in the absence of anything to put him on notice that such an event is likely to occur.[4] If he is driving at a reasonable rate of speed, so that he is able to stop immediately or within a reasonable distance, no liability exists.[5] He must, however, observe whether any person is about a car standing by the roadside, and he must have his car under control.[6] A driver may be put on notice, so that ordinary care requires him to operate his car more slowly and have it under better control, by the fact that he is passing through a busy thoroughfare on which machines are parked and which people are crossing at any point.[7]

A driver operating at an excessive rate of speed under the circumstances may be guilty of negligence even in striking a pedestrian coming from behind or around a vehicle, or alighting therefrom.[8]

§ 197. Pedestrian Turning or Stepping Backwards.—The driver of an automobile has the right to assume that a pedestrian crossing a street, having reached a place of safety, and being out of the path of his approaching car, will either remain in such place of safety or continue his journey in crossing the street, and that he will not suddenly retrace his steps and come within the line of travel of the car.[9]

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[20] Chaney v. Moore, 101 W. Va. 621, 134 S. E. 204, 47 A.L.R. 800.
Annotation: 47 A.L.R. 807.

[1] Annotation: 47 A.L.R. 807.

[2] Klink v. Bany, 207 Iowa, 1241, 224 N. W. 540, 65 A.L.R. 187.
Annotation: 65 A.L.R. 193.

The driver of an automobile, who is free from negligence, has a right to presume that no person will suddenly run from the side of the road into his line of travel. Annotation: 67 A.L.R. 314.

It has been held that no negligence is shown rendering the defendant liable, where the testimony showed that a pedestrian attempted to cross in front of a coal truck, although the defendant's automobile, which was in plain sight, was approaching at such a distance and rate of speed as to render her attempt to cross palpably dangerous, even though the driver of the car failed to sound his horn or give notice to pedestrians generally. Annotation: 65 A.L.R. 194.

[3] Annotation: 65 A.L.R. 193.

[4] Annotation: 65 A.L.R. 194.

[5] Annotation: 65 A.L.R. 194.

[6] Daughraty v. Tebbets, 122 Me. 397, 120 A. 354, 34 A.L.R. 1507.

[7] Annotation: 65 A.L.R. 194.

[8] Annotation: 65 A.L.R. 194.

(2) CHILDREN

§ 198. Driver's Duty Generally.—As shown at another point,[10] the driver of an automobile is bound to exercise ordinary care towards children. His liability for striking a child that has suddenly run in front of his car depends upon whether he was exercising such care at the time of the accident. A person operating a motor vehicle along the streets of a city is bound to recognize the fact that children will be found playing in the street, and that they may sometimes attempt to cross the street, unmindful of its dangers; a driver owes children the duty of reasonable and ordinary care under the circumstances,[11] and is required to keep his car under such control as the circumstances demand.[12]

While the driver is required to be vigilant, he is not bound to anticipate that a child will dart from the side of the street, or from a zone of safety, and suddenly run across the street in front of his car,[13] at least not when he is unaware of the presence of the child injured, and, acting under the circumstances as a reasonable person, was not bound to discover its presence.[14] If, however, at a designated place, there is anything to challenge the driver's attention and warn him that he should expect heedless acts, it becomes his duty to exercise greater care to avoid an accident.[15] The foregoing rules are based upon the condition that he is proceeding at a lawful speed, violating no law or regulation; if he is driving in excess of the statutory speed limit or at an unreasonable or dangerous speed, he cannot escape liability under such circumstances.[16]

§ 199. Application to Factual Situations.—The foregoing rules apply in the case of accidents to children alighting from or coming from behind or around a vehicle,[17] running from behind a building or other fixed object,[18] running

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[9] Annotation: 65 A.L.R. 196.

Evidence that the plaintiff had walked across the street until he had cleared the path of the defendant's automobile and was to the left of it and out of danger of being struck by it, when, on account of the sudden movement of a car going in the opposite direction, he became alarmed and suddenly jumped backward and was struck by the defendant's car, precludes the theory that the defendant failed to exercise diligence to avoid striking the plaintiff, after his peril was or should have been discovered. Annotation: 65 A.L.R. 196.

[10] See supra, § 185.

[11] Annotation: 14 A.L.R. 1180, s. 67 A.L.R. 317; 65 A.L.R. 197; L.R.A.1918A, 245.

When an automobile driver sees a child in a place of danger, or has reason to apprehend that it may run into a place of danger, and has sufficient time to stop his car if under proper control, it is his duty to exercise such care as is reasonably necessary to avoid a collision. Annotation: 65 A.L.R. 197.

When an automobile driver deflects his car to pass around a child, he must expect from it the most natural thing from one of its age, that is, some heedless, thoughtless, capricious act which comes from childish sportiveness, characteristic of an immature mind. Annotation: 65 A.L.R. 197.

[12] Annotation: 65 A.L.R. 198.

[13] Annotation: 14 A.L.R. 1180, s. 67 A.L.R. 317; 65 A.L.R. 197.

[14] Klink v. Bany, 207 Iowa, 1241, 224 N. W. 540, 65 A.L.R. 187.

[15] Annotation: 14 A.L.R. 1180, s. 67 A.L.R. 317; 65 A.L.R. 197.

[16] Annotation: 67 A.L.R. 317.

[17] Annotation: 65 A.L.R. 198.

It has been held that the defendant was not liable for an injury to a seven-year-old boy who almost instantly jumped from an automobile on its proper side of a country road, which had stopped opposite his home, and, without warning, ran in front of the defendant's car, which was being driven at about 20 miles an hour on its proper side of the road, in the opposite direction from that of the car from which the boy alighted. Klink v. Bany, 207 Iowa, 1241, 224 N. W. 540, 65 A.L.R. 187.

[18] Annotation: 65 A.L.R. 201.

Thus, evidence was held insufficient to warrant a finding of negligence on the part of the driver, where there was testimony that defendant was following a no-stop train of street cars at a speed not exceeding the statutory limit, about 3 feet from the curb on one side and 3 or 4 feet from the train on the other, and that the child who was killed was standing behind a pole just before the accident, so that the driver of the automobile could not see him, and suddenly stepped out into the street, and, or walking along or standing in the street and turning in front of the car,[19] turning after crossing or starting to cross, stopping and starting,[20] passing through a procession of vehicles,[1] crossing a bridge,[2] crossing a private driveway,[3] and breaking away from custodian and darting in front of the car.[4]

§ 200. Children in Crowds, Groups, etc.—Where the circumstances are such

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after having gone 3 or 4 feet, was struck by the machine. Annotation: 65 A.L.R. 201.

[19] Annotation: 65 A.L.R. 202.

The driver of an automobile is liable where a boy ran along the sidewalk until about the middle of a block, when he stepped into the street and started to go diagonally across it, toward a commotion and crowd, and, when near the curb, was struck by the defendant's automobile, which was on the wrong side of the street, it appearing that the driver failed to see him and avoid a collision because his attention was diverted in another direction. Burvant v. Wolfe, 126 La. 787, 52 So. 1025, 29 L.R.A. (N.S.) 677.

A cause of action which should be submitted to the jury is made out by evidence that the deceased, a child a little over six years of age, on a bright day, was walking easterly on the southerly side of the highway, and that the defendant, when about two tenths of a mile distant, saw him, and about that time the deceased and his companion left the macadam part of the highway and continued to walk easterly, with their backs toward the on-coming car, the deceased walking just at the southerly edge of the macadam, which was 14 feet wide; that, although the defendant saw the deceased at the distance stated, he drove his car within a foot of the southerly side of the macadam, and did not sound his horn, or swing his car to the north as he approached, and that the deceased, who was walking on the dirt shoulder, stepped upon the macadam and was almost instantly struck by the car. Annotation: 65 A.L.R. 202.

[20] Annotation: 65 A.L.R. 203.

The question of negligence is properly for the jury where there is testimony that as the defendant drove his automobile toward a street intersection, the plaintiff, a five-year-old boy, and his sister were standing on the curb at the intersection, that the boy started to run across the street, and, when his sister screamed for him to come back, turned and started back and was struck by the defendant's car, which was going 14 or 15 miles an hour, and that the defendant did not sound his horn or give any warning, although he saw the children in the street when he was 60 or 70 feet from them. Annotation: 65 A.L.R. 203.

[1] Annotation: 65 A.L.R. 204.

It is held that there is nothing in the evidence to support a finding that any negligence of the defendant had causal relation to the plaintiff's injury, the mere happening of the accident not being evidence to that end, where the evidence most favorable to the plaintiff was that the plaintiff, a boy eleven years of age, late in an evening in August, desiring to cross a street, looked up and down for automobiles and saw quite a number coming from what would be his left in crossing; that these machines were "four or five steps away from each other," and the plaintiff did not see any automobile coming from the opposite direction; that the street was full of automobiles and that the plaintiff was walking fast, and, when about halfway across the street, was struck by the defendant's automobile, coming from the plaintiff's right; and that he heard no noise, or horn, or other warning. Annotation: 65 A.L.R. 204.

[2] Annotation: 65 A.L.R. 204.

The evidence was held insufficient to warrant the submission of the question of the defendant's negligence to the jury in an action to recover for the death of a boy who was struck by an automobile while on the central part of a bridge, which was set apart for the use of vehicles, where there was no evidence that the child appeared upon the roadway in front of the car at any appreciable distance ahead of it, and no circumstances were shown that would tend to suggest to the driver of the car, prior to the happening of the accident, the probability of the boy leaving the footway on the side of the bridge and getting into danger upon the driveway. Annotation: 65 A.L.R. 204.

However, it has been held that the jury had a right to conclude from the evidence that the driver of the automobile which struck the plaintiff, an eight-year-old boy, was driving at an unreasonable and dangerous rate of speed, and that the injury was the direct result of such driving, where there was evidence that the car was being driven 45 miles an hour in a closely built-up section of the city, and that, as it was crossing a bridge, it struck the plaintiff, who ran off the sidewalk, but who testified that before he ran into the street, he looked in both directions and saw no vehicles approaching. Annotation: 65 A.L.R. 204, 205.

[3] Annotation: 65 A.L.R. 205.

Evidence was held sufficient to support a finding of negligence on the part of defendant where there was testimony that the plaintiff, a six-year-old child, while walking with his uncle along a sidewalk, as he approached a private driveway which crossed the sidewalk, stepped off the sidewalk on to the driveway and was almost immediately struck by an automobile which had come down the street in the same direction as that in which the child was traveling, and turned to cross the driveway without sounding any warning, although the driver saw the child approaching the driveway. Annotation: 65 A.L.R. 205.

[4] Annotation: 65 A.L.R. 205.

The driver of an automobile is not liable for an injury to a four-year-old child who broke away from his custodian and ran into the street and collided at a crossing with the automobile which was proceeding on an intersecting street, it appearing that the horn on the machine was sounded, the brake applied, and the speed diminished, but that owing to the sudden appearance of the child, the driver had no time to stop the car. Annotation: 65 A.L.R. 205.

as to indicate that the driver is passing through a school zone or through some other place where groups of children are to be found, it is his duty to bring his car under such control that it can be stopped on the shortest possible notice. If a child deliberately steps in front of a car which is under control and is struck, no liability attaches, since it is a well-known fact that a car cannot be stopped instantly, and that traffic must move.[5]

c. PEDESTRIANS WALKING ALONG STREET OR HIGHWAY

§ 201. **Generally.**—As shown above,[6] drivers of automobiles must share the streets with pedestrians, and each person on the highway must so exercise his right to use it as not to injure others, and use such caution as an ordinarily prudent person would use under like circumstances. The rights and duties of a pedestrian walking along a street or highway and the driver of an automobile are reciprocal and must be so exercised by each as not to injure the other, and each may rely to some extent on the due care of the other.[7] The rule is generally recognized and applied that in the absence of a statute or ordinance changing the rule, the driver of an automobile owes to pedestrians walking along a street or highway the duty to exercise reasonable or ordinary care to avoid injuring them.[8] It has been asserted that while the driver of an automobile and a pedestrian are charged with the same degree of care, the amount of care exacted of the driver of a motor vehicle is far greater than the amount of care exacted of a pedestrian.[9]

§ 202. **Duty to Anticipate Presence and Action of Pedestrian.**—As shown above,[10] the operator of a motor vehicle has no right to assume that the road is clear; under virtually all circumstances and at all times, he must be reasonably vigilant and must anticipate and expect the presence of others. Thus, the operator of an automobile on a public street or highway must anticipate the presence of pedestrians lawfully using the highway,[11] and must, in order to avoid a charge of negligence, keep a proper lookout for them and keep his machine under such control as will enable him to avoid a collision with another person using proper care and caution, and, if the situation requires it, must slow down and stop.[12] Even though he knows that there is a sidewalk in good condition paralleling the road on which he is driving, it is, nevertheless, his duty to anticipate the presence of pedestrians on the portion of the highway used by vehicular traffic.[13]

The driver, in the lawful use of a public highway, may assume, and prudently order the course and movement of his car in accordance with the assumption, until otherwise advised, that an adult pedestrian who has been warned of the approach of his car will not, without observing reasonable care, change his position so as to introduce danger where none existed before.[14] He may, however, be found guilty of actionable negligence in allowing too narrow a margin of safety in passing, so that when the pedestrian varied his course about 2 feet, he was struck by the automobile.[15]

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[5] Annotation: 65 A.L.R. 203.

[6] See supra, § 187.

[7] Annotation: 67 A.L.R. 97, s. 93 A.L.R. 551.

[8] Annotation: 67 A.L.R. 98, s. 93 A.L.R. 551.

Some statutes impose upon the driver a very high degree of care. See annotation in 67 A.L.R. 98.

An instruction that the driver owes a duty "to use all possible care not to collide with these people who are walking" is erroneous, since he is bound to use only such care as an ordinarily prudent man would use under all the circumstances. Annotation: 67 A.L.R. 98, s. 93 A.L.R. 551.

[9] Annotation: 67 A.L.R. 98, s. 93 A.L.R. 551.

[10] See supra, § 168.

[11] Annotation: 67 A.L.R. 99, s. 93 A.L.R. 553.

[12] Annotation: 67 A.L.R. 99, s. 93 A.L.R. 551.

[13] Annotation: 93 A.L.R. 553.

[14] Annotation: 67 A.L.R. 99, s. 93 A.L.R. 553.

The rule governing the duty of the driver of an automobile to children traveling on the sidewalks is different from that applicable to children traveling on the roadside of rural highways. With respect to the former, the driver has the right, as a rule, to assume that children will remain on the sidewalk, which is exclusively dedicated to pedestrians, and not suddenly attempt to cross a street, or adopt it for the uses for which the sidewalk was intended, whereas all parts of a country highway are, to the knowledge of everyone, used by pedestrians as well as by vehicles.[16]

§ 203. Failure to Give Timely Warning.—The failure of the operator of a motor vehicle to give timely warning of his approach is a significant factor in the determination of his liability for injuries to a pedestrian walking along a street or highway. It is the duty of the driver to give reasonable warning upon approaching a pedestrian in the roadway and to use every reasonable precaution to avoid injuring him.[17] The question of negligence is usually one of fact in such cases.[18]

Frequently statutes expressly require motorists to sound warnings of their approach, and sometimes, in addition, to slow down. The construction of these statutes is determined by their language.[19] Failure to comply with the statute is negligence per se or evidence of negligence according to the rule prevailing in the jurisdiction.[20]

§ 204. Absence of Lights or Inability to See.—The absence of lights or the use of lights with insufficient power may amount to negligence, particularly if there is a violation of a statute.[1]

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[15] Annotation: 67 A.L.R. 100, s. 93 A.L.R. 553.

And see infra, § 206.

[16] Annotation: 93 A.L.R. 553.

[17] Annotation: 67 A.L.R. 101, s. 93 A.L.R. 556.

Where a pedestrian, walking on the right-hand side of an unpaved street, was injured by an automobile which overtook him, and the evidence was conflicting as to whether or not the plaintiff looked back and saw the automobile, the driver stating that he did not sound the horn because the plaintiff saw him, the finding by the court, sitting without a jury, that the operator of the automobile was negligent was affirmed. Annotation: 67 A.L.R. 103.

[18] Rooney v. Maczko, 315 Pa. 113, 172 A. 151.

Annotation: 67 A.L.R. 101, s. 93 A.L.R. 556.

[19] **Under a statute providing that a driver, upon approaching a person** walking in the highway, when operating a motor vehicle, should give or cause to be given reasonable warning of his approach and use every precaution to prevent injury to persons or animals, an instruction in an action to recover for an injury to a pedestrian by an automobile was held erroneous which told the jury that the defendant was under no duty to sound his horn to warn the deceased as he approached from the rear, if the defendant saw that the deceased was so close to the automobile that there was no time in which to do so. Annotation: 93 A.L.R. 556.

The operator of an automobile, required by statute to sound a warning "whenever necessary," cannot excuse his neglect in that respect, when sued for injuring a pedestrian walking toward her automobile on her right-hand side of a state highway, 3 feet off the pavement, because, as he approached her from the rear, she saw the glare of his lights, since such fact did not notify the pedestrian that the automobile was partly off the pavement. Woodhead v. Wilkinson, 181 Cal. 599, 185 P. 851, 10 A.L.R. 291.

[20] Annotation: 67 A.L.R. 101, s. 93 A.L.R. 556.

As to the different rules, see supra, § 163.

[1] Annotation: 67 A.L.R. 103, s. 93 A.L.R. 557.

The driver of a truck, who is blinded by the lights of approaching motor vehicles, has no right to assume a clear distance ahead, and is guilty of negligence in not lessening the speed of the truck and regaining control thereof so as to be in command of a sudden emergency which arises when he comes upon a pedestrian after coming over the crest of a hill. Annotation: 93 A.L.R. 557.

A verdict finding the operator of an automobile guilty of negligence where he ran into a pedestrian pushing a handcart in the street between the car tracks on a dark night was affirmed where there was evidence that the automobile had no lights and that no warning of its approach was given. Annotation: 67 A.L.R. 104.

The evidence was held to justify a finding against a man and his wife, where their automobile struck a pedestrian who was walking on the grass strip along the side

§ 205. Speed or Failure to Stop or Slow Up.—The speed of a car, or the inability of the driver to stop, or the driver's failure to slow up, is a significant factor in the determination of his liability for injuries to a pedestrian walking along a street or highway.[2] It has been said that an operator who discovers the presence of small children on the highway ahead of him should travel at such a rate of speed, and bring his vehicle under such control, that an accident will be averted regardless of the unexpected and unforeseen movement of any of the children.[3] He has not the right to assume that a child, especially one of tender years, will exercise the discretion needed to protect it from the dangers of rapid automobile traffic.[4]

Under a statute requiring persons driving automobiles on public highways to drive them in a careful and prudent manner, and at a rate of speed not greater than is reasonable and proper, having regard to the traffic and use of the highway, a driver is, as a matter of law, negligent if, on a dark night, with a dark roadbed, he continues to travel at 20 to 25 miles an hour after his vision has been obscured by the glare of the lights on an approaching car, so that he cannot see objects in front of him.[5]

§ 206. Crowding Pedestrian.—Negligence may be found from the fact that the operator of the car drives too near to a pedestrian.[6] The driver of an automobile who negligently changes his course and drives his car in such close proximity to a pedestrian walking along the side of the highway that the pedestrian is struck by the door of the car, which is open, is liable for the injury whether or not he caused the door to be open.[7]

§ 207. Driving on Wrong Side.—It is the duty of the driver of an automobile traveling on the left-hand side of the road, when he should be on the right-hand side, to keep a strict watch for pedestrians and to give signals of his approach.[8]

§ 208. Swerving Car.—Whether or not a driver's car is swerving is frequently of importance in determining his liability for injuring a pedestrian traveling along a street or highway. Evidence tending to show that the plaintiff's deceased was walking along the right-hand side of the road to the

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of a state road, early in the evening, there being evidence that before passing another car, the lights on the defendants' car were turned off. Annotation: 67 A.L.R. 104.

[2] Keller v. Breneman, 153 Wash. 208, 279 P. 588, 67 A.L.R. 92.

In Keller v. Breneman, supra, the negligence of the operator of an automobile which injured a pedestrian was held to be a question for the jury, where, after dark, while a drizzling rain was falling, while driving on a curved road at an alleged speed of 40 miles an hour, the driver struck the pedestrian, who was walking in the center of the road, in front of his stalled truck, as the former turned to the left in an effort to pass to the left of the stalled truck, with which he collided.

[3] Annotation: 67 A.L.R. 105, s. 93 A.L.R. 558.

[4] Annotation: 67 A.L.R. 105, s. 93 A.L.R. 558.

In passing between children who are walking along the shoulders of the highway on both sides, with a space between them of 13 to 15 feet, the driver must bring his automobile under complete control and exercise the care which the danger of the situation demands, so that, if necessary, he can bring his car to a stop. Annotation: 93 A.L.R. 558.

[5] Hatzakorzian v. Rucker-Fuller Desk Co. 197 Cal. 82, 239 P. 709, 41 A.L.R. 1027.

[6] Annotation: 67 A.L.R. 108, s. 93 A.L.R. 559.

Evidence that a pedestrian who was walking along on her right-hand side of a dirt highway, on hearing a horn blow behind her, looked back, and, seeing two automobiles approaching, stepped off the traveled portion to her right, into the grass and weeds, and, after one of the automobiles had passed, continued to walk forward a foot outside the traveled portion, when she was struck by the second automobile, coming from the rear, was held sufficient to support an implied jury finding of negligence on the part of the operator of the automobile. Annotation: 67 A.L.R. 108, s. 93 A.L.R. 559.

[7] Annotation: 93 A.L.R. 559.

[8] Annotation: 67 A.L.R. 109, s. 93 A.L.R. 560.

right of the defendant's truck and a few steps in front of it when the truck swerved to the right and struck him while the driver was looking back was held sufficient to authorize the submission of the question of negligence to the jury and to sustain a verdict for the plaintiff.[9] Where there was evidence that the deceased was walking upon the shoulder of the road at a distance of 5 feet from the pavement, that the defendant swerved her car toward him, and that this caused the accident resulting in his death, it was held that there was a prima facie case and that a motion for nonsuit was properly denied.[10]

§ 209. **Object Extending beyond Car.**—The fact that an object extends beyond a car may be of significance in determining the liability of the operator of the car for injuring a pedestrian traveling upon a street or highway. Negligence in this regard is usually a question for the jury.[11]

§ 210. **Pedestrian Walking on Left Side of Road.**[12]—Statutes in some states require pedestrians walking along the traveled portion of a highway to walk on their left side, thus facing automobile traffic coming on that side. Even in the absence of a statute, the law of the road requiring traffic to move on its right-hand side of the road is generally held not to apply to pedestrians.[13] Obviously, where the statute requires the pedestrian to walk on his left hand side, he has the legal right to be at that point. An automobile driver going in the same direction as the pedestrian, who drives on his left-hand side when he should be on the right, must exercise a strict watch for pedestrians.[14] However, conditions may require automobile traffic to travel on the left side of the highway, as, for example, in the case of construction. In such event the care required of the automobilist would seem to be that required in driving along highways generally under similar conditions, at least the automobilist is not necessarily guilty of negligence in so driving.[15]

A person operating an automobile on the right-hand side of the road and meeting a pedestrian traveling on his left-hand side owes him the duty of ordinary care.

d. PEDESTRIANS CROSSING STREET AT UNUSUAL PLACE OR DIAGONALLY

§ 211. **Generally.**—At regular pedestrian crossings, the rights of automobilist and pedestrian are equal.[16] The only difference in relation to accidents occurring at, and those occurring between, regular crossings is that in the latter, the rule of ordinary care, applicable alike to the motorist and the pedestrian, requires less care of the former and more of the latter to avoid the injury than is required of them by the same rule at a regular crossing. And whether either has fulfilled his measure of care under this rule of ordinary care is a question for the jury.[17] Frequently statutes and ordinances relating to operation generally have a bearing upon the determination of the right of persons injured while crossing a street at an unusual place or diagonally to recover for such injuries.[18]

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[9] Annotation: 93 A.L.R. 560.

[10] Annotation: 93 A.L.R. 561.

[11] **The question of the defendant's negligence** was for the jury where there was evidence that the plaintiff was traveling along the path customarily used by pedestrians, on the right side of the highway, and that he was struck by a spike pole extending over the side of a truck which approached from the rear. Annotation: 93 A.L.R. 561.

An instruction directing a verdict for the plaintiff if he was walking on the right-hand side of the highway, exercising ordinary care for his own safety, when he was struck by a spike pole projecting from the defendant's truck was held erroneous, since it authorized a verdict for the plaintiff, whether the truck was being operated on the highway with ordinary care, or at a point where it had a right to be, or in an ordinarily prudent manner. Annotation: 93 A.L.R. 561.

[12] As to contributory negligence of pedestrian in walking on the left-hand side, see § 449, infra.

[13] Annotation: 17 A.L.R. 71.

[14] See supra, § 203.

An instruction in an action for death of a pedestrian who was struck from the rear while walking on the left side of the street, that it was immaterial whether the defendant was on that side, was held erroneous in view of a provision of the statute that a person operating an automobile shall, at the intersection of public highways or streets of any municipality, keep to the right of the center of the highway. Annotation: 93 A.L.R. 560.

[15] Annotation: 67 A.L.R. 109, s. 93 A.L.R. 561.

[16] See infra, § 293.

§ 212. Duty of Driver between Crossings.[19]—A pedestrian has the right, in the absence of prohibition by statute or ordinance, to cross a street at any point, either directly or diagonally, and is not restricted to the regular crossings; hence, the driver of an automobile owes him the duty of reasonable or ordinary care in the circumstances.[20] He must keep a lookout for pedestrians, not only at street crossings, but between street intersections.[1]

While the precise quantum of care and caution properly exercisable by the motorist toward pedestrians who cross the street at a point other than a regular crossing is largely dependent upon the facts and circumstances surrounding each case, it is uniformly held that the driver of a vehicle is not under the duty of using as much care toward one so crossing between street intersections as he would exercise toward one using a regular crossing.[2] A vehicle need not be under instant control between crossings, and what would be negligence in driving recklessly at a crossing may not constitute such negligence between crossings.[3] A driver must, however, in either case, exercise care commensurate with the situation, and it is his duty to look ahead and avoid collisions with pedestrians, and if he fails to do so, or if he carelessly runs a pedestrian down after seeing him, he will be held liable for the resulting injuries.[4] Thus, the rule requiring perfect control and ability to stop an automobile at the shortest possible notice at street intersections is not applicable in a case where a car struck a pedestrian crossing a street, at a street car stop which was not a street intersection, to catch a street car, where no street car was waiting.[5] Whether the driver of an automobile was negligent so as to render him, or one responsible for his conduct, liable to a person struck and injured by the car while walking across the street at a place other than the intersection is generally a question for the jury to decide.[6] In determining this question, the jury must consider all the facts of the case, the direction in which the car was traveling, the rate of speed, whether any signal or warning was given, the condition of the street, the situation and surroundings of the parties, the manner in which the injured person was crossing the street, and what observation, if any, the one in charge of the car made as he drove along.[7]

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[17] Annotation: 14 A.L.R. 1198, s. 67 A.L.R. 335.

[18] Evidence that an automobile made a sharp left turn into a street and struck a pedestrian who was crossing the street diagonally presents a question for the jury, in view of an ordinance which provides that vehicles, in turning to the left into another street shall pass to the right of and beyond the center of the intersecting streets before turning. Annotation: 67 A.L.R. 333.

[19] As affected by statute or ordinance, see infra, § 214.

[20] Ivy v. Marx, 205 Ala. 60, 87 So. 813, 14 A.L.R. 1173; Stringer v. Frost, 116 Ind. 477, 19 N. E. 331, 2 L.R.A. 614, 9 Am. St. Rep. 875.

Annotation: 14 A.L.R. 1176, s. 67 A.L.R. 313.

[1] Ivy v. Marx, 205 Ala. 60, 87 So. 813, 14 A.L.R. 1173.

[2] Annotation: 14 A.L.R. 1177, s. 67 A.L.R. 313.

[3] Annotation: 14 A.L.R. 1176, s. 67 A.L.R. 314.

[4] Ivy v. Marx, 205 Ala. 60, 87 So. 813, 14 A.L.R. 1173.

[5] Annotation: 67 A.L.R. 314.

[6] Sheldon v. James, 175 Cal. 474, 166 P. 8, 2 A.L.R. 1493.

Annotation: 14 A.L.R. 1178, s. 67 A.L.R. 315.

§ 213. Duty of Driver towards Children.[8] — The general principle previously set out,[9] that the amount of care to be exercised by the driver of an automobile toward one crossing a street at a place which is not a regular crossing is less than that required toward one crossing at a regular crossing, is equally applicable to children so crossing, as compared with children at a regular crossing.[10] The driver must exercise more care toward a child crossing the street between blocks than toward an adult in the same circumstances, the relative difference in care varying according to the age, physical condition, etc., of the child.[11] The tendency of small children to run across streets, especially at or near schools, must not be ignored by drivers of motor vehicles.[12]

§ 214. Duty as Affected by Statute or Ordinance.—It is provided by statute in some jurisdictions and by municipal ordinances in some municipalities that pedestrians must cross streets at regular crossings; crossing elsewhere is forbidden.[13] The enactment of such legislation by the state or by the municipality [14] is regarded as a reasonable exercise of the police power. The effect of such statutes or ordinances upon the duty of the automobile driver cannot be said to be entirely settled. The view is taken that such statutes or ordinances do not relieve the driver of a car of the duty of exercising reasonable care and diligence to avoid the injury.[15] Some such statutes or ordinances give the automobile the right of way between crossings,[16] and these would seem to modify the duty of the driver to a certain extent.

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[7] Ivy v. Marx, 205 Ala. 60, 87 So. 813, 14 A.L.R. 1173; Sheldon v. James, 175 Cal. 474, 166 P. 8, 2 A.L.R. 1493; Baker v. Close, 204 N. Y. 92, 97 N. E. 501, 38 L.R.A.(N.S.) 487; Peterson v. Ballantine & Sons, 205 N. Y. 29, 98 N. E. 202, 39 L.R.A.(N.S.) 1147; Watts v. Plymouth, 255 Pa. 185, 99 A. 470, 3 A.L.R. 1110.

Annotation: 14 A.L.R. 1177, s. 67 A.L.R. 313.

[8] See supra, § 185 and cross references therein contained as to driver's duty toward children.

[9] See supra, § 211.

[10] Annotation: 14 A.L.R. 1180, s. 67 A.L.R. 317.

[11] Annotation: 14 A.L.R. 1180, s. 67 A.L.R. 317.

Where there was evidence, in an action to recover for injuries to a seven-year-old child run into in front of a school as she was crossing the street, that the automobile which collided with her was moving from 15 to 20 miles an hour, that no horn was sounded, and that a warning had been given to the driver by a boy, who waved his hat, a finding of negligence was held justified. Annotation: 14 A.L.R. 1180, s. 67 A.L.R. 317.

A finding of negligence on the part of the defendant is justified where there is evidence that a little girl, six years of age, started to cross a street between street intersections, and the driver of an approaching automobile saw her and stopped his automobile to avoid a collision with her, that she stopped also, nearly ahead of his car, but a little on his left and about 12 feet from it, and that he, assuming that she would wait there until he drove by her, thereupon started his car, but she did not wait for him to pass her, but started running toward his moving car, and the collision occurred before he could again stop the car. Annotation: 14 A.L.R. 1180, s. 67 A.L.R. 317.

[12] Annotation: 14 A.L.R. 1180, s. 67 A.L.R. 317.

[13] As to the contributory negligence of the pedestrian in crossing in violation of such a statute or ordinance, see § 455, infra.

[14] Snyder v. Campbell, 145 Miss. 287, 110 So. 678, 49 A.L.R. 1402.

Annotation: 49 A.L.R. 1406.

[15] Snyder v. Campbell, 145 Miss. 287, 110 So. 678, 49 A.L.R. 1402.

Annotation: 49 A.L.R. 1406.

It has been said that an ordinance imposing a fine or fine and imprisonment for a violation thereof carries its own penalties and is not intended to relieve drivers of automobiles from any existing duties. Ivy v. Marx, 205 Ala. 60, 87 So. 813, 14 A.L.R. 1173.

In states where the comparative negligence doctrine prevails, recovery is reduced in the proportion that the pedestrian's negligence bears to the negligence of the driver of the automobile. Snyder v. Campbell, 145 Miss. 287, 110 So. 678, 49 A.L.R. 1402. Annotation: 49 A.L.R. 1406.

[16] Annotation: 14 A.L.R. 1197, s. 67 A.L.R. 333.

e. Pedestrians Alighting from, or Waiting for, Street Cars

(1) In General

§ 215. Generally.—The general rule that the operator of an automobile must exercise ordinary or reasonable care towards pedestrians applies to persons alighting from, or waiting for, street cars. Statutory regulations governing this situation have been enacted in certain jurisdictions, and it is therefore necessary to discuss the rules applying both under and in the absence of specific enactments.

(2) Absence of Specific Regulation

§ 216. Duty of Driver.—In the absence of a regulation specifically imposing a greater duty, the driver of a motor vehicle, when passing a street car which has stopped for the purpose of receiving or discharging passengers, is required to recognize that passengers will or may be moving to and from the car, and it is his duty to have his machine under proper control, and generally to exercise due care, under all the circumstances, to avoid injury to any such person.[17] He should not pass close to the car, and if he does so and strikes a person alighting or embarking, his negligence is a question for the determination of the jury.[18]

Although, in the absence of a statute or ordinance requiring a stop, it is ordinarily sufficient that a driver, in passing a street car, have his car under proper control, yet the circumstances may require that he bring his car to an absolute stop in order to avoid an injury to an alighting or entering passenger.[19]

A person operating an automobile on the wrong side of the road, who injures a person who is alighting from, or is waiting for, a street car, is ordinarily deemed to be negligent.[20] Driving at a rapid rate unnecessarily near

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[17] Minor v. Mapes, 102 Ark. 351, 144 S. W. 219, 39 L.R.A.(N.S.) 214; Gregory v. Slaughter, 124 Ky. 345, 99 S. W. 247, 8 L.R.A. (N.S.) 1228, 124 Am. St. Rep. 402; Hennessey v. Taylor, 189 Mass. 583, 76 N. E. 724, 3 L.R.A.(N.S.) 345, 4 Ann. Cas. 396; Marsh v. Boyden, 33 R. I. 519, 82 A. 393, 40 L.R.A.(N.S.) 582; Ouellette v. Superior Motor & Mach. Works, 157 Wis. 531, 147 N. W. 1014, 52 L.R.A.(N.S.) 299.

Annotation: 47 A.L.R. 1233.

[18] Annotation: 47 A.L.R. 1237.

[19] Gregory v. Slaughter, 124 Ky. 345, 99 S. W. 247, 8 L.R.A.(N.S.) 1228, 124 Am. St. Rep. 402.

[20] Annotation: 47 A.L.R. 1235.

In Harris v. Johnson, 174 Cal. 55, 161 P. 1155, L.R.A.1917C, 477, Ann. Cas. 1918E, 560, it appeared that the plaintiff, after alighting from a street car, was walking across the street toward the curb, when she was knocked down by the defendant's automobile which had come from the rear of the car and on the left-hand side of it. The court held that the defendant was negligent in driving on the left-hand side of the street in violation of an ordinance of the city.

In Allen v. Schultz, 107 Wash. 393, 181 P. 916, 6 A.L.R. 676, the court said: "It is not contended that the driver of the automobile was not driving upon the left-hand side of the street when the accident occurred, nor is it contended that to so drive is not contrary to the city ordinance; but it is contended that negligence does not necessarily follow from these conditions; that a driver of an automobile may, under some circumstances, drive upon the left-hand side of the street without being guilty of negligence; and whether it is negligence so to do in any particular case must depend upon the facts of such case. It is contended, further, that in the present case the facts show an excuse for the driver's action; it is said that when the street car did not pass on as he anticipated, but stopped in such a position that he could neither go forward nor turn to the right, he was confronted with an emergency, and whether he acted with due prudence in his effort to escape therefrom was a question of fact for the jury, not one of law for the court. It is probably the general rule that one confronted with a sudden peril, not arising from any fault of his own, may, to avoid bodily harm to himself, act in the way the emergency seems to require, without being guilty of negligence, even though in so acting he injures another who in no way contributed to the condition creating the peril. . . . Here it is clear by the testimony of the driver of the automobile, that he does not come within the rule. He had abundant time, according to his own testimony, to have stopped the automobile before he reached the place of peril, had he not been mistaken in assuming the street car was not going to stop. But this was a usual stopping place for street cars, and it was negligence for him to assume that it the street car, especially on the wrong side of the street, constitutes negligence. An attempt to drive past the car before any passengers should alight may also constitute negligence.[1]

§ 217. Application of Rules.—The general rule, in the absence of specific regulations on the subject, relating to the duty of the driver of an automobile towards pedestrians alighting from, or waiting for, street cars, discussed in the preceding section, applies to a variety of factual situations such as cases where the alighting passenger crosses the street[2] or waits for this purpose,[3] or transfers to another street car,[4] or walks around the rear or front of the street car.[5] The rule also applies to a blind person alighting from a street car.[6]

§ 218. Passenger Alighting at Regular Stopping Place Other than Intersection or from Moving Car.—The general rule that the driver of a car must exercise due care, under all the circumstances, to avoid injury to pedestrians alighting from, or waiting for, street cars applies to a passenger alighting at a regular stopping place other than an intersection,[7] and also to a person alighting from a moving street car. Of course, an automobile driver passing

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was not going to stop in this instance. Again, after he had turned and avoided the peril, he had abundant time, at the speed he was traveling, to have stopped the automobile before striking the respondent, had the brakes on the automobile been in proper condition. One who operates on the streets of a city such a dangerous instrumentality as an automobile is bound to take notice that he may be called upon to make emergency stops, and it is negligence on his part not to keep the automobile in such condition that such stops are possible."

[1] Annotation: 47 A.L.R. 1238.

[2] Marsh v. Boyden, 33 R. I. 519, 82 A. 393, 40 L.R.A.(N.S.) 582.

Annotation: 47 A.L.R. 1238, 1239.

In Minor v. Mapes, 102 Ark. 351, 144 S. W. 219, 39 L.R.A.(N.S.) 214, an action for damages to a person who was struck by an automobile after alighting from a street car, and while walking toward the sidewalk, the court said: "The machine was being operated at a rapid rate of speed, unnecessarily near the street car, though there was abundant space further out in the street for the machine to pass along. It was customary for passengers to alight from the front end of street cars, and it was reasonably to be anticipated that they might pass in front of a car going to the other side of the street. The jury was warranted in finding that it constituted negligence for an automobile driver to run the machine at a rapid speed so near a street car which had stopped for passengers to alight. Automobilists and the drivers of other vehicles have the right to share the street with pedestrians, but they must anticipate the presence of the latter and exercise reasonable care to avoid injuring them. Care must be exercised commensurate with the danger reasonably to be anticipated."

[3] Annotation: 47 A.L.R. 1239, 1240.

Where it appeared that the plaintiff, having alighted from the street car, was waiting for an opportunity to cross the street when the defendant's automobile drove from behind two standing automobiles, intending to pass them, and struck the plaintiff, knocking her down and inflicting serious injuries. It was held that the plaintiff being unaware of the approach of the defendant's automobile until it was right on her and so close to her that she was unable to extricate herself from her dangerous position, it was the duty of the defendant to use all the means in his power to avoid striking the plaintiff, and that therefore, a case was made out sufficient to go to the jury under the humanitarian doctrine. Annotation: 47 A.L.R. 1239.

[4] Annotation: 47 A.L.R. 1239.

[5] Harris v. Johnson, 174 Cal. 55, 161 P. 1155, L.R.A.1917C, 477, Ann. Cas. 1918E, 560.

Annotation: 47 A.L.R. 1240.

One passing in front of a standing street car has a right to assume that no automobile will come from the rear of the car on the left-hand side of it, in violation of ordinance. Harris v. Johnson, 174 Cal. 55, 161 P. 1155, L.R.A.1917C, 477, Ann. Cas. 1918E, 560.

[6] Annotation: 47 A.L.R. 1241.

[7] Annotation: 47 A.L.R. 1240.

Where it appeared that a passenger alighted from a street car at a place where the car customarily stopped, although it was not a crossing, and proceeded to cross the street, when he was struck and killed by the defendant's automobile, it was held that the defendant was negligent in that he was presumed to know that passengers were likely to be discharged at that time and place, and he should have had his automobile under proper control to avoid such an unnecessary accident; that the stopping place was the equivalent of a street crossing, used and recognized as such by the public; and, although he would not be required to stop his automobile at such a place, he should have had it under proper control. Annotation: 47 A.L.R. 1240.

a moving street car is not ordinarily bound to anticipate that a passenger will jump from the moving car.[8]

§ 219. Prospective Passengers.—The general rule that the driver of a car must exercise due care, under all the circumstances, to avoid injury to pedestrians alighting from, or waiting for, street cars applies to a prospective passenger standing at a regular stopping place for street cars[9] and to one running after a street car.[10] An automobile driver failing to have his car under such control that he could avoid striking a prospective passenger passing from the curb to the center of the street to take a street car may be guilty of negligence.[11] This rule is applicable to backing an automobile against a prospective street car passenger.[12]

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[8] Annotation: 47 A.L.R. 1240.

The defendant is entitled to an instruction as follows: "The defendant was not called upon to drive his car so as to protect passengers on the street car who might see fit to jump from the car while it was in motion, unless and until he had warning that the passengers did intend to jump from the street car while in motion." Annotation: 47 A.L.R. 1240.

In another case, however, it appeared that the plaintiff's intestate jumped from a moving trolley car and ran across the street in front of an onrushing automobile less than two seconds away. He had reached a point outside of, and beyond the part of, the road devoted to travel by vehicles, and was on the grass ground at the side of the road, and undoubtedly for one fleeting instant supposed that he was safe from pursuit by motor cars, when the defendant's automobile knocked him down and killed him. The court, in affirming a judgment for the plaintiff, approved of the following instruction: "If you find that the defendant at the time of the accident was approaching a regular stopping place of an interurban electric railroad, with an approaching electric car in sight, which car was slowing down to make a stop at its stopping place, it was the duty of the defendant to so control its automobile that it could stop it, and to stop it, if necessary, to avoid injury to passengers alighting from the electric car." Annotation: 47 A.L.R. 1241.

[9] Ouellette v. Superior Motor & Mach. Works, 157 Wis. 531, 147 N. W. 1014, 52 L.R.A.(N.S.) 299.

Annotation: 47 A.L.R. 1242.

The driver of an automobile is negligent in propelling his machine against a pedestrian standing in plain sight near a street car track, waiting to board a car, although he does not respond to a signal announcing the approach of the automobile. Ouellette v. Superior Motor & Mach. Works, 157 Wis. 531, 147 N. W. 1014, 52 L.R.A.(N.S.) 299.

Where it appeared that the plaintiff was in the street at the side of a standing electric car and was just getting ready to board it when she was struck by the automobile of the defendant, who, in avoiding the plaintiff's companion standing near the curb, turned his machine toward and against the plaintiff, the defendant was held to be liable. Annotation: 47 A.L.R 1242.

Where the plaintiff, while standing in the street close to the car line and waiting for the street car, was struck by the defendant's automobile, which came from the rear of the car, passing to its right at the rate of 25 miles an hour, it was held that the driver of the automobile could have seen the plaintiff and, by the use of proper caution, avoided her, and that whether this was negligence was a question for the jury. Annotation: 47 A.L.R. 1243.

[10] Annotation: 47 A.L.R. 1243.

Where it appeared that the plaintiff was running in the center of the street trying to catch a street car, and that the defendant was driving his automobile and, gradually coming up behind the plaintiff, struck him before he reached the street car, it was held that the plaintiff was within his rights to be in the street for the purpose of boarding a street car, and that the defendant, being aware of the presence of the plaintiff running ahead of his car, was bound to exercise ordinary care to avoid running into him. Annotation: 47 A.L.R. 1243.

[11] Hennessey v. Taylor, 189 Mass. 583, 76 N. E. 224, 3 L.R.A.(N.S.) 345, 4 Ann. Cas. 396.

Annotation: 47 A.L.R. 1241.

In Gregory v. Slaughter, 124 Ky. 345, 99 S. W. 247, 8 L.R.A.(N.S.) 1228, 124 Am. St. Rep. 402, it appeared that the plaintiff, in order to catch a street car, ran across the street and followed it with the view of boarding the car when it stopped. The defendant ran his automobile very close to the street car, but veered it around the rear of the car, when he found the plaintiff directly in his path and too late to avoid striking him. The court, in holding the defendant negligent, said: "He was on one of the principal thoroughfares of a great city, and approaching a crossing where it was at least reasonable to expect pedestrians to be. He could not see this crossing for the reason that the street car was between him and it, and thus obscured his vision. Instead of stopping his automobile until the car passed and he could see whether there were pedestrians on the crossing beyond, he simply changed his direction so as to go around the passing car, and by his own act was brought face to face with the appellee at a distance too short to prevent the collision at the rate he was moving. This was, in itself, gross negligence to the verge of recklessness."

Where it appeared that the plaintiff, after looking once and seeing a clear street, proceeded from a point within 12 feet of the street intersection toward the street car which he was intent upon boarding, without

(3) Specific Regulation

§ 220. Generally.—In various jurisdictions statutes or ordinances are in force governing the duty of the driver of a motor vehicle when passing a street car which has stopped for the purpose of receiving or discharging passengers. Such regulations are applicable for the benefit of persons who are in the street to board a street car or after alighting from a street car.[13]

§ 221. Regulation Prescribing Distance for Passing.—In some jurisdictions it is provided by statute or ordinance that drivers of motor vehicles, when passing street cars which have stopped for the purpose of receiving or discharging passengers, shall keep a specified distance from the street car. A failure to comply with such regulation has the same effect as negligence[14] as has the violation of a statute or ordinance generally.[15] A regulation of this kind is generally not applicable except where the street car and the automobile are running in the same direction.[16]

§ 222. Enactments Regulating Speed.—Sometimes, instead of regulating the distance which the driver of a motor vehicle shall take when passing a street car, it has been required by statute or ordinance that the driver, when passing a street car which has stopped to allow passengers to alight or embark, shall slow down and, if necessary for the safety of the public, shall bring his vehicle to a full stop. The violation of such a provision is negligence or evidence of negligence,[17] according to the view which obtains generally in the jurisdiction as to the effect of the violation of a statute or ordinance.[18]

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looking again in either direction, and, when he had taken only a few steps, he was knocked down by the defendant's automobile traveling at an excessive rate of speed, it was held that the defendant was guilty of negligence in running his automobile at about twice the maximum lawful rate of speed and in failing to sound his horn or other warning in approaching a pedestrian within 12 feet of an intersecting street, who, as must be manifest to any observer, was intending to board the street car at a usual place. Annotation: 47 A.L.R. 1241, 1242.

[12] Annotation: 47 A.L.R. 1243.

[13] Annotation: 47 A.L.R. 1238.

[14] Annotation: 47 A.L.R. 1254.

Where it appeared that the plaintiff was alighting from a street car which was standing while passengers were being discharged and taken on and she was struck by the defendant's automobile when about 1 foot distant from the car, it was held that the defendant was negligent in violating an ordinance making it unlawful for any person driving or having charge, possession, or control of any vehicle being driven or propelled or operated upon the streets of the city, upon overtaking any street car which was stopped for the purpose of discharging or taking on a passenger or passengers, to permit or cause said vehicle to pass or approach within 10 feet of said car as long as the said car was so stopped or remained standing for the purpose of discharging or taking on a passenger or passengers. Annotation: 47 A.L.R. 1254.

A judgment for the plaintiff was affirmed where it appeared that she alighted from a street car and was struck by the defendant's passing automobile, which failed to clear the street car by at least 6 feet, as was required by statute, that there was nothing to obstruct the defendant's view, that he could easily have stopped before striking the plaintiff, who had not moved from the street car after alighting therefrom, and that there was sufficient room in the street between the plaintiff and the curb for the defendant to have moved without striking her. Annotation: 47 A.L.R. 1254.

[15] See supra, § 163.

[16] Annotation: 47 A.L.R. 1254, 1255.

[17] Annotation: 14 A.L.R. 1196, s. 67 A.L.R. 333; 47 A.L.R. 1258.

The purpose of such a statute or ordinance is to create a zone of safety to protect those who use street cars against those who, in driving automobiles, may render ingress to, and egress from, the former dangerous. Such regulations modify the doctrine of reciprocal rights in the street in all cases falling within their terms and obviate the necessity, if any theretofore existed, on the part of those boarding or leaving standing cars of looking out for approaching automobiles; they have the right to presume that automobile drivers will perform their duty and obey the statute or ordinance; and, in the absence of any reasonable ground for thinking otherwise, they are not guilty of negligence in assuming freedom from a danger which comes only from such violation. Annotation: 47 A.L.R. 1258.

[18] See supra, § 163.

§ **223. Enactment Requiring Absolute Stop.**—There is another class of regulations bearing on the operation of motor vehicles when passing street cars by which it is required that drivers shall bring their motor vehicles to an absolute stop when about to overtake a street car standing to take on or discharge passengers.[19] The purpose of requiring automobiles to stop when about to overtake a street car standing to take on or let off passengers is to safeguard human life; and the restraint is not lifted with the starting of the street car, but remains until travel can be resumed with safety to persons in the street needing to reach the street curb.[20] In view of the obvious danger of passing street cars when they do stop for the accommodation of passengers, it behooves motorists not to trail them so closely that they cannot comply with such regulations.[1]

§ **224. —Effect of Violation of Such Enactments.**—There is some diversity of opinion as to the effect of the violation of a statute or ordinance requiring drivers to bring their cars to an absolute stop when about to overtake a street car standing to take on or to discharge passengers. Some courts hold that it is evidence of negligence.[2] In other jurisdictions it is held such violation is negligence per se.[3]

§ **225. —Applicability where Street Car and Automobile Approach from Opposite Directions.**—Enactments requiring drivers to bring their motor vehicles to an absolute stop when about to overtake a street car standing to take on or to discharge passengers are generally held not to apply to situations where the street cars and automobiles approach from opposite directions.[4]

§ **226. —Applicability where Street Car Stops at Other than Regular Stopping Place.**—Enactments requiring that drivers bring their automobiles to an absolute stop when about to overtake a street car standing to take on or discharge passengers are generally held not to apply to situations where the street car stops at other than a regular stopping place.[5] Obviously, the wording of the enactment involved is of considerable importance in determining this question.

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[19] Day v. Cunningham, 125 Me. 328, 133 A. 855, 47 A.L.R. 1229; Schell v. Du Bois, 94 Ohio St. 93, 113 N. E. 664, L.R.A.1917A, 710; Frankel v. Norris, 252 Pa. 14, 97 A. 104, L.R.A.1917E, 272.

Annotation: 47 A.L.R. 1258.

[20] Annotation: 47 A.L.R. 1260.

[1] Annotation: 47 A.L.R. 1259.

[2] Annotation: 47 A.L.R. 1261.

Where the plaintiff, after alighting from a street car, was proceeding to cross the street when he was struck by the defendant's automobile, the defendant was held guilty of negligence if he failed to bring his automobile to a stop less than 5 feet from the rear of the street car headed in the same direction as required by statute. Annotation: 47 A.L.R. 1260.

[3] Schell v. Du Bois, 94 Ohio St. 93, 113 N. E. 664, L.R.A.1917A, 710, wherein the court said: "One of the allegations of negligence in the petition, after stating the fact that the car had stopped to discharge passengers and that Gitchell was a passenger, is that the defendant carelessly and negligently drove his automobile past the standing car, in consequence of which the decedent was struck by the automobile. The plaintiff avers that there is an ordinance of the city of Bellaire which provides that it shall be unlawful to drive an automobile past a standing car which is receiving or discharging passengers, and that, in consequence of the violation of this ordinance and of defendant's carelessness in driving his automobile at the time, the decedent received his injuries. . . . While there is not entire harmony in the decisions as to the legal effect of a violation of a municipal ordinance, passed in the proper exercise of the police power for the protection of the public, we think it clear, from an examination of many cases, that the weight of authority and reason supports the proposition that a violation of an ordinance of the character referred to is negligence per se; and that, where the act of violation is the proximate cause of an injury to a plaintiff, who has not by his own negligence contributed to the injury, the defendant is liable. This is now the generally recognized rule."

See also supra, § 163.

[4] Day v. Cunningham, 125 Me. 328, 133 A. 855, 47 A.L.R. 1229.

Annotation: 47 A.L.R. 1262.

[5] Annotation: 47 A.L.R. 1262.

§ 227. —Where Passenger Alights from Moving Street Car.—Enactments requiring that drivers bring their automobiles to an absolute stop when about to overtake a street car standing to take on or discharge passengers do not apply to situations where passengers alight from moving street cars.[6]

§ 228. Enactments Requiring Warning.—In some jurisdictions enactments exist providing that drivers of motor vehicles must sound a warning as they approach street cars which have stopped to take on or discharge passengers. Failure to comply with such a statute raises an issue of negligence for the jury.[7]

f. Guests

(1) In General

§ 229. Generally.—Guests occupy a peculiar position in the law of automobiles. There has been much litigation over the liability of the owner or operator to one occupying such a position. In some jurisdictions a distinction is made between invited guests and guests at sufferance. Then, too, it is important to determine whether the guest is injured because of the negligent operation of the car or the condition of the car. The question is further complicated by the numerous statutory regulations pertaining to this subject.

(2) Injuries Due to Negligent Operation

(a) Invited Guests

§ 230. General Rule.—The rule is established by the weight of authority that the owner or operator of an automobile owes the duty to an invited guest to exercise reasonable care in its operation, and not unreasonably to expose him to danger and injury by increasing the hazard of travel.[8] This rule, as

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[6] Annotation: 47 A.L.R. 1263.

[7] Annotation: 47 A.L.R. 1265.

[8] Hewlett v. Schadel (C. C. A. 4th) 68 F. (2d) 502, 91 A.L.R. 743; Perkins v. Galloway, 194 Ala. 265, 69 So. 875, L.R.A.1916E, 1190, second appeal in 198 Ala. 658, 73 So. 956; Beard v. Klusmeier, 158 Ky. 153, 164 S. W. 319, 50 L.R.A.(N.S.) 1100, Ann. Cas. 1915D. 342; Raymond v. Portland R. Co. 100 Me. 529, 62 A. 602, 3 L.R.A.(N.S.) 94; Jessup v Davis, 115 Neb. 1, 211 N. W. 190, 56 A.L.R. 1403, writ of error dismissed in 276 U. S. 593, 72 L. ed. 722, 48 S. Ct. 300; Paiewonsky v. Joffe, 101 N. J. L. 521, 129 A. 142, 40 A.L.R. 1335; Stewart v. Houk, 127 Or. 589, 271 P. 998, 272 P. 893, 61 A.L.R. 1236; Marple v. Haddad, 103 W. Va. 508, 138 S. E. 113, 61 A.L.R. 1248; Olson v. Hermansen, 196 Wis. 614, 220 N. W. 203, 61 A.L.R. 1243; Cleary v. Eckart, 191 Wis. 114, 210 N. W. 267, 51 A.L.R. 576.

Annotation: 20 A.L.R. 1014, s. 26 A.L.R. 1425, 40 A.L.R. 1338, 47 A.L.R. 327, 51 A.L.R. 581, 61 A.L.R. 1252, and 65 A.L.R. 952.

The court, in Perkins v. Galloway, 194 Ala. 265, 69 So. 875, L.R.A.1916E, 1190, said: "The express or implied duty of the owner and driver to the occupant of the car is to exercise reasonable care in its operation not to unreasonably expose to danger and injury the occupant, by increasing the hazard of that method of travel. He must exercise the care and diligence which a man of reasonable prudence, engaged in like business, would exercise for his own protection and the protection of his family and property—a care which must be reasonably commensurate with the nature and hazards attending this particular mode of travel. Reaves v. Maybank, 193 Ala. 614, 69 So. 137. Failing in this duty, he will be liable to the occupant or guest in the car for injuries the result of such carelessness or lack of diligence."

In Garrow v. Seattle Taxicab Co. 135 Wash. 630, 238 P. 623, 45 A.L.R. 293, the court declared the rule to be that a higher degree of care is imposed upon a common carrier of passengers with respect to its passengers than is imposed upon an automobile owner who carries a person as his guest or as an accommodation; but that case, involving a suit against a taxicab company, gave no consideration to the specific duty imposed upon an owner who carries another as his guest.

A husband in driving an automobile jointly owned by himself and wife, while returning from a visit to their daughter, owes to the wife a duty to exercise due care equal in quality and extent to that frequently stated by the courts, is that an owner of an automobile owes a guest the duty to exercise ordinary[9] or reasonable[10] care to avoid injuring him. Since one riding in an automobile is no less a guest because he asked for the privilege of doing so, the same obligation of care is imposed upon the driver as in the case of one expressly invited to ride.[11]

§ 231. Minority Rule.—In some jurisdictions it is held, independent of statute, that gross negligence must be shown in order to hold the owner or operator of an automobile liable for an injury to an invited guest.[12] The principle of the minority rule is that there is no liability in the case of a gratuitous bailment in the absence of gross negligence.[13] Under this rule, one inviting another to ride gratuitously in his automobile is not, in the absence of gross negligence, liable for injury to him by the overturning of the car through the negligence of the chauffeur.[14] What constitutes gross negligence within this rule is a matter depending upon the facts of the individual case. Illustrations are given in the footnote.[15]

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sustained by a gratuitous agent. Archer v. Chicago, M. St. P. & P. R. Co. 215 Wis. 509, 255 N. W. 67, 95 A.L.R. 851.

[9] Paiewonsky v. Joffe, 101 N. J. L. 521, 129 A. 142, 40 A.L.R. 1335; Schwartz v. Johnson, 152 Tenn. 586, 280 S. W. 32, 47 A.L.R. 323.

Annotation: 20 A.L.R. 1014, s. 26 A.L.R. 1425, 40 A.L.R. 1338, 47 A.L.R. 327, 51 A.L.R. 581, 61 A.L.R. 1252, and 65 A.L.R. 952.

[10] Avery v. Thompson, 117 Me. 120, 103 A. 4, L.R.A.1918D, 205.

Annotation: 20 A.L.R. 1014, s. 26 A.L.R. 1425, 40 A.L.R. 1338, 47 A.L.R. 327, 51 A.L.R. 581, 61 A.L.R. 1252, and 65 A.L.R. 952.

[11] Annotation: 20 A.L.R. 1014, s. 26 A.L.R. 1425, 40 A.L.R. 1338, 47 A.L.R. 327, 51 A.L.R. 581, 61 A.L.R. 1252, 65 A.L.R. 952.

[12] Slaton v. Hall, 168 Ga. 710, 148 S. E. 741, 73 A.L.R. 891.

Annotation: 20 A.L.R. 1018, s. 26 A.L.R. 1427, 40 A.L.R. 1339, 47 A.L.R. 328, 51 A.L.R. 582, 61 A.L.R. 1254, and 65 A.L.R. 954.

See, however, the remarks by the court in Avery v. Thompson, 117 Me. 120, 103 A. 4, L.R.A.1918D, 205, wherein an attempt was made, partially at least, to reconcile the decisions.

[13] **In criticism of this rule,** it has been stated that the analogy between the gratuitous bailment of personal property and the gratuitous transportation of human beings in an automobile does not hold, inasmuch as the degree of protection required to be given property rights is not necessarily the same as that which must be given to human life. Annotation: 47 A.L.R. 328.

[14] Pepper v. Morrill (C. C. A. 1st) 24 F. (2d) 320, 57 A.L.R. 750; Massaletti v. Fitzroy, 228 Mass. 487, 118 N. E. 168, L.R.A. 1918C, 264, Ann. Cas. 1918B, 1088, wherein the court went to great lengths to show that the different degrees of negligence still obtained in Massachusetts, and, after reviewing the decisions, said in conclusion: "Approaching the question apart from authority, we are led to the same conclusion. Justice requires that the one who undertakes to perform a duty gratuitously should not be under the same measure of obligation as one who enters upon the same undertaking for pay. There is an inherent difficulty in stating the difference between the measure of duty which is assumed in the two cases. But justice requires that, to make out liability in case of a gratuitous undertaking, the plaintiff ought to prove a materially greater degree of negligence than he has to prove where the defendant is to be paid for doing the same thing. It is a distinction which seventy-five years' practice in this Commonwealth has shown is not too indefinite a one to be drawn by the judge and acted upon by the jury."

However, the Massachusetts rule requiring a guest in an automobile to show that the driver was guilty of gross negligence has been held not to apply to an action brought in that state to recover for injuries received in an accident in another state by the law of which a guest need show only ordinary negligence on the part of the driver. Annotation: 51 A.L.R. 583.

[15] **Evidence that an automobile was being operated at a speed** of between 35 and 40 miles per hour over a rough country road, in an effort to render assistance at a fire in the country, and that the car "jumped out of the rut" and, in the attempt to get it back, skidded and struck a pole 8 or 10 feet from the nearest wheel rut "viewed in the light most favorable to the plaintiff" by the court, was not, in its opinion, sufficient to show that degree of negligence necessary to establish liability by an owner or operator of an automobile for injury to a guest. Annotation: 40 A.L.R. 1339.

It has been held that violation of a state law prohibiting the driving of automobiles at a greater speed than 10 miles an hour when approaching and traversing intersections of public highways would not constitute gross negligence as a matter of law. Annotation: 51 A.L.R. 582.

Driving a big, closed car around a corner on a wet street at a speed of 20 miles per hour was held not gross negligence. Annotation: 61 A.L.R. 1254.

A finding of "utter disregard of the dictates of prudence amounting to complete neglect of the safety of the guest, which would constitute gross negligence," was held warranted, however, where the defendant, upon meeting a car at a curve on a slippery road, put on additional speed and drove to the left to get into a driveway, instead of stopping or turning to the right across a graveled border and some car

§ 232. **Respondeat Superior.**—The general rule that the owner or operator of a motor vehicle owes the duty to an invited guest to exercise reasonable care in its operation, and not unreasonably to expose him to danger and injury by increasing the hazard of travel, has been held applicable where the employee of the owner was operating the car and the question of respondeat superior was expressly raised.[16] Thus, where the driver of a car was authorized by the defendant, his employer, to invite the plaintiff, a customer of the defendant, to ride in the car, the defendant was held liable for injuries resulting proximately from the driver's negligence.[17] The respondeat superior doctrine was held to apply where the owner constituted one guest his agent to operate the car and another guest was injured.[18] When the owner of an automobile directs another to assume, and intrusts him with, the control of her automobile as a driver, he becomes, for all purposes of a driver, the special representative or agent of the owner; and the latter is liable for any injury that may be inflicted upon one riding in the automobile by invitation of the owner because of the negligence of the driver.[19] A boy helper on a milk wagon was held to have been assisting the driver by delivering milk, with the implied consent of the driver's employer, so as to make him an invitee of such employer and to make the latter liable for the driver's negligence.[20] And a coal concern was held liable for the negligence of the driver of one of its trucks, which was used in bringing school children home from a picnic, toward one of the boys, who was sitting at the rear of it, with his legs hanging down, in suddenly stopping the truck without warning, whereby an automobile in back bumped into it.[21] Of course, to hold the master liable for the negligent act of his servant, the negligence of the servant must be proved.[1] In cases where the person injured was riding at the invitation of the driver the owner's liability depends upon whether the driver had authority in fact or ostensible or apparent authority to extend the invitation.[2]

§ 233. **Applications of General Rule.**—The general rule now under consideration has been applied to a variety of factual situations. The operator of an automobile has been held liable to his guest for injuries received by the guest as a result of the operator's violation of the speed laws[3] and as a result of the operator's falling asleep.[4] Applying brakes in such a way as to make them lock and bring the car to a sudden stop, thereby throwing off the guest,[5] and driving at about 35 miles per hour on a rough road in a

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tracks, which offered less danger. Annotation: 61 A.L.R. 1254, 1255.

For a case holding a verdict of gross negligence warranted where the driver tried to make a turn at an excessive speed, see Pepper v. Morrill (C. C. A. 1st) 24 F. (2d) 320, 57 A.L.R. 750.

[16] Annotation: 20 A.L.R. 1021, s. 26 A.L.R. 1427, 40 A.L.R. 1340, 47 A.L.R. 328, 51 A.L.R. 583, 61 A.L.R. 1257, and 65 A.L.R. 955.

As to respondeat superior generally, see infra, §§ 373 et seq.

[17] Paiewonsky v. Joffe, 101 N. J. L. 521, 129 A. 142, 40 A.L.R. 1335.

[18] Annotation: 20 A.L.R. 1021, s. 26 A.L.R. 1427, 40 A.L.R. 1340, 47 A.L.R. 328, 51 A.L.R. 583, 61 A.L.R. 1257, and 65 A.L.R. 955.

[19] Annotation: 20 A.L.R. 1021, s. 26 A.L.R. 1427, 40 A.L.R. 1340, 47 A.L.R. 328, 51 A.L.R. 583, 61 A.L.R. 1257, and 65 A.L.R. 955.

The doctrine was held inapplicable, however, where a mother, owning a car, consented to her daughter's taking the plaintiff in it to a skating party and the injury occurred in an attempt to put the car in the garage after returning. Annotation: 61 A.L.R. 1257.

[20] Annotation: 65 A.L.R. 955.

[21] Annotation 65 A.L.R. 955.

[1] Annotation: 20 A.L.R. 1021, s. 26 A.L.R. 1427, 40 A.L.R. 1340, 47 A.L.R. 328, 51 A.L.R. 583, 61 A.L.R. 1257, and 65 A.L.R. 955.

[2] Infra, §§ 394, 395.

[3] Beard v. Klusmeier, 158 Ky. 153, 164 S. W. 319, 50 L.R.A.(N.S.) 1100, Ann. Cas. 1915D, 342.

Annotation: 20 A.L.R. 1022, s. 26 A.L.R. 1427, 40 A.L.R. 1340, 47 A.L.R. 329, 51 A.L.R. 583, 61 A.L.R. 1257, and 65 A.L.R. 955.

[4] Annotation: 65 A.L.R. 956.

[5] Annotation: 61 A.L.R. 1258, and 65 A.L.R. 955.

storm[6] have been held to be acts of negligence warranting recovery. It has been held also that a finding was justified that the defendant did not use the reasonable care required toward his guest, where it appeared from the evidence that he was familiar with the premises and knew that he was approaching a grade crossing, and that although the whistle of an approaching train had been blown, an automatic bell was ringing, and he saw the train approaching a short distance away, he attempted to drive over the crossing and was hit by the train.[7] On the other hand, other alleged acts of negligence have been held not to be such.[8] For instance, a finding of negligence was held unwarranted, where the driver, proceeding at considerable speed, with the guest's acquiescence, was suddenly confronted with dogs jumping out from behind a parked car.[9] Similarly, merely turning his head to look at some horses, at the behest of his young son, while proceeding at ordinary speed behind other cars, was held, as a matter of law, not "heedlessness" or "reckless disregard of the rights of others," within the statute, so as to make the driver liable to his wife who was riding as a guest and was injured when the car bumped into the one in front.[10]

Voluntary drunkenness of the driver is no excuse for negligence and does not relieve him from exercising the degree of care required of a sober man under the same circumstances.[11]

Obviously, however, the negligence of the driver of the car and the freedom from contributory negligence of the guest must be established before the guest can recover.[12]

(b) GUESTS AT SUFFERANCE

§ 234. **Generally.**—The cases are not entirely in harmony regarding the liability of the owner or operator of a motor vehicle for injuries to permissive guests or guests at sufferance. There is a strong line of authority in favor of the view that the operator of an automobile owes to a guest at sufferance or licensee the same duty he owes to an invited guest. Accordingly, it is held that the owner or driver of an automobile owes a guest at sufferance the same duty he owes to an invited guest, namely, the duty of using reasonable care not to injure him.[13] It has been said that the only sensible and humane rule is that an owner and driver of an automobile owes a guest at sufferance the duty of using reasonable care so as not to injure him. The rule as to trespassers and licensees upon real estate, with all its niceties and distinctions, is not to be applied to one riding in an automobile at the invitation of, or with the knowledge and tacit consent of, the owner and operator of the automobile. The law exacts of one who puts a force in motion that he shall control it with skill and care in proportion to the danger created. This rule applies to a guest at sufferance as well as to a guest by invitation.[14]

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[6] Annotation: 61 A.L.R. 1259, and 65 A.L.R. 955.

[7] Avery v. Thompson, 117 Me. 120, 103 A. 4, L.R.A.1918D, 205, Ann. Cas. 1918E, 1122.

[8] **Merely jouncing a car in going slowly over a bump** on a rough road, so that a guest's head hit the top, was held not to be, of itself, negligence of any sort. Annotation: 61 A.L.R. 1259.

A finding that the driving of a car off a pavement and into a rut to avoid another car, and then immediately back to the pavement without stopping, as a result of which the car turned over, did not amount to negligence was held warranted. Annotation: 65 A.L.R. 956.

[9] Olson v. Hermansen, 196 Wis. 614, 220 N. W. 203, 61 A.L.R. 1243.

[10] Silver v. Silver, 108 Conn. 371, 143 A. 240, 65 A.L.R. 943, affirmed in 280 U. S. 117, 74 L. ed. 221, 50 S. Ct. 57.

[11] Powell v. Berry, 145 Ga. 696, 89 S. E. 753, L.R.A.1917A, 306.

[12] In Jacobs v. Jacobs, 141 La. 272, 74 So. 992, L.R.A.1917F, 253, where the provision of the Civil Code that any act of negligence or imprudence that causes injury to another obliges him who was at fault to pay for the injury was held applicable in the case of an invited guest, it was held that the driver of an automobile was not liable for injuries sustained by his guest, where it appeared that the driver had inquired about the condition of the thoroughfare before entering it and was informed that it was all right; that the car, while traveling at a moderate rate of speed on a prominent street in a city, ran into an open canal extending across the thoroughfare without any guard rail, barrier, red light, or other warning of danger; that the glare of an electric light between the driver and the canal prevented his seeing the danger until it was too late to stop while going at an ordinary speed; that the driver had never traveled over that route before and had no knowledge of the dangerous situation; and that the guest had traveled over the route several times, and was acquainted with the situation, but did not warn the driver or complain of the speed.

[13] Marple v. Haddad, 103 W. Va. 508, 138 S. E. 113, 61 A.L.R. 1248.

In some cases, however, involving an injury to a guest at sufferance riding in an automobile, a distinction has been made between the degree of care required in the operation of a car in which one is riding as an invited guest, and one in which the guest is merely a guest at sufferance.[15] In these cases it is generally held that the duty owed to the guest at sufferance is only to refrain from wantonly or wilfully injuring him.[16] Thus, where one was riding in a motor truck as an accommodation and without charge, it was held that he was a mere licensee and assumed all the risks of the carriage, except such as might result from wanton or intentional wrong or a failure to exercise due care to avert injury after the danger became apparent.[17] It is asserted that the fact that the licensee is an infant, even of tender years, will make no difference in the application of this rule.[18]

(3) Injuries Due to Condition of Car

§ 235. Generally.—The cases are not entirely in accord regarding the liability of the owner or operator of a motor vehicle for injuries to guests by the defective condition and equipment of the automobile.[19] It is held that a guest who comes upon the premises or enters a vehicle of another must take such premises or vehicle as he finds them and as it pleases the owner, in the exercise of his right of dominion over his own property, to maintain the same, provided, of course, such owner does not fail in the duty of informing or warning the guest of that which might be considered a trap or concealed defect, or does not, by any act of his, create a new danger.[20] Gross

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Annotation: 20 A.L.R. 1025, s. 26 A.L.R. 1428, 40 A.L.R. 1340, 47 A.L.R. 329, 51 A.L.R. 584, 61 A.L.R. 1260, and 65 A.L.R. 956.

[14] Annotation: 20 A.L.R. 1025, s. 26 A.L.R. 1428, 40 A.L.R. 1340, 47 A.L.R. 329, 51 A.L.R. 584, 61 A.L.R. 1260, and 65 A.L.R. 956.

[15] Annotation: 20 A.L.R. 1025, s. 26 A.L.R. 1428, 40 A.L.R. 1340, 47 A.L.R. 329, 51 A.L.R. 584, 61 A.L.R. 1260, and 65 A.L.R. 956.

[16] Annotation: 20 A.L.R. 1025, s. 26 A.L.R. 1428, 40 A.L.R. 1340, 47 A.L.R. 329, 51 A.L.R. 584, 61 A.L.R. 1260, and 65 A.L.R. 956.

It has been said in such cases that the act of the defendant in acceding to a request to ride possessed none of the elements of a contract and involved no element of invitation bringing it within the rule of law applicable to a passenger upon a railway train or a hired bus, or to cases of express or implied invitation which involve, as a consequence of the legal relationship thus established, the application of the rule of due care. The legal status of the plaintiff is that of a licensee, on whom the only legal obligation imposed is that of refraining from the perpetration of acts wantonly or wilfully injurious. Annotation: 20 A.L.R. 1025.

[17] Annotation: 20 A.L.R. 1025.

Evidence showing that the one riding on the motortruck for his accommodation was thrown therefrom when the car, which was traveling 20 or 25 miles an hour, in rounding a curve, turned 2 or 3 feet to the right to allow an automobile to pass, and hit a hole does not show that the driver was negligent in respect of the immediate and emergent duty presented by the actual conditions obtaining at the time of the accident. Annotation: 20 A.L.R. 1025.

[18] Annotation: 40 A.L.R. 1341.

[19] Marple v. Haddad, 103 W. Va. 508, 138 S. E. 113, 61 A.L.R. 1248; Cleary v. Eckart, 191 Wis. 114, 210 N. W. 267, 51 A.L.R. 576; O'Shea v. Lavoy, 175 Wis. 456, 185 N. W. 525, 20 A.L.R. 1008.

[20] Gifford v. Dice, 269 Mich. 293, 257 N. W. 830, 96 A.L.R. 1477.

Annotation: 20 A.L.R. 1029, s. 40 A.L.R. 1344, 47 A.L.R. 332, 51 A.L.R. 585, 61 A.L.R. 1264, and 65 A.L.R. 958.

An owner of an automobile is not liable to his father-in-law, riding with him as an invited guest, for an injury sustained when the machine turned over because of a defective spring breaking, although the car negligence, within the meaning of the guest statutes, cannot be predicated upon defects in the car.[1] It has been said that one who invites another to ride with him in his automobile does not guarantee to the guest a sound automobile; his duty extends only to refraining from increasing the danger which the guest assumes upon entering the automobile, or from adding a new danger.[2] Reasonable care for the safety of a guest commences only when he enters the automobile; the operator owes him no duty of prior inspection, the guest taking the automobile and driver as he finds them.[3] The mere fact that the car was equipped with defective brakes was held not to render the driver negligent toward a guest.[4] The facts that the windshield of the car in which defendant was taking plaintiff to the former's home was not equipped with a cleaner, and that it was dark and raining hard, were held not to indicate gross negligence.[5]

A line of authority, apparently at variance in spirit with the cases above discussed, exists.[6] According to this view, an invitation carries with it the assurance of some measure of security which the driver must make good by the exercise of active care; he owes the duty of exercising reasonable care in the operation and control of the car, in view of some known defective condition.[7] A charge of negligence predicated upon the car owner's knowledge that the car door was loose and not fastened, and upon his failure to advise the guest of such condition when inviting the latter to enter the car, was held properly alleged.[8] The negligence of the owner of an automobile in not having the accelerator thereon repaired, though he knew that the accelerator rod was out of alignment and would stick, and though he had been warned by different garage mechanics that it was dangerous to drive the car without having the accelerator repaired, was held to be the proximate cause of a collision occurring while a guest, whom the owner had invited to ride with him on a trip, was, at the instance of the owner, driving the car, when the accelerator stuck as the car reached the crest of a hill, causing it

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was a secondhand one and the spring had been repaired with old parts. O'Shea v. Lavoy, 175 Wis. 456, 185 N. W. 525, 20 A.L.R. 1008. The court held that the situation was analogous to a case of one invited to dine; that the legal relation was that of licensor and licensee; that in such cases the guest accepts the premises as he finds them, subject only to the limitation that the licensor must not set a trap or be guilty of active negligence; and that the broken spring in question did not constitute a trap. The court discussed cases dealing with the question of liability of an owner of an automobile for damages resulting to an invited guest by reason of the negligent management of the car and pointed out that the apparent conflict may be accounted for on the ground that in some states different degrees of care are recognized, while in others there is but one degree of care; the court refrained, however, from deciding the degree of negligence in the management of the car which would render the owner of an automobile liable for damages to an invited guest.

[1] Gifford v. Dice, 269 Mich. 293, 257 N. W. 830, 96 A.L.R. 1477.

Gross negligence or wilful and wanton misconduct on the part of the driver of an automobile, rendering him liable under a guest statute for injury to one riding with him as a guest, cannot be predicated upon the facts that he drove the car on a concrete pavement, knowing that one of the front tires was in a weakened condition by reason of being worn through the tread and part of the fabric lining, and that the injury was due to a "blow-out" of the tire, resulting in loss of control of the car and a collision. Ibid.

[2] Gifford v. Dice, 269 Mich. 293, 257 N. W. 830, 96 A.L.R. 1477; Cleary v. Eckart, 191 Wis. 114, 210 N. W. 267, 51 A.L.R. 576.

[3] Marple v. Haddad, 103 W. Va. 508, 138 S. E. 113, 61 A.L.R. 1248.

[4] Annotation: 20 A.L.R. 1029, s. 40 A.L.R. 1344, 47 A.L.R. 332, 51 A.L.R. 585, 61 A.L.R. 1264, and 65 A.L.R. 958.

Liability may not rest upon the driver of an automobile because of the failure of the brake to hold when going down a hill, where the failure to work was unexpected, where, upon the same trip, it had worked properly while descending a number of hills, and where the brake shoe had been adjusted two or three days before the accident. Annotation: 40 A.L.R. 1344.

[5] Annotation: 61 A.L.R. 1264.

[6] Annotation: 20 A.L.R. 1029, s. 40 A.L.R. 1344, 47 A.L.R. 332, 51 A.L.R. 585, 61 A.L.R. 1264, and 65 A.L.R. 958.

[7] Annotation: 20 A.L.R. 1029, s. 40 A.L.R. 1344, 47 A.L.R. 332, 51 A.L.R. 585, 61 A.L.R. 1264, and 65 A.L.R. 958.

[8] Annotation: 61 A.L.R. 1264.

to descend at a rapid rate of speed.[9] Evidence of driving with knowledge that the car's steering gear was worn and loose, together with speeding down a rough slope with a turn at the bottom, was held to justify submitting to the jury the question of the driver's negligence toward a guest.[10]

(4) Inexperience or Lack of Skill of Driver

§ 236. Generally.—While there is scant authority on the question of the liability of the owner or operator of a car for injuries to a guest by virtue of the inexperience or lack of skill of the driver, it seems clear, especially in view of statutory provisions which are in force in many jurisdictions, relieving a host from liability for injury to a guest in his automobile in the absence of gross negligence, that a host cannot be held liable for an injury to a guest resulting from the host's inexperience or lack of skill as a driver. In some of the cases reaching this conclusion the decision has been based on the ground that there was no breach of duty by the host, or that the guest accepted or assumed the risk; in others, recovery was denied on the ground of contributory negligence.[11] One accepting a gratuitous invitation to ride in an automobile "accepts" such skill as may be possessed by the driver in the handling of his car [12] and assumes whatever risks attend the degree of proficiency of such driver, and his usual and customary habit of driving, with which they are familiar.[13] Even though his want of skill was not known to the guest, and though the guest was a child of tender years, there is no liability where the driver exercised such skill as he possessed.[14]

The driver of an automobile owes a guest therein the same duty as he owes other users of the highway to keep a proper lookout, and failure to keep such lookout is not a risk assumed by the guest.[15]

(5) Effect of "Guest" Statutes

§ 237. Generally.[16]—Statutes which relieve the owner or operator of a motor vehicle of liability for injury to a guest unless he has been grossly negligent or guilty of wilful or intentional misconduct have been enacted in many states. These are commonly denominated "guest" statutes.[17] Many of the statutes except operation while intoxicated from the limitation.[18]

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[9] Annotation: 47 A.L.R. 332.

[10] Annotation: 61 A.L.R. 1264.

[11] Eisenhut v. Eisenhut, 212 Wis. 467, 248 N. W. 440, 250 N. W. 441, 91 A.L.R. 549.
Annotation: 91 A.L.R. 554.

A gratuitous guest in the automobile of a comparatively inexperienced driver could not hold him liable for injuries caused by his error of judgment in applying the brakes when driving over a light coating of gravel-covered hardpan in the road, so that the car skidded, when he felt a bump which he attributed to a deflated tire which he honestly believed required the stopping of the car as soon as possible. Cleary v. Eckart, 191 Wis. 114, 210 N. W. 267, 51 A.L.R. 576.

In Naudzius v. Lahr, 253 Mich. 216, 234 N. W. 581, 74 A.L.R. 1189, it was held that gross negligence in permitting an inexperienced person to drive an automobile would not render the owner liable under a statute exonerating him from liability for injury to a guest unless proximately caused by gross negligence or wilful and wanton misconduct, if the driver himself was guilty of no negligence or of only ordinary negligence.

[12] Cleary v. Eckart, 191 Wis. 114, 210 N. W. 267, 51 A.L.R. 576.

[13] Olson v. Hermansen, 196 Wis. 614, 220 N. W. 203, 61 A.L.R. 1243.
Annotation: 91 A.L.R. 555.

It has been held that the driver of an automobile, who acted in good faith and in accordance with his highest degree of skill in the emergency created by the conduct of two dogs in jumping from behind a standing car in front of his car, could not be held liable for the death of one of his guests and injury to another occasioned by the resulting accident, on the theory that he failed to exercise ordinary care in his management of the car. Olson v. Hermansen, 196 Wis. 614, 220 N. W. 203, 61 A.L.R. 1243.

[14] Eisenhut v. Eisenhut, 212 Wis. 467, 248 N. W. 440, 250 N. W. 441, 91 A.L.R. 549.

[15] Ibid.

[16] As to retrospective operation of statutes, see Statutes [Also 25 R. C. L. pp. 785 et seq.]

[17] See statute involved in Bookhart v. Greenlease-Lied Motor Co. 215 Iowa, 8, 242 N. W. 721, 82 A.L.R. 1359.

The so-called "guest" statutes are designed to relieve the owner of the consequences of ordinary negligence to his guest.[19] Where the guest, a minor child, is precluded from recovery, a parent cannot recover for loss of services and expenses occasioned by the injury.[20]

The variation in the terms of the statutes in the different states must be taken into consideration in determining upon the existence of the requisite degree of negligence.[1]

In some instances general statutes relating to negligence not expressly applying to guests have been involved in determining upon the liability to a guest. Speaking generally, statutes which prescribe rules of negligence are held to apply equally to guests as to other persons, and if the statute imposes a liability for the failure to exercise ordinary care, the owner or operator is liable to a guest where he fails to exercise such degree of care.[2]

Such statutes should not be extended by construction beyond the correction of the evils and attainment of the objects sought by them, but should not be so restricted as to defeat or impair those objects.[3]

§ 238. **Validity of Statutes.**—Statutes which merely limit liability of the owner or operator of the automobile by requiring a degree of negligence greater than ordinary negligence as a condition of the liability of the owner or operator are generally upheld.[4] At least, such a statute does not deprive persons injured subsequently to its enactment of property without due process.[5] Distinguishing between motor-propelled and other vehicles, and between gratuitous and paying passengers, does not make an arbitrary or unreasonable discrimination.[6]

The view has been taken, however, that the guest cannot, by statute, be deprived of all remedy against the owner or operator.[7] Such abolition violates a constitutional provision giving every man a remedy by due course of law for injury done him in his person or property.[8]

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[18] See statute involved in Bookhart v. Greenlease-Lied Motor Co. 215 Iowa, 8, 244 N. W. 721, 82 A.L.R. 1359, and that involved in Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A.L.R. 1327.

[19] Gifford v. Dice, 269 Mich. 293, 257 N. W. 830, 96 A.L.R. 1477.

[20] Shiels v. Audette, 119 Conn. 75, 174 A. 323, 94 A.L.R. 1206.

[1] **Gross negligence cannot be made** an element of liability for the death of a guest by the overturning of an automobile, where the statute requires proof of ordinary negligence only, in actions to recover damages for death. Flynn v. Lewis, 231 Mass. 550, 121 N. E. 493, 2 A.L.R. 896.

[2] Annotation: 20 A.L.R. 1021, s. 51 A.L.R. 583, 61 A.L.R. 1255, and 65 A.L.R. 954.

The driver of an automobile, who has invited a guest to ride with him, is not absolved from responsibility for negligence or imprudence merely because he is performing a gratuitous service, and although an invited guest, being a mere licensee, is not entitled to the consideration due by a carrier to a passenger for hire, he is, nevertheless, entitled to the benefit of the provision of the statute that any act of negligence or imprudence that causes injury to another obliges him who was at fault to pay for the injury; and it was held that the responsibility of the driver of an automobile for the safety of his guest is not limited to his duty to abstain from acts of gross or wilful negligence, but demands that he avoid the ordinary negligence or imprudence referred to in the statute. Jacobs v. Jacobs, 141 La. 272, 74 So. 992, L.R.A.1917F, 253.

[3] Chaplowe v. Powsner, 119 Conn. 188, 175 A. 470, 95 A.L.R. 1177.

[4] Silver v. Silver, 280 U. S. 117, 74 L. ed. 221, 51 S. Ct. 57, 65 A.L.R. 939, affirming 108 Conn. 371, 143 A. 240, 65 A.L.R. 943 (it was here upheld against the contention that it may be an unreasonable classification and that it deprived the guest of the equal protection of the law); Naudzius v. Lahr, 253 Mich. 216, 234 N. W. 581, 74 A.L.R. 1189 (valid even as against an infant—does not deprive him of property without due process).

Such a statute, being intended to discourage collusion and fraud in litigation, is one pertinent to public safety within a constitutional provision permitting the legislature to give immediate effect to acts immediately necessary for the preservation of the public peace, health, or safety. Naudzius v. Lahr, 253 Mich. 216, 234 N. W. 581, 74 A.L.R. 1189.

[5] Naudzius v. Lahr, 253 Mich. 216, 234 N. W. 581, 74 A.L.R. 1189.

[6] Ibid.

[7] Stewart v. Houk, 127 Or. 589, 271 P. 998, 272 P. 893, 61 A.L.R. 1236.

§ 239. **Who Is Guest.**—The question who is a guest within the contemplation of a statute fixing liability of the owner or operator of a motor vehicle for injury to a guest is largely a question for determination in the individual case. The fact that the person pays no compensation but is riding for pleasure upon invitation of the owner or operator gives him the status of a guest.[9] The compensation, however, which will take him out of this class need not be a money compensation,[10] nor need it pass from the passenger to the driver.[11] A prospective buyer of an automobile, who, at the invitation of a dealer, is riding therein for the sole purpose of ascertaining whether it complies with his requirements,[12] or a prospective purchaser of real estate, who, at the invitation of a real estate company, is riding in an automobile hired by it and used to carry prospective purchasers to and from the tract,[13] is not a guest within the meaning of these statutes. A high school student rightfully riding in a school bus is not a guest within the meaning of a statute defining a "guest" as a person who accepts a ride in any vehicle without giving compensation therefor.[14] An expectation of compensation, however, has been held insufficient to prevent one from being a guest.[15] The question sometimes resolves itself into one of fact for the determination of the jury[16] or of the trial court,[17] with which determination the reviewing court will ordinarily not interfere.[18]

Such a statute should not be extended by construction beyond the correction of the evils and attainment of the objects sought by it, nor should it be so restricted as to defeat or impair those objects.[19]

When the guest relationship begins depends upon the facts of the individual case. One whose fingers were injured in the door before the car was started was held to be a guest within the meaning of the statute.[20] On the other hand, one invited to get into an automobile and wait there until the owner had finished his dinner, when he would take her to her home, is not a guest, where she was injured when the door of the car fell off as she tried to open it to enter.[1]

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[8] Ibid.

[9] Shiels v. Audette, 119 Conn. 75, 174 A. 323, 94 A.L.R. 1206.

Annotation: 82 A.L.R. 1365, s. 95 A.L.R. 1180.

A child riding with his parent has been held to be a guest of such parent. Annotation: 82 A.L.R. 1367.

A minor was held not to be a guest where the one with whom the mother had placed him to board compelled him to accompany her on a journey in an automobile against the minor's objection. Annotation: 82 A.L.R. 1365.

[10] Annotation: 82 A.L.R. 1365.

The fact that the person was riding for no purpose of, or benefit to, the owner is noted in some of the cases in which the person was held to be a guest. Shiels v. Audette, 119 Conn. 75, 174 A. 323, 94 A.L.R. 1206.

[11] Annotation: 82 A.L.R. 1367, s. 95 A.L.R. 1180.

[12] Annotation: 82 A.L.R. 1365.

[13] Annotation: 82 A.L.R. 1365, s. 95 A.L.R. 1180.

[14] Annotation: 82 A.L.R. 1365, s. 95 A.L.R. 1180.

[15] Annotation: 82 A.L.R. 1365, s. 95 A.L.R. 1180.

A person transported in an ambulance without charge is a guest although it is expected that later he may, out of gratitude, make a donation to the organization which maintains the ambulance. Annotation: 82 A.L.R. 1365.

[16] Annotation: 82 A.L.R. 1365, s. 95 A.L.R. 1180.

[17] Chaplowe v. Powsner, 119 Conn. 188, 175 A. 470, 95 A.L.R. 1177.

[18] Ibid.

One having a pass to a theater, who makes an arrangement with a friend to share the pass and to use the latter's automobile, may be found to be a guest and so precluded from recovery of damages on account of the owner's negligent operation of the automobile while they are proceeding to the theater, although the situation is thus one of reciprocal hospitality. Ibid.

[19] Chaplowe v. Powsner, 119 Conn. 188, 175 A. 470, 95 A.L.R. 1177.

[20] Annotation: 82 A.L.R. 1365, s. 95 A.L.R. 1180.

§ 240. What Constitutes Negligence within the Statutes.—The negligence which amounts to a violation of the so-called guest statutes cannot be stated in any general way. The first subject of inquiry is the terms of the statute. Speaking generally, these statutes require a higher degree of care to avoid the charge of negligence than is required generally. In fact, this is their purpose.[2]

In the application of these principles to factual situations, the courts very rarely characterize the acts of the defendant as negligence as a matter of law. Certain things may amount to gross negligence or wilful and wanton misconduct within the meaning of the guest statutes. Whether or not there is such negligence as the statute requires is ordinarily a question for the jury.[3] With its conclusions the courts do not ordinarily interfere.[4] In some instances the courts hold as a matter of law that certain acts do not amount to such negligence as comes within the condemnation of the statutes now under consideration.[5]

While the terms "gross negligence" or "wilful and wanton misconduct" are not susceptible of exact meaning, they are not so uncertain as to render invalid an act in which they are used to define the degree of negligence.[6]

§ 241. —Gross Negligence, Wilful Misconduct.—Gross negligence, within the meaning of these statutes, has been variously defined— as "the want of slight diligence," as "an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others," and as "that want of care which would raise a presumption of the conscious indifference to consequences."[7] Again, it is stated to be the equivalent of "great negligence, aggravated negligence, or carelessness substantially greater than ordinary negligence," and so not necessarily to mean the total lack of any care.[8] Other authorities have taken it to mean such a degree of recklessness as approaches wanton and wilful misconduct[9] and seem to treat it as equivalent there-

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[1] Annotation: 82 A.L.R. 1367, s. 95 A.L.R. 1180.

[2] See supra, § 237.

[3] Annotation: 74 A.L.R. 1200, s. 86 A.L.R. 1147, and 96 A.L.R. 1481.

[4] Annotation: 74 A.L.R. 1200, s. 86 A.L.R. 1147, and 96 A.L.R. 1481.

[5] Annotation: 74 A.L.R. 1199, s. 86 A.L.R. 1146, and 96 A.L.R. 1480.

[6] Naudzius v. Lahr, 253 Mich. 216, 234 N. W. 581, 74 A.L.R. 1189.

[7] Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A.L.R. 1327, holding such a statute inapplicable as not being retroactive.

Annotation: 74 A.L.R. 1198, s. 86 A.L.R. 1145, and 96 A.L.R. 1479.

The test of gross negligence is not met where the defendant gave strict attention to his driving, no objection was made to the car's moderate speed, and its lights were burning brightly,—he having rightly assumed that the injured guest, whom he had requested to ride inside of his car, but who persisted in standing on the running board, would not project part of her body outward so that it might possibly come in contact with something at or near the edge of the road. Shaw v. Moore, 104 Vt. 529, 162 A. 373, 86 A.L.R. 1139.

Upon the ground that there was no evidence of a heedless and reckless disregard of the (back seat) guest's rights, where the owner and operator, without looking in that direction, reached back and slammed the rear door to just after the guest had entered the car, thereby catching the guest's fingers between the door and the body frame, a finding for the guest was reversed. Annotation: 74 A.L.R. 1201.

[8] Annotation: 74 A.L.R. 1199, s. 86 A.L.R. 1146, and 96 A.L.R. 1482.

Gross negligence is substantially and appreciably higher in magnitude and more culpable than ordinary negligence—an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. Shaw v. Moore, 104 Vt. 529, 162 A. 373, 86 A.L.R. 1139.

[9] Naudzius v. Lahr, 253 Mich. 216, 234 N. W. 581, 74 A.L.R. 1189.

Annotation: 74 A.L.R. 1198, s. 86 A.L.R. 1145, and 96 A.L.R. 1480.

To constitute gross negligence, there must be either a wilful intent to injure, or

to.[10] It is generally regarded as not amounting to such misconduct.[11]

Wantonness is by some courts regarded as something more than negligence and something less than wilful injury.[12]

The line of demarcation between gross negligence and "wilful negligence" is shadowy. Gross negligence "falls short of being such reckless disregard of probable consequences as is equivalent to a wilful and intentional wrong," while wilful negligence "involves the element of conduct equivalent to a so-called constructive intent." [13]

The following elements have been said to be necessary to characterize the injury, to a guest, as wanton or wilful: (1) Knowledge of a situation requiring the exercise of ordinary care and diligence to avoid injury to another; (2) ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand; and (3) the omission to use such care and diligence to avert the threatened danger when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another.[14] Mere misjudgment or carelessly exercised judgment does not amount to such misconduct.[15]

§ 242. —Reckless Operation, etc.—Numerous statutes provide that a guest shall have no right of recovery against an owner or driver except for injuries resulting from reckless operation, etc.[16] The phrase "heedlessness or his reckless disregard" must be construed to mean the owner's or operator's "heedlessness and his reckless disregard of the rights of others." [17] A high degree of negligence is not enough to amount to such heedlessness or reckless disregard of the rights of others.[18] The words are not restricted to some wilful or intentional act, but include, also, conduct evincing an indifference to, or heedless disregard of, obvious duty and of probable consequences and dangers.[19] Such "reckless operation" has been said to mean "proceeding without heed of or concern for consequences," to imply "no care, coupled with disregard for consequences," and it has been said that it may or may not include wilfulness or wantonness.[20] Again, it is said that some act which would be pronounced by every person to be an utter indif-

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that reckless and wanton disregard of the rights and safety of another or of his property and that willingness to inflict injury which the law deems equivalent to an intent to injure. Bentson v. Brown, 186 Wis. 629, 203 N. W. 380, 38 A.L.R. 1417.

[10] Annotation: 74 A.L.R. 1198, s. 86 A.L.R. 1145, and 96 A.L.R. 1480.

[11] Annotation: 74 A.L.R. 1198, s. 86 A.L.R. 1145, and 96 A.L.R. 1480.

[12] Annotation: 74 A.L.R. 1198, s. 86 A.L.R. 1145, and 96 A.L.R. 1480.

[13] Annotation: 74 A.L.R. 1198, s. 86 A.L.R. 1145, and 96 A.L.R. 1480.

Without attempting any general observation of what is meant by the words "gross negligence or wilful and wanton misconduct" of the owner or operator such as would render him liable to the guest other than stating that facts lifting the owner's faults above ordinary negligence must be set out, it has been held that the owner's act in intrusting the car's operation, while he was in it, to his seventeen-year-old son, who was alleged to be inexperienced, unskilful, and incompetent was not of itself gross negligence; and that even if gross negligence could be predicated upon so intrusting the car to his son, such gross negligence was not charged to be the proximate cause of the guest's injury, which was said to be caused by the boy's ordinary negligence in losing control of the car. Naudzius v. Lahr, 253 Mich. 216, 234 N. W. 581, 74 A.L.R. 1189.

[14] Annotation: 74 A.L.R. 1198, s. 86 A.L.R. 1145, and 96 A.L.R. 1480.

[15] Annotation: 74 A.L.R. 1198, s. 86 A.L.R. 1145, and 96 A.L.R. 1480.

[16] **Under the Connecticut statute,** the guest is not permitted to recover against the owner or operator "unless such accident shall have been intentional on the part of said owner or operator or caused by his heedlessness or his reckless disregard of the rights of others." Silver v. Silver, 108 Conn. 371, 143 A. 240, 65 A.L.R. 943 (affirmed in 280 U. S. 117, 74 L. ed. 221, 50 S. Ct. 57, 65 A.L.R. 939.

[17] Annotation: 74 A.L.R. 1199, s. 86 A.L.R. 1146, and 96 A.L.R. 1480.

[18] Annotation: 74 A.L.R. 1199, s. 86 A.L.R. 1146, and 96 A.L.R. 1480.

[19] Annotation: 74 A.L.R. 1199, s. 86 A.L.R. 1146, and 96 A.L.R. 1480.

[20] Annotation: 74 A.L.R. 1199, s. 86 A.L.R. 1146, and 96 A.L.R. 1480.

ference to the guest's safety must be shown.[1] The words "reckless disregard of the rights of others" have been held not to relieve from liability for injury caused when the owner or operator voluntarily does an improper or wrongful act or, with knowledge of existing conditions, voluntarily refrains from doing a proper and prudent act, under circumstances such that his action, or his failure to act, evinces an entire abandonment of any care, and a heedless indifference to results which may follow and he recklessly takes the chance of an accident happening without intent that any shall occur.[2]

§ 243. Application to Facts.—The foregoing principles apply to excessive speed;[3] dozing while driving;[4] driving with the knowledge of mechanical defects;[5] lack of control;[6] failure to observe;[7] failure to stop or slow down;[8] operating without lights;[9] operating in wrong part of road or outside it,[10] especially on a curve or turn in the road;[11] acts and conduct at railroad crossings[12] and intersections;[13] passing other cars on the road;[14] driving in fog, ice, rain, or snow,[15] or when blinded by glare of lights or sun.[16]

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[1] Annotation: 74 A.L.R. 1199, s. 86 A.L.R. 1146, and 96 A.L.R. 1480.

[2] Annotation: 74 A.L.R. 1199, s. 86 A.L.R. 1146, and 96 A.L.R. 1480.

[3] Annotation: 74 A.L.R. 1200, s. 86 A.L.R. 1147, and 96 A.L.R. 1481.

Gross negligence has been found as a matter of law by the court from driving at a prohibited rate of speed at an intersection and failing to turn. Annotation: 74 A.L.R. 1200.

A speed of 50 miles an hour was regarded as not evidence of recklessness in and of itself; and it was said that the defendant, himself injured, had as much at stake as the guest where the car was traveling down a slight incline and went into a pile of snow at the side of the road. Annotation: 86 A.L.R. 1157, s. 96 A.L.R. 1491.

[4] **It has been asserted that to constitute gross negligence in falling asleep while driving,** there must be such a prior warning of the likelihood of sleep that continuing to drive would constitute reckless disregard of circumstances. It has been held as a matter of law in some cases that gross negligence is shown by a showing that the driver of the car was asleep, without any further explanation. Annotation: 86 A.L.R. 1147, s. 96 A.L.R. 1481.

Wilful and wanton misconduct was held to be shown where the guest had already aroused the defendant after he had fallen asleep at the wheel and almost run into a safety zone, and then, shortly afterwards, he again dozed off and ran into another one. Annotation: 86 A.L.R. 1147, s. 96 A.L.R. 1481.

But a person's act in operating his car while asleep was said to make him no more accountable than he would have been had he been suddenly seized with a fit of epilepsy, where the fact that he was tired and facing the east sun and went to sleep was held not to raise any negligence there may have been to the level of recklessness, the car having apparently got out of his control after hitting some small clods in the road. The court added, however, that it did not decide that there might not be facts and circumstances in some other case amounting to recklessness because the driver went to sleep at the wheel. Annotation: 86 A.L.R. 1147, s. 96 A.L.R. 1481.

A finding that one who had been driving alone most of the day and was pretty tired and yawned a good deal was guilty of reckless misconduct in dozing off shortly before midnight when his car swerved to the wrong side of a street was upheld. Annotation: 86 A.L.R. 1147, s. 96 A.L.R. 1480.

[5] Annotation: 86 A.L.R. 1148, s. 96 A.L.R. 1482.

Operating a car with knowledge that its brakes were so defective that they would not work and that the steering apparatus was so worn and loose as to be liable to cause loss of control, especially if the car should be driven at any considerable speed, was the ground upon which a finding in a guest's favor of heedless or reckless disregard of her rights was held sustained where the court regarded it as doubtful whether the evidence as to speed, lookout, control, and collision with a pole would warrant a recovery apart from the other consideration. Annotation: 86 A.L.R. 1148.

Some cases apply the rule that the guest accepts the car in its condition at the time, and cannot recover for injuries resulting from defects therein. Gifford v. Dice, 269 Mich. 293, 257 N. W. 830, 96 A.L.R. 1477, holding that gross negligence or wilful and wanton misconduct on the part of the driver of an automobile, so as to render him liable under a guest statute for injury to one riding with him as a guest, cannot be predicated upon the facts that he drove the car on a concrete pavement, knowing that one of the front tires was in a weakened condition by reason of being worn through the tread and part of the fabric lining, and that the injury was due to a "blow-out" of the tire, resulting in loss of control of the car and a collision.

[6] Annotation: 86 A.L.R. 1148, s. 96 A.L.R. 1483.

The act of a driver who was accustomed only to using a car of a different model in using the hand throttle in operating a car of standard control was held not wilful or wanton. Annotation: 86 A.L.R. 1148, 1149.

Gross negligence was held not shown, and accordingly a judgment against a host was reversed, where he drove partly off the right side of a road in rounding a curve at moderate speed, whereupon he turned the car sharply to the left and then again to the right, but it landed in the ditch at the left, the court observing that he was probably an inexperienced driver, that the car's quick movements apparently alarmed him, and that his excessive concern magnified the danger, so that he lost his head, but that the result was inadvertent. Annotation: 86 A.L.R. 1149.

[7] Annotation: 86 A.L.R. 1149, s. 96 A.L.R. 1484.

Recklessness of a driver who paid more attention to a young lady at his side than to traffic, as well as being otherwise careless, was held established. Annotation: 86 A.L.R. 1149.

Neither a speed of 45 miles an hour nor failure to see in the highway at night a trailer with which the defendant's car collided was regarded as gross negligence or wilfulness or wantonness. Annotation: 86 A.L.R. 1150.

Failure to look back before slamming a rear door and failure to observe a car in front, by reason of turning to look at some horses, were held respectively not to constitute reckless operation. Silver v. Silver, 108 Conn. 371, 65 A.L.R. 943, 143 A. 240 (affirmed in (1929) 280 U. S. 117, 74 L. ed. 221, 50 S. Ct. 57, 65 A.L.R. 939).

[8] Annotation: 86 A.L.R. 1150, s. 96 A.L.R. 1485.

Upon the ground that the test of gross negligence was not met, a verdict for a guest was reversed and judgment ordered for the defendant where he failed to stop his car, as did the driver of a truck coming from the opposite direction, but tried his best to get his left wheels out of a frozen rut on the left of the road and into one on the right. Annotation: 86 A.L.R. 1150.

[9] Annotation: 86 A.L.R. 1150.

Driving without headlights at over 40 miles an hour in city streets on a wet night against the repeated protests of guests, giving more attention to a young lady at his side than to traffic, and running the car 100 feet without control after slightly hitting a car at an intersection were held to constitute, on the driver's part, an indifference to consequences which might befall the guests. Annotation: 86 A.L.R. 1150.

[10] Annotation: 86 A.L.R. 1150, s. 96 A.L.R 1486.

[11] Annotation: 86 A.L.R. 1151, s. 96 A.L.R. 1487.

A guest's recovery was reversed, and judgment for the defendant ordered, where neither the defendant nor the guest saw a curve, the defendant having apparently become confused and misled, at dusk, by the lights of an oil station. Annotation: 86 A.L.R. 1152.

Recklessness, being an exceptional case under the statute, was held not shown where the car in question was driven up a long and steep hill at about midnight at a speed of 35 to 40 miles an hour, or possibly 45, to a point where there was a sharp curve, where it sideswiped a car coming down the hill. Annotation: 86 A.L.R. 1152.

[12] Annotation: 86 A.L.R. 1152, s. 96 A.L.R. 1488.

Making no effort to stop a car going 30 to 35 miles an hour when 50 or 60 feet from a railway crossing, with a train coming at a distance of only 100 to 150 feet to the left, to which the guest called the driver's attention, was held not statutory misconduct. Annotation: 86 A.L.R. 1152, s. 96 A.L.R. 1488.

The driver's noncompliance with the guest's request to slow down before making a turn to cross a railroad track, or else stop and let him out, was held not evidence of wilfulness or wantonness, and his driving faster than the rate permitted in the business and residential section of a hamlet was said not to constitute wilful and wanton misconduct where the car made the turn, but something, which appears to have been a flat tire, happened to make the driver lose control at the crossing. Annotation: 86 A.L.R. 1152, s. 96 A.L.R. 1488.

[13] Annotation: 86 A.L.R. 1153, s. 96 A.L.R. 1488.

Slowing up, without stopping in obedience to a stop sign, at a crossing where there was not much traffic was held not gross negligence. Annotation: 86 A.L.R. 1143, s. 96 A.L.R. 1488.

A driver who relied on his having the right of way at an intersection and who therefore made no effort to stop in obedience to a stop sign, but slowed down to nearly 45 miles an hour upon seeing a car on his left, which slowed down almost to a stop and then started again with change of gears, was held at most negligent, but not guilty of wilful or wanton misconduct. Annotation: 86 A.L.R. 1154, s. 96 A.L.R. 1488.

Mere failure to turn either way, upon reaching an intersecting highway, where the road on which the car had come went no farther, but the driver apparently did not know that until within a very short distance, was held not recklessness where the car had been driven at from 30 to 35 miles an hour at about midnight, and there was no evidence of any defect in the car, or that the lights and brakes were not working, or that the driver did not do all in his power to avoid running into the ditch. Annotation: 86 A.L.R. 1154, s. 96 A.L.R. 1488.

[14] Annotation: 86 A.L.R. 1154, s. 96 A.L.R. 1490.

Permitting a jury to find a driver reckless in passing other cars on a straight, smooth, graveled road at 40 to 45 miles an hour was held prejudicial. Annotation: 86 A.L.R. 1154, s. 96 A.L.R. 1490.

[15] Annotation: 86 A.L.R. 1156, s. 96 A.L.R. 1491.

A judgment for a guest was reversed, and judgment directed for the defendant, where the car's rear wheels skidded on the ice into a trailer attached to a poorly lighted truck, which the defendant was trying to pass at a cut under a railroad on a dark and stormy morning, snow and sleet having formed on his windshield, which was equipped only with a wiper that worked by hand. Annotation: 86 A.L.R. 1156, s. 96 A.L.R. 1491.

While there was considered to be a reasonable basis for the conclusion that the defendant knew the conditions which would probably confront him upon returning late at night over a road which took a sharp turn and upon which some patches of snow turned to ice in wet places, and where there was evidence that he drove at considerable

g. Passengers for Hire

§ 244. Generally.—A motor vehicle common carrier is liable to all the duties and obligations of any common carrier.[17] Thus, it is held that one who operates a sight-seeing automobile over regular routes in a city, which he invites the general public to patronize for hire, owes his patrons the duty of exercising, in the operation of the vehicle, the highest degree of care consistent with the proper transaction of the business.[18]

h. Trespassers

§ 245. Generally.—The doctrine that one owes a trespasser only the duty of refraining from inflicting wanton or wilful injury upon him[19] is applied to automobile cases. Liability does result where there is wilful or wanton conduct on the part of the operator.[20]

§ 246. Children.—The doctrine that one owes a trespasser only the duty of refraining from inflicting wanton or wilful injury upon him has been applied to automobile cases where children have been injured, as, for example, children playing about or upon automobiles.[1] The age of the minor is a factor to be considered. An intelligent boy about fifteen years of age who is accustomed to street traffic and who falls under a wheel and is injured while undertaking to board a passing motor truck moving at a speed of from 6 to 10 miles per hour is a conscious trespasser and responsible for his own negligence, unless the driver of the motorcar wilfully and wantonly failed to protect him after he had learned of his peril.[2] In the case of very young children the care required is increased.[3]

speed over it without any chains, the trial court's finding in a guest's favor was held to reflect only a high degree of negligence, and not enough to warrant a recovery. Annotation: 86 A.L.R. 1156, s. 96 A.L.R. 1491.

[16] Annotation: 86 A.L.R. 1157, s. 96 A.L.R. 1491.

There was held to be no evidence of wilful and wanton misconduct or gross negligence where the defendant was apparently blinded by the glaring lights of another car in rounding a curve at between 20 and 25 miles an hour and could not make the turn. Annotation: 86 A.L.R. 1157, s. 96 A.L.R. 1491.

A ruling that a driver who was suddenly blinded by the sun when rounding a left curve on a slight upgrade at moderate speed and ran into an embankment at the left was not grossly negligent was upheld. Annotation: 86 A.L.R. 1157, s. 96 A.L.R. 1491.

[17] See generally Carriers [also 4 R. C. L. p. 521]; Motor Transportation Companies.

[18] Hinds v. Steere, 209 Mass. 442, 95 N. E. 844, 35 L.R.A.(N.S.) 658.

[19] See Negligence [Also 20 R. C. L. p. 1].

[20] Iaconio v. D'Angelo, 104 N. J. L. 506, 142 A. 46, 58 A.L.R. 614.

Annotation: 58 A.L.R. 617.

To force anyone from a rapidly moving automobile is to subject him to hazards more or less serious; such an act, therefore, if the conditions are known, is malicious and wrongful. Iaconio v. D'Angelo, 104 N. J. L. 506, 142 A. 46, 58 A.L.R. 614.

[1] Annotation: 1 A.L.R. 1385.

A chauffeur who, on finding several children playing about and on his motor truck, ordered them to get off, looked around to see what they had done so, and, hearing the call that they were off, started up his car, whereupon a child who was on the left or far side of the car fell off and was injured, was held not wanting in reasonable care, unless he knew that the child was on the car, in which case he should have given her time to get off and should have waited until she did get off. Annotation: 1 A.L.R. 1386.

[2] Gamble v. Uncle Sam Oil Co. 100 Kan. 74, 163 P. 627, L.R.A.1917D, 875, wherein the evidence was held insufficient to sustain a finding that the driver of a motor truck who knew that a boy was clinging to the truck was chargeable with wilful and wanton neglect to protect him where the testimony failed to show that the driver knew that the boy had been unable to find support for his feet and was holding on entirely by his hands, and it did not appear that the driver knew that he was in danger or that, if he saw him, there were any signs of distress upon his face.

[3] **Where the owner of an automobile, upon returning to his car, found an infant four and one-half years of age thereon,** and twice drove the infant from the car, the owner was held not thereby absolved from further duty towards such infant. Under such circumstances, when the child still remained in close proximity to the car, the driver was required to exercise reasonable care to avoid injury to the child. Ziehm v. Vale, 98 Ohio St. 306, 120 N. E. 702, 1 A.L.R. 1381, wherein the operator of the car contended that he was not liable unless he actually knew that the child was on the run-

Here again, the fundamental rule that the negligence, to be actionable, must be the proximate cause of the injury applies.[4]

§ 247. **—Attractive Nuisance Doctrine.**—It is generally held that the attractive nuisance doctrine cannot be extended to include motor trucks passing through the streets, upon which children may be attracted to catch rides.[5] Thus, an electric delivery truck which the driver had left standing in the street with power off and brakes set while he carried some parcels to a house, and with which children had not previously been known to meddle, was held not to be an attractive nuisance so as to render the owner liable to a child who got into it and turned on the power, and was injured in getting off.[6] It has been held, however, that the principle of nonliability does not apply where the statical condition of the premises is made perilous by the active and negligent operation thereof by the owner.[7]

i. Persons on Running Board or Outside Body of Car

§ 248. **Generally.**—In determining the liability of the owner or operator of a car for injuries inflicted upon one riding on the running board or other place outside of the body of the car, it is of importance to determine whether the person injured was a trespasser or a guest, and to determine whether or not the driver of the motor vehicle had knowledge of the presence of such person. A person permitted to ride on the running board is not a mere trespasser;[8] the duty rests on the driver not to expose him to danger of injury.[9]

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ning board of the car at the time he started it or while he was running it forward. He took the position that after driving the child away from the car, there devolved no further duty upon him, and that no obligation rested upon him to see that the child remained away. But both the trial court and the supreme court refused to apply the principle of nonliability as requested and imposed upon the operator of the car the obligation to use ordinary care if the circumstances would apprise him, as an ordinarily prudent man, that a child of four and a half years, under childish impulses, would renew his attempt to get upon the running board of the automobile.

[4] **The proximate cause of injury to a child** by the starting, by other children, of an electric delivery wagon left momentarily standing in the street by the driver when entering a house to deliver packages, without removing the switch, is the act of such children, and not the failure to remove the switch. Jackson v. Mills Baking Co. 221 Mich. 64, 190 N. W. 740, 26 A.L.R. 906.

[5] Gamble v. Uncle Sam Oil Co. 100 Kan. 74, 163 P. 627, L.R.A.1917D, 875.

In Gamble v. Uncle Sam Oil Co. 100 Kan. 74, 163 P. 627, L.R.A.1917D, 875, which was an action brought by a boy to recover for injuries sustained while trying to board a moving motor truck, the court refused to apply the attractive nuisance doctrine and held that an ordinary motor truck moving along a public street could not be regarded as an attractive or alluring vehicle to an intelligent boy about fifteen years of age who is accustomed to the traffic of the street.

It is not actionable negligence for the driver of an auto truck standing at the curb of a city street to call "Hey, there," as a warning to children congregated about such truck for the purpose of procuring pieces of ice which had dropped therefrom into the street, where, in addition to such act of claimed negligence, it is averred that as a result of such warning and similar warnings on previous occasions, the plaintiff, a child five years of age, and other children with her near the truck, were put in fear of the driver, and upon his approach would run away from the truck, although upon the occasion in question the plaintiff, in crossing the street toward her home, was struck by a passing automobile. The doctrine of attractive nuisance has no application under the facts here presented. Baker-Evans Ice Cream Co. v. Tedesco, 114 Ohio St. 170, 150 N. E. 745, 44 A.L.R. 430.

[6] Jackson v. Mills Baking Co. 221 Mich. 64, 190 N. W. 740, 26 A.L.R. 906.

The attractive nuisance doctrine is one upon which there has been a remarkable diversity of opinion, not only as to whether the doctrine should be recognized or not, but also, in jurisdictions where it has been accepted, as to the conditions under which it is applicable. See Negligence [Also 20 R. C. L. p. 79, §§ 70 et seq.].

[7] Ziehm v. Vale, 98 Ohio St. 306, 120 N. E. 702, 1 A.L.R. 1381.

[8] Annotation: 80 A.L.R. 554.

A traffic ordinance making it unlawful for any person to be upon the running board of a motor vehicle while such vehicle is in motion may be violated by riding on the running board of a truck while in a private driveway used by the public with the consent and invitation of the owner for the purpose of delivering goods on the premises. Crossler v. Safeway Stores, 51 Idaho, 413, 6 P. (2d) 151, 80 A.L.R. 463.

Annotation: 80 A.L.R. 469.

[9] Annotation: 80 A.L.R. 554.

Where the car is driven by an employee of the owner, who, acting without the scope of his employment, permits another to ride on the car, the employee is not liable for an injury resulting to such person when he is dismounting.[10]

As is true of many questions of negligence, the existence of negligence in this situation is for the determination of the jury.[11]

j. Persons Coasting in Street

§ **249. Generally.**—It is generally held that the fact that a person who was injured while coasting was pursuing this sport on a public street will not necessarily preclude a recovery if he was not guilty of contributory negligence, and if negligence by another, causing the injury, is shown.[12] It is held that where the driver of a motor vehicle is aware of the presence of children coasting on a hill, he is bound to exercise unusual care and watchfulness.[13] The questions of negligence and contributory negligence were held for the jury, where the plaintiff's sled was traveling slowly on the proper side of the street and was run into at night by the defendant's automobile, which he turned on the wrong side, as he testified, to avoid objects on the road which he took for pedestrians.[14]

E. Measure of Care Required as to Particular Matters

1. In General

§ **250. Generally.**—The question of negligence is often dependent upon care with reference to particular matters such as the equipment of the automobile, the speed at which it was driven, etc. In the present subdivision such matters will be considered.

2. Equipment

§ **251. Generally.**[15]—While the owner of a motor vehicle does not, at common law, owe an absolute duty to other users of the highway that his vehicle shall be in a safe and proper condition,[16] he is bound to use reasonable care to see that his vehicle is in such condition, and is generally held liable for an injury which is shown to have resulted from the failure to do so.[17]

Statutes frequently regulate the condition of the equipment of motor vehicles with a view to avoiding danger to persons in the car or on the highway; in other words, they require safe equipment.[18] The defective equipment, however, must be the proximate cause of the injury in order that liability shall arise.[19]

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[10] Zampella v. Fitzhenry, 97 N. J. L. 517, 117 A. 711, 24 A.L.R. 666.
Annotation: 80 A.L.R. 554.

[11] Annotation: 80 A.L.R. 557.

[12] Terrill v. Virginia Brewing Co. 130 Minn. 46, 153 N. W. 136, L.R.A.1915E, 1028, Ann. Cas. 1917C, 453; Lynch v. Public Serv. Corp. 82 N. J. L. 712, 83 A. 382, 42 L.R.A. (N.S.) 865.
Annotation: 20 A.L.R. 1433.

[13] Annotation: 20 A.L.R. 1435.

[14] Idell v. Day, 273 Pa. 34, 116 A. 506, 20 A.L.R. 1429.

[15] **The effect of defective equipment** upon the liability to a guest is discussed in other sections. See supra, §§ 235, 243.

[16] Phillips v. Britannia Hygienic Laundry Co. [1923] 1 K. B. 539, 12 B. R. C. 418—Div. Ct. affirmed in [1923] 2 K. B. 832, 12 B. R. C. 437, note,—C. A.
Annotation: 79 A.L.R. 1218.

In Halverson v. Blosser, 101 Kan. 683, 168 P. 863, L.R.A.1918B, 498, where the defendant loaned his automobile, which had a broken muffler, it was held that he was not liable for an injury sustained when a horse became frightened at the noise of the car while the borrower was using it and overturned the surrey in which the plaintiff's wife was riding.

[17] Annotation: 79 A.L.R. 1218.

[18] Phillips v. Britannia Hygienic Laundry Co. [1923] 1 K. B. 539, 12 B. R. C. 418—Div. Ct. affirmed in [1923] 2 K. B. 832, 12 B. R. C. 437.

[19] **The absence of a reflective signal** required by statute to be on the rear of a motor truck is not the proximate cause of a

§ 252. **Defective Brakes.**[20]—The fact that the brakes of an automobile are defective undoubtedly is a material element in the determination of the question of negligence in a case involving a collision with or by such machine, at least, where the driver knew, or should, by the exercise of proper care, have known, of the defect.[1]

Statutes in some states make provisions requiring good and sufficient brakes on automobiles. Failure to comply with such provisions generally renders the owners liable for injuries or damages resulting, where the inadequacy of the brakes is the proximate cause.[2] It is otherwise where the defective brakes are not the proximate cause of the injury.[3] There is little authority dealing with the sufficiency of compliance with provisions regulating brakes.[3a]

Liability, in cases where liability exists, is, of course, based upon the driver's negligence in operating a car with defective brakes.[4] The fact that the driver was acting in an emergency is no excuse for negligence where the injury could have been avoided had the brakes been in good condition.[5]

On the other hand, the mere failure of brakes to function properly is

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collision of an automobile with the truck on a dark and foggy evening while it was standing on the paved portion of the highway, where the distance at which such signal would have been visible was less than that required to bring the automobile to a stop. Walker v. Kroger Grocery & Baking Co. 214 Wis. 519, 252 N. W. 721, 92 A.L.R. 680.

[20] As to liability of manufacturer or seller, see infra, § 350.

[1] Annotation: 14 A.L.R. 1339, s. 63 A.L.R. 398.

The court observed in Davis v. Hareford 156 Ark. 67, 245 S. W. 833 (certiorari denied in 262 U. S. 745, 67 L. ed. 1211, 43 S. Ct. 521, writ of error dismissed in 265 U. S. 571, 68 L. ed. 1184, 44 S. Ct. 458), an action to recover damages for personal injuries resulting from a collision between a train and the automobile in which plaintiff was riding, that evidence that the emergency brake on the automobile was defective would tend to show that the plaintiff was guilty of contributory negligence in using the car in that condition.

The proximate cause of an injury in a collision at a railroad crossing was held to be the striking of the automobile by the train, and not a defective emergency brake on the automobile, in Davis v. Hareford, 156 Ark. 67, 245 S. W. 833 (certiorari denied in 262 U. S. 745, 67 L. ed. 211, 43 S. Ct. 521, writ of error dismissed in 265 U. S. 571, 68 L. ed. 1184, 44 S. Ct. 458).

[2] Southall v. Smith, 151 La. 967, 92 So. 402, 27 A.L.R. 1194; Allen v. Schultz, 107 Wash. 393, 181 P. 916, 6 A.L.R. 676.

Annotation: 63 A.L.R. 399; 12 B. R. C. 442.

The driver of an automobile on which the brakes are defective is negligent in approaching a road intersection where a car is stalled in the middle of the street, with a blind corner at his right, without slackening his speed or having his car under control, so as to be liable for injury caused by collision with the stalled car, which becomes necessary by the emergence of another machine from the intersecting street. Southall v. Smith, 151 La. 967, 92 So. 402, 27 A.L.R. 1194.

[3] **The manner of driving an automobile, and not the defective condition of its brakes, is,** as a matter of law, the proximate cause of injury to a pedestrian, where the automobile was being driven at a speed of about 30 miles an hour, in violation of a city ordinance, and the driver, finding, on applying the brakes with a view to keeping out of the way of an approaching street car, that he could not stop before reaching the street car track, stepped on the gas, crossed the track ahead of the street car, and ran over the curb on to the parking against a fire hydrant, which broke off and was thrown against the pedestrian. Eklof v. Waterston, 132 Or. 479, 285 P. 201, 68 A.L.R. 1002.

[3a] Annotation: 16 B. R. C. 296.

A motor vehicle having two brakes, a handbrake and a footbrake operating on the same brake drum on the rear wheel, has been held to have two independent brakes within the meaning of a statute requiring two independent brakes in good working order and of such efficiency that the application of either to the motor car shall cause two of its wheels on the same axle to be so held that the wheels shall be effectually prevented from revolving. Bowen v. Wilson [1927] 1 K. B. 507, 16 B. R. C. 290.

[4] Southall v. Smith, 151 La. 967, 92 So. 402, 27 A.L.R. 1194, wherein it was held that the driver of an automobile on which the brakes were defective was negligent in approaching a road intersection where a car was stalled in the middle of the street, with a blind corner at his right, without slackening his speed or having his car under control, so as to be liable for an injury caused by a collision with the stalled car, which became necessary by the appearance of another machine from the intersecting street.

[5] Allen v. Schultz, 107 Wash. 393, 181 P. 916, 6 A.L.R. 676.

It has been said that one who operates on the streets of a city such a dangerous instrumentality as an automobile is bound to take notice that he may be called upon to make emergency stops, and that it is negligence on his part not to keep the automobile in such condition that such stops are possible. Ibid.

not conclusive of the driver's negligence. It seems that where the brakes on an automobile have previously functioned properly, but suddenly fail to respond, their failure does not render the owner guilty of negligence or contributory negligence, unless he had knowledge of the defective condition.[6] Nor is driving on a public highway an automobile with defective brakes, contrary to the provisions of the statute, negligence per se which will render the driver absolutely liable for resulting injuries, regardless of circumstances.[7]

§ 253. Defective Lights. — It is practically a universal requirement that automobiles traveling on the streets and highways at night shall be equipped with lights.[8] Failure to comply with the statute in this regard is negligence,[9] or evidence of negligence, according to the view which prevails in the jurisdiction generally.[10]

§ 254. Defective Wheels, Axles, or Tires.—Accidents are frequently caused by defects in wheels, axles, or tires.[11] General provisions against the operation of defective motor cars and all the appliances or fittings thereof would seem to apply to wheels, axles, and tires, thereby making the owner or driver of the motor vehicle liable for damages caused because of such a defect.[12] But, as in the case of brakes,[13] defects in such parts are not conclusive of the driver's negligence unless he knew of such defects or was negligent in that respect,[14]—that is, in order to hold the owner liable, there must be proof of negligence.[15] For instance, the owner of a motor vehicle is not, on this ground, liable for damages caused when the wheel of his motor vehicle, which had recently been overhauled by a competent firm, came off, owing to a latent defect in an axle of which the owner had no knowledge.[16] And the doctrine of res ipsa loquitur is inapplicable in an action based on the reckless operation of an automobile which overturned, injuring its occupants, where, after the accident, a front tire was found to have blown out.[17]

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[6] Puhr v. Chicago & N. W. R. Co. 171 Wis. 154, 176 N. W. 767, 14 A.L.R. 1334.

Annotation: 12 B. R. C. 444.

For example, it was decided that if one, knowing of an approaching train drove his automobile toward a railroad crossing with the intention of stopping to let the train pass, he would not be guilty of any negligence if, upon making a reasonable effort to stop, he discovered too late that his brakes failed to work, so that the machine went upon the track in front of the train, but that if the driver had prior knowledge of the imperfect condition of the stopping mechanism of his car, it was his duty to approach the track cautiously, and at a rate of speed that would enable him to bring the car to a stop in its condition at that time, as known to him, before reaching the zone of danger, and that if, with knowledge of such defective condition, he failed to approach the track with that degree of caution, he was guilty of more than a slight want of ordinary care. Puhr v. Chicago & N. W. R. Co. 171 Wis. 154, 176 N. W. 767, 14 A.L.R. 1334.

In Plasikowski v. Arbus, 92 Conn. 556, 103 A. 642, L.R.A.1918E, 415, it was held that the failure of an automobile owner to warn his experienced chauffeur that the brakes were in a defective condition did not render him liable for the expense to the chauffeur of defending himself against the charge of reckless driving and assault and battery in colliding with a pedestrian, after he had operated the machine through various parts of the state.

[7] Landry v. Hubert, 101 Vt. 111, 141 A. 593, 63 A.L.R. 396.

The jury must determine whether or not one discovering that the brakes of a borrowed automobile, which he had taken upon a public highway, were not working properly, was negligent in continuing to use the car, so as to be liable for a resulting accident, where the statute makes it negligence to have such a car upon the public highway, whether in motion or at rest. Ibid.

[8] See supra, §§ 25 et seq.

The operator must adopt proper lights. Gallagher v. Montpelier & Wells River R. Co. 100 Vt. 299, 137 A. 207, 52 A.L.R. 744.

[9] Philadelphia & R. R. Co. v. Dillon, 31 Del. 247, 114 A. 62, 15 A.L.R. 894.

[10] See supra, § 163.

[11] Annotation: 79 A.L.R. 1218; 12 B. R. C. 441.

[12] **A carrier of passengers for hire** may be held liable for an injury to a passenger which results from a failure to see to it that the tires on its vehicles are in proper condition.

Annotation: 79 A.L.R. 1218.

[13] See supra, § 252.

[14] Phillips v. Britannia Hygienic Laundry Co. [1923] 1 K. B. 539, 12 B. R. C. 418—Div. Ct., affirmed in [1923] 2 K. B. 832, 12 B. R. C. 437, note—C. A.

[15] Annotation: 79 A.L.R. 1218.

An action for injury to a passenger in an automobile through the overturning of the car cannot be submitted to the jury where there is nothing to show whether the accident was caused by negligent driving or the blowing out of a tire. Klein v. Beeten, 169 Wis. 385, 172 N. W. 736, 5 A.L.R. 1237.

§ 255. Defective Steering Gear.—It would seem that an automobile, the steering gear of which is in such an imperfect condition that the driver is likely to lose control of the steering, is a thing which, on a highway is necessarily dangerous to persons using the highway, and that to cause such a vehicle to be driven on a highway amounts to negligence.[18]

§ 256. Use of Trailers.—The increasing use of trailers has necessitated the enactment of legislation in many states regulating the use of such vehicles upon the streets and highways.[19] It must be equipped with the necessary brakes.[19a] Apart from such legislation, one using vehicle trailers on the public highways is required to exercise reasonable care, both as to their equipment and as to the operation of the vehicles to which they are attached.[20]

In the operation of cars with trailers the operator is required to observe all of the rules as to lights or warning signals,[21] as to keeping a lookout,[22] regulations as to speed,[23] and the rules of the road.[24]

§ 257. —Defective Trailer Fastenings.—Accidents may be caused by defective trailer fastenings. Where a car, having a trailer in the form of a wagon behind it, is operated with defective fastenings, the owner is liable for the loss and injury thereby inflicted.[1] Some statutes require certain safety devices in connection with the use of trailers, and such requirements must be complied with. For failure so to comply, a liability arises for resulting damages.[2]

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[16] Phillips v. Britannia Hygienic Laundry Co. [1923] 1 K. B. 539, 12 B. R. C. 418—Div. Ct., affirmed in [1923] 2 K. B. 832, 12 B. R. C. 437, note—C. A.

[17] Giddings v. Honan, 114 Conn. 473, 159 A 271, 79 A.L.R. 1215.

The court will not take judicial notice of the fact that a blowout of the front tire of a Ford automobile running at 15 miles per hour cannot cause the car to leave a perfectly smooth highway and plunge into the ditch at the side of the road. Klein v. Beeten, 169 Wis. 385, 172 N. W. 736, 5 A.L.R. 1237.

[18] Annotation: 12 B. R. C. 451.

[19] Annotation: 3 A.L.R. 618, s. 84 A.L.R. 281.

[19a] Annotation: 15 B. R. C. 528.

A requirement that a vehicle drawn by a motor car should have a brake attached thereto and carry thereon a person competent to apply it efficiently, but that it should not be necessary to comply with the above requirement if the brake of the vehicle drawn could be applied from the motor car by a person upon the latter independently of the brakes of the motor car, was held to be contravened where a motor vehicle had two brakes which could be operated simultaneously by the driver without losing control of the steering wheel and the trailer attached was fitted with a brake which could be operated by the driver of the motor vehicle independently of the brakes of the latter and he could, without leaving hold of the steering wheel, apply simultaneously the handbrake of the trailer and the footbrake of the motor vehicle, but could not simultaneously apply the handbrake of the latter vehicle and the handbrake of the trailer without losing control of the steering wheel. Robinsons v. Richards, [1928] 2 K. B. 234, 15 B. R. C. 519.

[20] Annotation: 3 A.L.R. 618, s. 84 A.L.R. 281.

As to defective trailer fastenings, see infra, § 257.

[21] Annotation: 84 A.L.R. 284.

It has been held that although a statute requiring a red flag or other signal to be displayed in case of vehicles being towed, did not specifically provide that a light or signal should be used where a pipe connected two vehicles, such light is demanded by the general rules of law, and where the trailer is attached to the car by several pipes, a light should have been placed on them or used in such a manner that they might have been visible to those traveling on the street. Annotation: 84 A.L.R. 285.

[22] Annotation: 84 A.L.R. 285.

In passing children it has been held that the jury is authorized to find that ordinary care requires the driver to keep his eyes on the children and not to rush by them with his truck and wabbling trailer without paying any attention to how near they might be to the roadway. Annotation: 84 A.L.R. 285.

[23] Annotation: 84 A.L.R. 286.

[24] Annotation: 84 A.L.R. 286.

[1] In Lambert v. American Box Co. 144 La. 604, 81 So. 95, 3 A.L.R. 612, it was held gross negligence for the chauffeur of a motor truck having a trailer in the form of a wagon behind it to drive the tandem through a much-frequented thoroughfare in a populous city for 250 or 300 feet at a fairly high speed, after one of the two attachments connecting the trailer at its front axle tree with the truck had parted,

In view of the fact that trailers are coming into common use, and that such use will undoubtedly give rise to considerable litigation, this point is of particular value. The question as to what constitutes negligence in using these vehicles is affected by considerations not incident to the use of ordinary vehicles, such, for example, as the additional allowance which must be made in turning the two vehicles, the duty to look behind as well as ahead, the duty to see that the couplings between the vehicles are sufficient and in good condition, and, possibly, under certain conditions, the duty to have a person on the trailer for the purpose of warning other travelers, watching the load, fastenings, lights, etc.[3]

§ 258. Size or Weight of Automobile.—It is the present tendency to increase the size and weight of motor vehicles used on the highways. The size and weight of such vehicles are important factors in determining questions of negligence and contributory negligence in cases arising from collisions. Drivers of these vehicles have knowledge of their width and length, and clearly owe other travelers on the highway the duty to take these elements into consideration in the operation of their vehicles. The fact that vehicles are of a greater size or weight than the average gives them no additional rights on the highways. Every traveler is required to exercise ordinary care in the operation of his vehicle, in view of all the circumstances.[4]

3. Speed

§ 259. Generally.[5]—The question whether speed constitutes negligence is one which arises frequently in the cases. Speed itself, however, is very rarely urged as negligence, apart from the circumstances of the particular case. The reader will, therefore, find speed discussed in connection with many situations.[6]

At common law there is no precise limit of speed. A driver must exercise ordinary care and drive his car at a reasonable rate of speed,[8] and what

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and the trailer, for several hundred feet, had zigzagged across the roadway, at times scraping the curb, until finally it mounted the banquette, and one after another, broke and knocked down three cast-iron posts, set near the curb, which supported a gallery that extended across the banquette from the house, and the owner of the truck and trailer was held liable for the loss and injury thereby inflicted upon the owner of the gallery. Annotation: 3 A.L.R. 618, s. 84 A.L.R. 281; 12 B. R. C. 453.

[2] Steele v. Commercial Mill. Co. (C. C. A. 6th) 50 F. (2d) 1037, 84 A.L.R. 278.

Annotation: 3 A.L.R. 618, s. 84 A.L.R. 283.

A penal statute fixing a stated minimum deflection of trailer wheels from the tracks of a truck, and providing for suitable safety chains or devices of sufficient strength to haul the trailer when loaded, was intended for the protection of travelers on the highway and constituted a basis for an action by one who was standing on a grass plat between the curb and the sidewalk, and who was injured as a result of a failure to comply with this statute. Steele v. Commercial Mill. Co. (C. C. A. 6th) 50 F. (2d) 1037, 84 A.L.R. 278.

[3] Annotation: 3 A.L.R. 618, s. 84 A.L.R. 281.

[4] Annotation: 85 A.L.R. 1173.

The driver of a truck having an overhanging rack about 7 feet wide owed a special duty, in approaching a narrow bridge, on a foggy night, to the driver of a car approaching the bridge from the opposite direction. Baldwin v. Bell [1933] (Can.) S. C. R. 1, 85 A.L.R. 1166, [1933] 1 D. L. R. 232.

[5] As to speed as preventing recovery under Workmen's Compensation Acts, see Workmen's Compensation [Also 28 R. C. L. p. 709].

As to violation of speed laws in criminal prosecutions, see § 806, infra.

As to exemption from speed regulations, see § 40, supra.

As to speed on curves and hills, see § 342, infra.

[6] See, for example, §§ 311 et seq.

[8] Annotation: 4 L.R.A.(N.S.) 1132; 5 L.R.A.(N.S) 254.

A traveler by automobile must adopt a

is a reasonable rate of speed is dependent upon the circumstances of the case. An excessive speed may, under certain circumstances, constitute negligence at common law.[9] Some circumstances may require a very slow speed if the charge of negligence is to be avoided.[10] Another fundamental rule is that in order to impose liability, the speed must have been the proximate cause of the injury. Excessive speed cannot be said necessarily to have contributed to a collision between an automobile traveling at such speed on its proper side of the highway and a car proceeding in the opposite direction not on its proper side.[11] Similarly, even though the speeding car is on the wrong side of the road the speed is not necessarily the proximate cause of a collision with another car on its right side of the road.[12] In the latter situation, however, there are numerous cases in which driving at an unlawful or excessive speed on the wrong side of the street or road has been held to have proximately caused an accident or injury.[13]

Driving an automobile at a greatly excessive rate of speed in violation of the statutes may constitute an act so wanton and reckless as to evince an utter disregard for the safety of others, and necessarily to imply an intent to injure, so as to constitute gross negligence.[14]

§ 260. **Statutory Regulation.**—Regulation of speed is now quite generally effected by statute or ordinance. Some statutes and ordinances do not go beyond the common-law rule, but provide merely that the speed must not be one which endangers property or the life or limb of any person, and must not exceed such rate as may be reasonable and proper under the particular circumstances, having regard to the width of the road and the amount of traffic.[15] Some such statutes provide that a speed exceeding a certain limit shall be prima facie evidence of a rate of speed greater than is reasonable and prop-

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proper speed. Gallagher v. Montpelier & Wells River R. Co. 100 Vt. 299, 137 A. 207, 52 A.L.R. 744.

A chauffeur is negligent in taking his hands from the steering gear to adjust his hat while the car is running 30 miles an hour, although the road is level, smooth, and straight. O'Bierne v. Stafford, 87 Conn. 354, 87 A. 743, 46 L.R.A.(N.S.) 1183.

In Zarzana v. Neve Drug Co. 180 Cal. 32, 179 P. 203, 15 A.L.R. 401, it was held that one driving a motorcycle at a speed of 15 miles an hour upon a wet and slippery pavement, at a point where the street was crowded with pedestrians and vehicles, may be found to have been negligent where, when he attempted to stop in order to avoid striking a pedestrian, the machine skidded and injured the pedestrian and threw the rider over the handle bars.

[9] Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035, 1 L.R.A.(N.S.) 215, 108 Am. St. Rep. 196, 3 Ann. Cas. 487; McIntyre v. Orner, 166 Ind. 57, 76 N. E. 750, 4 L.R.A.(N.S.) 1130, 117 Am. St. Rep. 359, 8 Ann. Cas. 1087; Shinkle v. McCullough, 116 Ky. 960, 77 S. W. 196, 105 Am. St. Rep. 249; Daughraty v. Tebbets, 122 Me. 397, 120 A. 354, 34 A.L.R. 1507; Robertson v. Monongahela Power & R. Co. 99 W. Va. 356, 128 S. E. 829, citing R. C. L.

Annotation: 84 A.L.R. 286; 5 L.R.A.(N.S.) 255; 25 L.R.A.(N.S.) 41; 108 Am. St. Rep. 215.

The driver of an automobile approaching from the rear a car standing on the roadside may be found negligent upon evidence that he did not apply his brakes, traveled 68 feet after striking an occupant of the car, who was attempting to cross the road, turned a right angle, and tore up the turf of the adjoining yard over a space 2½ feet in circumference. Daughraty v. Tebbets, 122 Me. 397, 120 A. 354, 34 A.L.R. 1507.

One may be found guilty of driving an automobile at a speed greater than is reasonable and prudent, who, on a much traveled highway, drives at 43 miles an hour around a curve and into a hollow, the condition of which cannot be seen until the edge of it is reached. Gallaher v. State, 193 Ind. 629, 141 N. E. 347, 29 A.L.R. 1059.

[10] Lambert v. Eastern Massachusetts Street R. Co. 240 Mass. 495, 134 N. E. 340, 22 A.L.R. 1291.

Twelve miles per hour may be found to be an unreasonable speed at which to drive an automobile on wet and slippery tarvia-surfaced highways. Ibid.

[11] O'Malley v. Eagan, 43 Wyo. 233, 2 P. (2d) 1063, 77 A.L.R. 582, rehearing denied in 43 Wyo. 350, 5 P. (2d) 276, 77 A.L.R. 597.

Annotation: 77 A.L.R. 601.

[12] Annotation: 77 A.L.R. 599.

[13] Annotation: 77 A.L.R. 603.

As to whether death resulting from an injury, when there is an intervening cause, is the proximate result of the injury, see NEGLIGENCE [Also PROXIMATE CAUSE, 22 R. C. L. p. 106].

[14] Clemens v. State, 176 Wis. 289, 185 N. W. 209, 21 A.L.R. 1490.

[15] Annotation: 25 L.R.A.(N.S.) 41; 38 L.R.A.(N.S.) 488.

er. And it is sometimes required that the specified rate of speed, to have this effect, must be maintained for a certain distance. Other statutes fix a precise limit and prohibit driving above such limit.

§ 261. Driving within Speed Limits.—Driving within the limits fixed by a speed law is not conclusively the exercise of due care, especially under a statute which connects the rate with the requirement that the speed must be reasonable and proper, having due regard to the traffic and use of the highway.[16] The common-law duty to exercise ordinary care is still existent, and failure to comply therewith results in liability for injuries.[17]

§ 262. Driving in Excess of Speed Limits.—The effect of exceeding the speed limit fixed by statute or ordinance is different in different jurisdictions.[18] According to one line of authorities, the violation of a statute or ordinance is negligence as a matter of law or negligence per se.[19] In other jurisdictions the violation of the speed regulation is merely prima facie evidence of negligence,[20] or at least some evidence of negligence[1] and is sufficient to take the case to the jury.[2] Some statutes merely declare that a speed exceeding a certain fixed limit shall be prima facie evidence of a speed greater than is reasonable and proper, at least where it is maintained for a certain distance.

Excessive speed cannot be invoked by persons other than those for whose benefit the speed limit was fixed.[3]

§ 263. Ability to Stop within Range of Lights.—It is asserted as a general rule of law that it is negligence as a matter of law to drive an automobile at such a rate of speed that it cannot be stopped in time to avoid an obstruction discernible within the driver's length of vision ahead of him.[4] A statute re-

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[16] Snyder v. Campbell, 145 Miss. 287, 110 So. 678, 49 A.L.R. 1402.

To drive a motor vehicle on the streets of a city at a rate of speed of 15 miles per hour may, under some conditions of weather and traffic, be negligent. Ibid.

[17] Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035, 1 L.R.A.(N.S.) 215, 108 Am. St. Rep. 196, 3 Ann. Cas. 487.

[18] As to violation of a statute or ordinance as negligence generally, see infra, § 163.

Violation of a statute fixing under penalty a speed limit for automobiles on a highway does not deprive one of the defense of contributory negligence on the part of one injured by collision with the automobile, unless his conduct is such under all the circumstances as to amount to gross negligence. Ludke v. Burck, L.R.A.1915D, 968, 160 Wis. 440, 152 N. W. 190.

[19] Hubbard v. Bartholomew, 163 Iowa, 58, 144 N. W. 13, 49 L.R.A.(N.S.) 443 (statute); Schell v. Du Bois, 94 Ohio St. 93, 113 N. E. 664, L.R.A.1917A, 710.

Annotation: 5 L.R.A.(N.S.) 255; 25 L.R.A.(N.S.) 40; 38 L.R.A.(N.S.) 488, s. 42 L.R.A.(N.S.) 1180, and 51 L.R.A.(N.S.) 993; L.R.A. 1915E, 540.

Driving an automobile at a greatly excessive rate of speed in violation of the statutes may constitute an act so wanton and reckless as to evince an utter disregard for the safety of others and necessarily to imply an intent to injure, so as to constitute gross negligence. Clemens v. State, 176 Wis. 289, 185 N. W. 209, 21 A.L.R. 1490.

Where the prohibited speed was combined with other violations of law, the owner of the car was held liable for injuries. Elmendorf v. Clark, 143 La. 971, 79 So. 557, L.R.A.1918F, 802.

[20] Annotation: 5 L.R.A.(N.S.) 255; 25 L.R.A.(N.S.) 40; 38 L.R.A.(N.S.) 488, s. 42 L.R.A.(N.S.) 1180, and 51 L.R.A.(N.S.) 993.

[1] Annotation: 5 L.R.A.(N.S.) 255.

[2] Loveless v. Red Top Cab Co. 158 Wash. 474, 291 P. 344, 79 A.L.R. 347.

[3] **A person operating a motorcycle along a public highway** at a rate of speed greatly in excess of the speed limit is not liable for injuries received by a person in a field adjacent to the highway whose team, attached to a binder, became frightened at the noise of the exhaust on the motorcycle and ran away. Walker v. Faelber, 102 Kan. 646, 171 P. 605, L.R.A.1918D, 569.

[4] Hart v. Stence, 219 Iowa, 55, 257 N. W. 434, 97 A.L.R. 535; Lindquist v. Thierman, 216 Iowa, 170, 248 N. W. 504, 87 A.L.R. 893; Fisher v. O'Brien, 99 Kan. 621, 162 P. 317, L.R.A.1917F, 610; Ruth v. Vroom, 245 Mich. 88, 222 N. W. 155, 62 A.L.R. 1528; Hanser v. Clyde, — Utah, —, 56 P. (2d) 1366, 104 A.L.R. 943; Lauson v. Fond du Lac, 141 Wis. 57, 123 N. W. 629, 25 L.R.A.(N.S.) 40, 135 Am. St. Rep. 30.

Annotation: 44 A.L.R. 1403, s. 58 A.L.R. 1493, 87 A.L.R. 900 and 97 A.L.R. 546.

This rule applies in a variety of situations.

One who drives his automobile on a dark, rainy night over a straight stretch of country road at such speed that he is unable to stop within a distance in which he may quiring an automobile to be so driven as to permit it to be brought to a stop "within the assured clear distance ahead" makes it incumbent, at night as well as in the daytime, to be able at all times to stop within the distance that discernible objects may be seen ahead, even though such objects are without lights.[5] The fact that an automobile driver had dimmed his lights, in accordance with a state statute, when he passed other cars coming from the opposite direction just before he collided with a herd of cattle does not relieve him of his duty to have his car under such control that he could stop or avoid an obstruction or any traffic on the highway with the range of the light produced by the lamps on his automobile.[6]

Without denying that in many situations and under many conditions a driver of an automobile is as a matter of law guilty of negligence in driving at such a rate of speed as prevents stopping within time to avoid an obstruction within the range of his vision, there is a strong tendency in the recent cases to refuse to adopt that as a universal formula or a hard and fast rule.[7] Thus, it has been held to have no application in case of emergencies creating unexpected hazards.[8] The rule does not apply to a case where an object or obstruction which the driver has no reason to expect appears suddenly immediately in front of his automobile and, where a canal suddenly appears at the end of a road, to pass over which it is necessary at that point to turn to the left and again to the right, since the driver is not liable for negligence to one riding

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clearly see an obstacle in the path is negligent. Lauson v. Fond du Lac, 141 Wis. 57, 123 N. W. 629, 25 L.R.A.(N.S.) 40, 135 Am. St. Rep. 30.

Where an automobile driver whose lights had gone out hung a lantern from the radiator, it was held that independently of statute, he was guilty of negligence as a matter of law in driving along the highway on a dark night at such a speed that the car could not be stopped within the distance in which objects could be seen ahead of it. Annotation: 44 A.L.R. 1404.

One who, while driving at late dusk upon a straight, level highway at a speed in excess of 40 miles per hour, collided with an unlighted truck parked partly on and partly off the pavement, which he failed to see until close to it in consequence of being momentarily blinded by the lights of a car coming from the other direction, must be regarded as guilty of contributory negligence as a matter of law where a statute provides that no person shall drive any vehicle upon a highway at a speed greater than will permit him to bring it to a stop within the assured clear distance ahead. Hart v. Stence, 219 Iowa, 55, 257 N. W. 434, 97 A.L.R. 535.

[5] Lindquist v. Thierman, 216 Iowa, 170, 248 N. W. 504, 87 A.L.R. 893.

Annotation: 44 A.L.R. 1403, s. 58 A.L.R. 1493, 87 A.L.R. 900 and 97 A.L.R. 546.

[6] Annotation: 44 A.L.R. 1403, s. 58 A.L.R. 1493, 87 A.L.R. 900, and 97 A.L.R. 546.

[7] Murphy v. Hawthorne, 117 Or. 319, 244 P. 79, 44 A.L.R. 1397.

In Rozycki v. Yantic Grain & Products Co. 99 Conn. 711, 122 A. 717, 37 A.L.R. 582, where one collided with a truck left standing in the roadway without a tail light, when he was driving his car at 12 miles per hour, with blinding rain rendering vision impossible at a distance of more than 20 feet, it was urged that the facts did not show that the plaintiff had used due care, in that he drove his car at such a rate of speed that he could not bring his car to a stop within the distance in which he could easily see objects or obstructions ahead of him; but the court held that the trial court properly rejected the defendant's standard and rightly applied the standard of care to be expected from a reasonably prudent person, which was a question of fact for the trial court.

In Tresise v. Ashdown, 118 Ohio St. 307, 160 N. E. 898, 58 A.L.R. 1476, it was held that an instruction that the operation of a motor vehicle at such a rate of speed that the driver could not stop within the distance in which an obstruction in the highway could be seen by his own headlights constituted negligence per se was erroneous, and that each case must be considered by the jury in the light of its facts and circumstances and the usual tests applied to determine whether there was a failure to exercise ordinary care in the operation of such motor vehicle.

In Morehouse v. Everett, 141 Wash. 399, 252 P. 157, 58 A.L.R. 1482, the court held that a rule requiring one driving an automobile at night, under all circumstances, to see any object in the road in front of him which came within the radius of his lights, and be able, under all circumstances, to stop his car before striking the object, was entirely too broad and, if put into effect, would have very serious and unjust results. The court said that it believed that generally speaking, where the statutes or decisions of the courts required red lights as a warning of danger on any object in the highway and such lights were not present, it was a question for the jury to determine whether the driver at night should have seen the obstruction notwithstanding the absence of red lights.

[8] Annotation: 44 A.L.R. 1403, s. 58 A.L.R. 1493, 87 A.L.R. 900, and 97 A.L.R. 546.

with him in not having his car under such control as to enable him to avoid going into the canal at the end of the road.[9]

F. MEASURE OF CARE REQUIRED IN PARTICULAR SITUATIONS

1. IN GENERAL

§ **264. Generally.**—It is a well-established principle of law that in the absence of statutory requirements, the operator of a motor vehicle must exercise ordinary, reasonable, or due care—namely, that degree of care and caution which an ordinarily careful and prudent person would exercise under the same or similar circumstances. Obviously, the care required of a motorist is controlled by, and depends upon, the place, circumstances, and surroundings. There is no arbitrary or fixed rule.

§ **265. Injuries to Animals on Highway.**—A motorist is under a duty to exercise ordinary care to avoid injuring animals on the highways.[10] If he is driving carefully and at a reasonable rate of speed, and the injury is caused solely by the animal suddenly and unexpectedly turning from its course and crossing the road in front of the car, and immediately as soon as the animal turns from its course, he uses all the means in his power to stop and keep from striking the animal, the driver is not liable.[11]

§ **266. Frightening Horses.**[12]—The early cases dealing with the duty of the operators of automobiles toward horses on the highway required of the operator more care than is required in the modern cases. Due to the strangeness of motor vehicles upon the highway, it was the duty of the operator, apart from any provisions of statute, to take such steps as to horses on the highway as ordinary prudence might suggest, including slowing up, or even stopping, the automobile. This is also true under the more recent cases, although, due to the fact that horses are now accustomed to automobiles and are less frequently frightened by them, the operator is not required to take all the precautions that were required by the early cases.[13] That it is the duty to stop is especially true when the driver receives a signal[14] or when the horse shows signs of fright.[15] If the operator has no opportunity to stop his car before the horse is frightened or shows signs of fright, there is no liability.[16]

Various early statutes require stopping upon signal[17] and in some cases require the driver to go to the side of the road as far as practicable and remain stationary until the horse has passed.[18] Some of these statutes require this action irrespective of any signal by the person in charge of such horses.[19] Where a statute so provides, it is the duty of the driver of an automobile to stop it when a horse becomes frightened or shows that it is about to become frightened by the approach of the motor vehicle.[20] Failure to stop or otherwise comply with these statutes is regarded as negligence.[1] Where the statute requires the driver merely to stop the automobile, there is no statutory duty to stop the engine also.[2]

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[9] Jacobs v. Jacobs, 141 La. 272, 74 So. 992, L.R.A.1917F, 253.

Annotation: 44 A.L.R. 1403, s. 58 A.L.R. 1493, 87 A.L.R. 900, and 97 A.L.R. 546.

[10] Bombard v. Newton, 94 Vt. 354, 111 A. 510, 11 A.L.R. 1402.

Annotation: 11 A.L.R. 1405.

The right to drive an automobile along a public highway is not superior to that to drive cows along the highway. Bombard v. Newton, 94 Vt. 354, 111 A. 510, 11 A.L.R. 1402.

[11] Annotation: 11 A.L.R. 1406.

[12] As to frightening by noise, see infra, § 267.

[13] Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035, 1 L.R.A.(N.S.) 215, 108 Am. St. Rep. 196, 3 Ann. Cas. 487; McIntyre v. Orner, 166 Ind. 57, 76 N. E. 750, 4 L.R.A.(N.S.) 1130, 117 Am. St. Rep. 359, 8 Ann. Cas. 1087; Indiana Springs Co. v. Brown, 165 Ind. 465, 74 N. E. 615, 1 L.R.A.(N.S.) 238, 6 Ann. Cas. 656; Cumberland Teleph. & Teleg. Co. v. Yeiser, 141 Ky. 15, 131 S. E. 1049, 31 L.R.A. (N.S.) 1137; Shinkle v. McCullough, 116 Ky. 960, 77 S. W. 196, 105 Am. St. Rep. 249; Navailles v. Dielmann, 124 La. 421, 50 So. 449, 134 Am. St. Rep. 508; State v. Swagerty, 203 Mo. 517, 102 S. W. 483, 10 L.R.A. (N.S.) 601, 120 Am. St. Rep. 671, 11 Ann. Cas. 725; Tudor v. Bowen, 152 N. C. 441, 67 S. E. 1015, 30 L.R.A.(N.S.) 804, 136 Am. St. Rep. 836, 21 Ann. Cas. 646; Messer v. Bruening, 25 N. D. 599, 142 N. W. 158, 48 L.R.A. (N.S.) 945; Pease v. Cochran, 42 S. D. 130, 173 N. W. 158, 5 A.L.R. 936.

Annotation: 1 L.R.A.(N.S.) 226; 4 L.R.A. (N.S.) 1130; 14 L.R.A.(N.S.) 253; 48 L.R.A. (N.S.) 946; 108 Am. St. Rep. 215; 11 Ann. Cas. 728; 21 Ann. Cas. 649.

[14] Mahoney v. Maxfield, 102 Minn. 377, 113 N. W. 904, 14 L.R.A.(N.S.) 251, 12 Ann. Cas. 289.

Annotation: 48 L.R.A.(N.S.) 946.

[15] Pease v. Cochran, 42 S. D. 130, 173 N. W. 158, 5 A.L.R. 936.

[16] Ibid.

[17] **Under statutes requiring a signal,** it

Where a statute authorizes the operator of an automobile, in the absence of any signal, to pass a vehicle drawn by a horse at the rate of 8 miles an hour without stopping, it is nevertheless the duty of the driver of the machine to use reasonable care to adopt some other and safer method of proceeding if it is apparent that literal compliance with the statute would precipitate a collision.[3] Apart from the provisions of any statute, it is not necessarily negligence for a steam automobile, differing in construction from ordinary motor vehicles in having a smokestack which emits a certain amount of smoke and steam, to approach a horse at a moderate pace, and the owner of the horse is not, in the absence of negligence, entitled to recover for damages occasioned by the horse running away in fright.[4]

The operation upon the highway of a motorcar loaded in such a manner that a horse drawing a buggy on the highway becomes frightened at it is not actionable negligence; there must be something about the appearance of the car or the manner in which it is loaded that would suggest to the ordinarily prudent man that it would terrify or frighten an ordinary horse.[5]

In general, it may be stated that the degree of care required at common law of an operator of an automobile in the vicinity of horses is affected by all the circumstances of the particular situation, including the presence or absence of other vehicles and travelers and the character of the horse, whether gentle or wild.[6]

The degree of care required in the use of motorcycles appears to be intermediate between that required in the use of automobiles and of bicycles. The operator of a motorcycle upon the streets of a city is not required to anticipate that a horse will be frightened at his cycle, although it is his duty to stop the machine when he discovers that the horse is frightened by it and likely to get beyond control.[7]

§ 267. **Noise.**—Noises which are incident to the normal operation of motor

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was necessary that the signal be given. Mahoney v. Maxfield, 102 Minn. 377, 113 N. W. 904, 14 L.R.A.(N.S.) 251, 12 Ann. Cas. 289.

Annotation: 14 L.R.A.(N.S.) 251; 12 Ann. Cas. 292; 13 Ann. Cas. 465.

If the statute requires the driver to give the signal, a signal by an occupant is insufficient. Messer v. Bruening, 25 N. D. 599, 142 N. W. 158, 48 L.R.A.(N.S.) 945.

[18] Annotation: 12 Ann. Cas. 292.

[19] Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035, 1 L.R.A.(N.S.) 215, 108 Am. St. Rep. 196, 3 Ann. Cas. 487.

[20] Pease v. Cochran, 42 S. D. 130, 173 N. W. 158, 5 A.L.R. 936.

Annotation: 4 L.R.A.(N.S.) 1132; 48 L.R.A.(N.S.) 946.

[1] Mahoney v. Maxfield, 102 Minn. 377, 113 N. W. 904, 14 L.R.A.(N.S.) 251, 12 Ann. Cas. 289.

Annotation: 14 L.R.A.(N.S.) 253; 12 Ann. Cas. 292.

[2] Mahoney v. Maxfield, 102 Minn. 377, 113 N. W. 904, 14 L.R.A.(N.S.) 251, 12 Ann. Cas. 289.

Annotation: 14 L.R.A.(N.S.) 251; 13 Ann. Cas. 465.

[3] Annotation: 1 L.R.A.(N.S.) 224.

[4] Annotation: 108 Am. St. Rep. 214.

[5] Pease v. Cochran, 42 S. D. 130, 173 N. W. 158, 5 A.L.R. 936.

[6] Indiana Springs Co. v. Brown, 165 Ind. 465, 74 N. E. 615, 1 L.R.A.(N.S.) 238, 6 Ann. Cas. 656.

[7] Annotation: 13 Ann. Cas. 464.

vehicles are not of themselves evidence of negligence;[8] and if a horse is frightened by ordinary noises such as are usually made when an automobile is propelled at the legal speed, there ordinarily can be no recovery for injuries which may result.[9] The failure to stop the motor and machinery of an automobile, although it may be making a disturbing noise, is not necessarily negligence.[10] For example, it has been held that the driver of an automobile is not guilty of negligence in causing the running away of a team of horses by reason of the fact that he stops the machine near where the team is hitched, without stopping the engine, where it appears that the team escaped almost immediately upon the stopping of the automobile, and that the operator could not have seen the team in time to stop the explosions of the engine, thus avoiding the accident.[11] In order to negative liability for an accident caused by a horse running away due to the noise of an automobile, it may be shown that the animal is unsafe and would become unmanageable at the sight of an automobile, whether or not it is making a noise.[12] Apart from the provisions of any statute it formerly seemed to be the duty of the operator of an automobile, when he began to "crank up" a noisy machine, to keep a watchful eye on horses standing near by and, if they manifested symptoms of fright, to stop at once until they could be removed.[13]

§ **268. Racing.**—Highways are constructed for public travel, and their exclusive use cannot be lawfully granted, even temporarily, by a municipality to any individual or association for the purpose of holding races and speed contests. Such a use of the roads and streets of a community amounts to a nuisance at common law, and the operation on them of motor vehicles traveling at dangerous speeds is illegal and constitutes gross negligence as to any person who may be injured, although there may be no other actual negligence in the manner in which the race is conducted.[14]

Such racing is an act of negligence which makes the parties thereto responsible for injuries resulting to others therefrom;[15] they may be jointly liable.[16] Such a use of the public highways cannot be justified by the passage of an ordinance by the local authorities; and where a state law has fixed a maximum rate of speed for motor vehicles which is necessarily exceeded in the races, the ordinance itself is wholly void and may operate to make the municipality a participator in the violation of the law, so that it may become liable in damages for injuries which persons may sustain during the races.[17]

There is some difference of opinion as to the persons to whom participants may thus be held liable. The persons responsible for the holding of speed contests upon public highways are liable, regardless of the skill and care exercised, in the event of injury to any person lawfully in the vicinity as a traveler, or as an occupant of adjacent lands, or otherwise. According to one view, this liability does not extend to a spectator who has come into the neighborhood for the express purpose of seeing the race and with knowledge of the fact that the automobiles are to be driven at the greatest speed of which they are capable. The contributory negligence of such injured person, due to his voluntary presence at the place of danger, relieves the municipality and the persons responsible for the speed contest from liability in such cases, provided they are not otherwise at fault.[18] The view has been taken, however, that the participants are not necessarily relieved from liability by the fact that the injured person was in one of the racing cars.[19]

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[8] House v. Cramer, 134 Iowa, 374, 112 N. W. 3, 10 L.R.A.(N.S.) 655, 13 Ann. Cas. 461.
Annotation: 48 L.R.A.(N.S.) 950.

[9] Eichman v. Buchheit, 128 Wis. 385, 107 N. W. 325, 8 Ann. Cas. 435.

[10] Mahoney v. Maxfield, 102 Minn. 377, 113 N. W. 904, 14 L.R.A.(N.S.) 251, 12 Ann. Cas. 289.

[11] House v. Cramer, 134 Iowa, 374, 112 N. W. 3, 10 L.R.A.(N.S.) 655, 13 Ann. Cas. 461.
Annotation: 12 Ann. Cas. 292.

[12] Bliss v. Wolcott, 40 Mont. 491, 107 P. 423, 135 Am. St. Rep. 636.

[13] Tudor v. Bowen, 152 N. C. 441, 67 S. E. 1015, 30 L.R.A.(N.S.) 804, 136 Am. St. Rep. 836, 21 Ann. Cas. 646.

[14] Johnson v. New York, 186 N. Y. 139, 78 N. E. 715, 116 Am. St. Rep. 545, 9 Ann. Cas. 824; Bogart v. New York, 200 N. Y. 379, 93 N. E. 937, 21 Ann. Cas. 466.
Annotation: 9 Ann. Cas. 828; 21 Ann. Cas. 469.
See generally HIGHWAYS, STREETS, AND SIDEWALKS [Also 13 R. C. L. p. 1].

[15] Reader v. Ottis, 147 Minn. 335, 180 N. W. 117, 16 A.L.R. 463.

[16] Ibid.
Annotation: 16 A.L.R. 465.

[17] Johnson v. New York, 186 N. Y. 139, 78 N. E. 715, 116 Am. St. Rep. 545, 9 Ann. Cas. 824.
Annotation: 9 Ann. Cas. 828.

2. WHERE VISION IS OBSTRUCTED

§ 269. Generally.—Where the vision of the driver of an automobile is obstructed for any cause, ordinary care requires him to proceed with more caution than where he has an unobstructed vision. Obstruction of vision may arise from various causes.

§ 270. Where Blinded by Lights.—A person driving an automobile at night and finding himself blinded by a glare of light is bound to exercise care commensurate with the situation to avoid inflicting injury on any person who may be using the street while he is thus unable to see what is before him.[20] He should slow down or even stop, rather than negligently proceed, when he cannot see anyone walking ahead of him.[1] If the blinding results from glare on his windshield, he may be required to look around the end of the windshield if that is the only way in which he can proceed in safety.[2] A driver is not relieved from liability by the fault of the driver of the other car in using his bright lights instead of his dimmers while approaching and passing.[3]

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[18] Johnson v. New York, 186 N. Y. 139, 78 N. E. 715, 116 Am. St. Rep. 545, 9 Ann. Cas. 824; Bogart v. New York, 200 N. Y. 379, 93 N. E. 937, 21 Ann. Cas. 466.

Annotation: 25 L.R.A.(N.S.) 40; 9 Ann. Cas. 828; 21 Ann. Cas. 469.

[19] Reader v. Ottis, 147 Minn. 335, 180 N. W. 117, 16 A.L.R. 463.

[20] Hatzakorzian v. Rucker-Fuller Desk Co. 197 Cal. 82, 239 P. 709, 41 A.L.R. 1027; Woodhead v. Wilkinson, 181 Cal. 599, 185 P. 851, 10 A.L.R. 291; Mathers v. Botsford, 86 Fla. 40, 97 So. 282, 32 A.L.R. 881; Ruth v. Vroom, 245 Mich. 88, 222 N. W. 155, 62 A.L.R. 1528; Jaquith v. Worden, 73 Wash. 349, 132 P. 33, 48 L.R.A.(N.S.) 827.

Annotation: 10 A.L.R. 294, s. 32 A.L.R. 887, 41 A.L.R. 1040, and 62 A.L.R. 1531.

An automobile driver, blinded by the bright headlights of an automobile approaching from the opposite direction, thereafter permits his car to proceed at a speed of from 20 to 25 miles an hour for a distance of from 100 to 200 feet, until he strikes and kills a pedestrian walking along the highway is guilty of negligence. Hatzakorzian v. Rucker-Fuller Desk Co. 197 Cal. 82, 239 P. 709, 41 A.L.R. 1027.

In Jaquith v. Worden, 73 Wash. 349, 132 P. 33, 48 L.R.A.(N.S.) 827, it appeared that the defendant, while driving an automobile, turned into a busy street. After entering that street, his car struck an unlighted machine standing in the street, knocking it against the plaintiff and injuring her. In an action to recover damages for the injuries, the defendant testified that he was so blinded by the headlight of an approaching street car that he could not see ahead, that he could not have seen a person, and that he did not see the machine until he struck it. It was held that under his own testimony, he was guilty of negligence. The court said: "He was proceeding in utter disregard of the presence of other travelers or objects ahead of him. Had he been without eyes, he would have been in no worse position. To proceed at all, in the face of those conditions, was at his peril."

In Ruth v. Vroom, 245 Mich. 88, 222 N. W. 155, 62 A.L.R. 1528, recovery was sought for injuries due to the alleged negligence of the defendant in leaving an unlighted trailer attached to a truck by the side of the road. It appeared that the driver of the plaintiff's car was blinded by lights of an approaching car about 400 or 500 feet before striking the trailer, but continued to drive until he was too close to the trailer to stop. The court held that it was negligence to continue to drive 400 or 500 feet after being so blinded that he could not see ahead, and that the driver's failure to stop after finding himself unable to see, and not the fact that the trailer had no lights, or that he was blinded, was the proximate cause of the accident.

[1] Mathers v. Botsford, 86 Fla. 40, 97 So. 282, 32 A.L.R. 881.

[2] Woodhead v. Wilkinson, 181 Cal. 599, 185 P. 851, 10 A.L.R. 291; Mathers v. Botsford, 86 Fla. 40, 97 So. 282, 32 A.L.R. 881.

Annotation: 10 A.L.R. 299.

§ 271. Where Windshield Obscured. — A driver whose view through the windshield is obscured by foreign material, such as rain, frost, or ice, is bound to exercise care commensurate with the situation.[4]

§ 272. View Obstructed by Dust, Smoke, and Atmospheric Conditions.— The driver of an automobile whose vision is obscured by dust, smoke, or atmospheric conditions, such as fog, snow, or heavy rain, must exercise care commensurate with the situation.[5] The degree of care varies with the conditions creating the obstructed vision, the roadway, and traffic conditions.[6]

[3] Mathers v. Botsford, 86 Fla. 40, 97 So. 282, 32 A.L.R. 881.

[4] Woodhead v. Wilkinson, 181 Cal. 599, 185 P. 851, 10 A.L.R. 291; Schwalen v. W. P. Fuller & Co. 107 Wash. 476, 182 P. 592, 10 A.L.R. 296.

Annotation: 10 A.L.R. 299.

As to glare on windshield, see Woodhead v. Wilkinson, 181 Cal. 599, 185 P. 851, 10 A.L.R. 291. See also supra, § 270.

The jury may find negligence in driving an automobile with the windshield so covered with rain water as to obstruct the driver's view of the road ahead. Schwalen v. W. P. Fuller & Co. 107 Wash. 476, 182 P. 592, 10 A.L.R. 296.

For the driver of an automobile to allow rain water to collect on the windshield is not a violation of a city ordinance which provides that "no person shall drive any vehicle that is so inclosed, constructed, or loaded as to prevent the driver thereof from having a clear and unobstructed view to the front, rear, and on both sides." Thus, such a situation does not constitute negligence as a matter of law. Ibid.

[5] Rozycki v. Yantic Grain & Products Co. 99 Conn. 711, 122 A. 717, 37 A.L.R. 582; Castille v. Richard, 157 La. 274, 102 So. 398, 37 A.L.R. 586; Peasley v. White, 129 Me. 450, 152 A. 530, 73 A.L.R. 1017.

Annotation: 37 A.L.R. 587, s. 73 A.L.R. 1020.

Thompson v. Bellingham, 112 Wash. 583, 192 P. 952, 19 A.L.R. 864, was an action for damages incurred when the plaintiff's car ran off a highway in a very thick fog which concealed the roadway. It was the court's opinion that the plaintiff was unduly imprudent in proceeding on a road known to him to be potentially dangerous when he might have taken another way. It was said: "If the danger was obvious, it was so only to the appellant, who persisted in proceeding in the face of an unusual natural condition rapidly occurring and completely baffling only within a limited area. Being perfectly familiar with the condition of the locality, now suddenly obscured by a bank of fog, appellant had no right to act on the ordinary presumption that this particular way or place was safe, or that it did not hold out the possibility of his straying through the gap on to the railway trestle."

In Rozycki v. Yantic Grain & Products Co. 99 Conn. 711, 122 A. 717, 37 A.L.R. 582, however, it appeared that the plaintiff, driving his motor car at a speed of 12 miles per hour in a thunderstorm, with blinding rain rendering vision impossible at a distance of more than 20 feet, collided with the defendant's motor truck which was standing in the roadway without a tail light. The defendant urged that the plaintiff had been guilty of contributory negligence, insisting that he was bound to use due care. This, it was urged, is not shown where one drives his car at such a speed that he cannot stop it within the distance of visible obstructions, even though visibility is greatly reduced by a storm. It was held that the trial court properly rejected the defendant's standard, and rightly applied the standard of care to be expected from a reasonably prudent person. And after noting the absence of a red light on the truck, the appellate court said: "As bearing upon the claimed contributory negligence of plaintiff, we are to inquire whether, had the red light been properly lighted and displayed, the plaintiff, traveling at the rate at which he was going, in a severe thunderstorm with blinding rain, over a slippery road, ought to have seen the truck light in time to stop or safely pass. . . . The trial court was clearly right in overruling the defendant's claim as to the standard to be applied, and in holding that the proximate cause of the collision was the lack of the tail light and the position of the truck upon the road, and that plaintiff was not negligent."

In Lauson v. Fond du Lac, 141 Wis. 57, 123 N. W. 629, 25 L.R.A.(N.S.) 40, 135 Am. St. Rep. 30, an action for injuries incurred by a passenger in a motorcar, due to a defect in the highway, on a dark, rainy night, it was held that the driver of the car was not exercising ordinary care if he was driving it at such a rate of speed that he could not stop it within the distance in which objects were visible.

[6] Peasley v. White, 129 Me. 450, 152 A. 530, 73 A.L.R. 1017.

Annotation: 37 A.L.R. 587, s. 73 A.L.R. 1020.

In an action for injuries to a pedestrian, it was held that one driving his motorcar in the highway, sounding no alarm and with side lights only, on a night when the visibility was reduced to 20 or 30 feet by falling snow, was bound to exercise the highest degree of care and, under such circumstances, could not proceed on the assumption that pedestrians would keep to the sidewalks except at crossings. And it was said to be the driver's duty not only to keep watch for the presence of pedestrians in front of his car, but to sound a warning where, on account of an obstruction to his view, he might come on them

The driver may be required to slow up.[7] It has been asserted that a driver of a motor truck on a public highway who voluntarily turns his vehicle from the right-hand side of the road to the left, where vehicles going in the opposite direction are expected to travel, at a time when he cannot see the road for dust, without giving a reasonable warning signal, is grossly negligent.[8]

3. SKIDDING

a. IN GENERAL

§ 273. Generally.[9]—Skidding, at least on a slippery pavement, is not necessarily due to negligence.[10] The mere fact, therefore, that an automobile skids does not, of itself, constitute evidence of negligence upon the driver's part so as to render the doctrine of res ipsa loquitur applicable.[11] Such skidding is not an occurrence of such uncommon or unusual character that, unexplained, it furnishes evidence of the driver's negligence.[12]

The inquiry in cases of skidding is as to the driver's conduct previous to such skidding. The speed of the automobile prior to the skidding and the care in handling the automobile, particularly in the application of brakes, are factors to be considered in determining whether or not there was an exercise of due care.[13] This is particularly true where statutory provisions are involved.[14] Extremely slippery streets require correspondingly greater care in operation.[15]

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without seeing them. Annotation: 37 A.L.R. 587, s. 73 A.L.R. 1020.

[7] Castille v. Richard, 157 La. 274, 102 So. 398, 37 A.L.R. 586.

In Castille v. Richard, 157 La. 274, 102 So. 398, 37 A.L.R. 586, the cars of the plaintiff and the defendant, each of whom sought damages, collided and were wrecked on a comparatively narrow dirt road while proceeding in opposite directions through a cloud of dust raised by a third car. At the time this car passed between the two wrecked cars, the latter were on their proper sides of the road respectively. The court held, however, that it was inexcusable negligence for the drivers of the cars on the narrow road not to come to a stop until the impenetrable dust cloud which reduced visibility to about 10 feet had subsided.

[8] Annotation: 37 A.L.R. 587, s. 73 A.L.R. 1020.

[9] For discussion of proximate cause, see supra, § 164.

[10] Rozycki v. Yantic Grain & Products Co. 99 Conn. 711, 122 A. 717, 37 A.L.R. 582; Nordby v. Sorlie, 35 N. D. 395, 160 N. W. 70, L.R.A.1917B, 753; Richards v. Rifenbery, 108 Okla. 56, 233 P. 692; Osborne v. Charbneau, 148 Wash. 359, 268 P. 884, 64 A.L.R. 251; Cleary v. Eckart, 191 Wis. 114, 210 N. W. 267, 51 A.L.R. 576; Linden v. Miller, 172 Wis. 20, 177 N. W. 909, 12 A.L.R. 665.

Annotation: 58 A.L.R. 266.

[11] Barret v. Caddo Transfer & Warehouse Co. 165 La. 1075, 116 So. 563, 58 A.L.R. 261; Osborne v. Charbneau, 148 Wash. 359, 268 P. 884, 64 A.L.R. 251; Linden v. Miller, 172 Wis. 20, 177 N. W. 909, 12 A.L.R. 665.

Annotation: 58 A.L.R. 269.

Some authority exists apparently in conflict with this general rule. Annotation: 58 A.L.R. 271.

For a discussion of the res ipsa loquitur doctrine, see §§ 607 et seq.

[12] Lambert v. Eastern Massachusetts Street R. Co. 240 Mass. 495, 134 N. E. 340, 22 A.L.R. 1291.

In one case holding the res ipsa loquitur doctrine inapplicable it was said: "In order to make the doctrine of res ipsa loquitur apply, it must be held that skidding itself implies negligence. This it does not do. It is a well-known physical fact that cars may skid on greasy or slippery roads without fault either on account of the manner of handling the car or on account of its being there." In another case the court said: "The mere skidding of an automobile is not necessarily negligent, nor will negligence be presumed from the mere skidding without some fact or circumstance connected therewith from which negligence may be inferred." Annotation: 58 A.L.R. 270.

The skidding of an automobile, while going down a recently sprinkled street, does not conclusively show negligence upon the driver's part. Osborne v. Charbneau, 148 Wash. 359, 268 P. 884, 64 A.L.R. 251.

The court of appeal, in Wing v. London General Omnibus Co. [1909] 2 K. B. (Eng.) 652, 3 B. R. C. 79, held that in the absence of any suggestion of failure to take any proper precaution to prevent skidding, no evidence of negligence or of nuisance was presented by the mere fact that the owner placed on the road a machine liable to become uncontrollable in slippery conditions, in view of the fact that motor omnibuses had been running for several years.

[13] Barret v. Caddo Transfer & Warehouse Co. 165 La. 1075, 116 So. 563, 58 A.L.R. 261; Jessup v. Davis, 115 Neb. 1, 211 N. W. 190, 56 A.L.R. 1403, writ of error dismissed in 276 U. S. 593, 72 L. ed. 722, 48 S. Ct. 300.

[14] Annotation: 58 A.L.R. 268.

[15] See infra, §§ 274 et seq.

§ 274. Failure to Use Chains.—Failure to use chains has not been considered uniformly to charge the driver with negligence.[16] In some cases, however, the fact that no chains were used on the car has been stressed in holding that the motorist could not excuse his negligent conduct on the theory that the skidding of the car was unavoidable, or, at least, that the question of his negligence was for the jury.[17]

§ 275. Injury to Occupant of Skidding Car.—So far as an occupant of the skidding car is concerned, an apparent disinclination upon the part of some courts to hold the driver to a high degree of care to avoid skidding appears in certain cases,[18] and verdicts in favor of defendants are sustained.[19] At least, the courts will not ordinarily find gross negligence to exist in such cases so as to render the owner or operator liable under the guest statutes.[20]

b. In Particular Circumstances

§ 276. Generally.—The question whether skidding is the result of a failure to exercise due care is one dependent upon the circumstances. The question has been considered in many factual situations.

§ 277. Onto Sidewalk.—The driver of a motor vehicle is required to exercise special care or precaution to avoid skidding upon or onto a sidewalk.[1] Negligence of a motorist has been predicated upon speed and turning so far on the left side of a street, which was dry, to pass a street car, that he skidded or slued and the top of his car struck a boy on the sidewalk.[2] A finding that a driver who knew that his car, a new one, was not running right was negligent in continuing to operate it upon a wet street until it swerved to and upon a sidewalk and hit a pedestrian is warranted.[3]

§ 278. Hitting Pedestrian.—The driver of a motor vehicle must exercise special care or precaution to avoid skidding into a pedestrian who is rightfully in the street or is crossing it, and accordingly, liability for injuring a pedestrian in such a situation, at least where he himself was not negligent, may be predicated upon the driver's negligence.[4]

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[16] Annotation: 58 A.L.R. 268.

[17] Annotation: 58 A.L.R. 268.

[18] Annotation: 58 A.L.R. 283.

[19] **A finding that the defendant, whose car, equipped with new chains, had skidded before reaching the steep hill in question,** about a quarter of a mile long, was not negligent in driving down it at a speed of about 20 miles an hour at a time when rain and sleet were freezing as they fell, and crashing into a stone wall near the bottom of the hill by reason of being unable to follow a turn of the road to the left, was held to be warranted in a suit by a guest, and this notwithstanding the guest called to the defendant's attention, at the top of the hill, a sign cautioning drivers to go into second gear, and defendant continued in high gear. Annotation: 58 A.L.R. 284.

A comparatively inexperienced driver, who supposes that it is necessary to make a quick stop, is not liable to a guest for making a car skid, in erroneously applying brakes where a light coating of gravel covers hardpan in the road. Cleary v. Eckart, 191 Wis. 114, 210 N. W. 267, 51 A.L.R. 576.

[20] Annotation: 58 A.L.R. 283.

[1] Barret v. Caddo Transfer & Warehouse Co. 165 La. 1075, 116 So. 563, 58 A.L.R. 261.

Annotation: 58 A.L.R. 272.

In Barret v. Caddo Transfer & Warehouse Co. 165 La. 1075, 116 So. 563, 58 A.L.R. 261, the negligence upon which liability for injuring a building was predicated consisted in the driving of a heavy truck down a slippery street and into an alley, in broad daylight, at a speed of 8 to 10 miles an hour, the court remarking that it was possible to operate a car with safety in spite of the downward grade and the slippery condition if a slow rate of speed was maintained and the car was handled properly.

[2] Annotation: 58 A.L.R. 273.

[3] Annotation: 58 A.L.R. 273.

[4] Zarzana v. Neve Drug Co. 180 Cal. 32, 177 P. 203, 15 A.L.R. 401.

Annotation: 58 A.L.R. 274.

Compare Osborne v. Charbneau, 148 Wash. 359, 268 P. 884, 64 A.L.R. 251.

In one case the court said: "The driver was certainly aware of the slippery condition of the streets and presumably of the tendency of his truck to skid upon sudden application of the brakes; hence, it was his duty to approach the crossing with due regard to the rights of pedestrians. Whether he did so or not, the distance his car slid

§ 279. Collision with Other Vehicles.—The driver of a car must exercise unusual care to keep it under control on a slippery street or road, so as not to cause injury to another vehicle or an occupant thereof by skidding into it, particularly where the car is being driven on a grade or curve, or at an intersection, or where it is proceeding at a considerable speed.[5] The question is one of the exercise of care; if the requisite degree of care is exercised, no liability results from the skidding.[6] Negligence cannot be imputed as a matter of law to the driver of defendant's truck, where, in going up a steep hill, its right rear wheel rolled into some oil or grease, and the truck slid backwards into another car, where the pavement, although discolored, was "no different in appearance from that of many other hilly streets in the city over which motor vehicles of all kinds passed daily."[7]

4. Vehicles Proceeding in Same Direction

§ 280. Generally.—The general rule that drivers of automobiles on public highways or the streets of municipalities must exercise reasonable care in the operation of their vehicles, that is, such care as a person of ordinary prudence would exercise under the same or similar circumstances, governs the reciprocal rights and duties of the drivers of cars proceeding in the same direction.[8] The driver must keep a safe distance behind a vehicle ahead[9] and must have his machine well in hand to avoid injury to the car ahead so long as the car ahead is being driven in accordance with the law of the road.

The driver of the front car owes no duty to the rear or trailing car except to use the road in the usual way, in keeping with the laws of the road, and until he has been made aware of it, by signal or otherwise, he has a right to assume either that there is no other automobile in close proximity to his rear or that, being there, it is under such control as not to interfere with his free

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and the violence of the movement were matters properly for consideration in determining if, under the circumstances, he performed his duty." Annotation: 58 A.L.R. 275.

In another case it was said: "If it be true, as argued by the respondents, that automobiles skid in ordinary operation, if the rear part of such a vehicle under normal conditions is apt to swing or skid from side to side, it would appear to call for care on the part of the driver of such a vehicle commensurate with the danger to be avoided, especially to pedestrians at street crossings." Annotation: 58 A.L.R. 275.

The driver of a motorcycle may be found negligent in going at such a speed, upon a wet and slippery street, that in applying the brake the machine skidded and hit a boy who had started to cross at an intersection. Zarzana v. Neve Drug Co. 180 Cal. 32, 179 P. 203, 15 A.L.R. 401.

[5] But see Rozycki v. Yantic Grain & Products Co. 99 Conn. 711, 122 A. 717, 37 A.L.R. 582; Gage v. Atchison, T. & S. F. R. Co. 91 Kan. 253, 137 P. 938, Ann. Cas. 1915B, 410; Lambert v. Eastern Massachusetts Street R. Co. 240 Mass. 495, 134 N. E. 340, 22 A.L.R. 1291.

Annotation: 58 A.L.R. 278.

Compare Nordby v. Sorlie, 35 N. D. 395, 160 N. W. 70, L.R.A.1917B, 753; Linden v. Miller, 172 Wis. 20, 177 N. W. 909, 12 A.L.R. 665.

And see Lambert v. Eastern Massachusetts Street R. Co. 240 Mass. 495, 134 N. E. 340, 22 A.L.R. 1291, holding that contributory negligence can be predicated upon driving at the rate of 12 miles per hour upon a wet and slippery tarvia surface.

[6] **A motorist is not negligent** in driving in the ruts on the left side of a rough road, so that in turning the car to the right his rear wheels slide along therein, at any rate with respect to a motorcyclist who drives in the opposite direction at great speed. Nordby v. Sorlie, 35 N. D. 395, 160 N. W. 70, L.R.A.1917B, 753.

A finding that a heavy passenger car was not negligently driven, where it proceeded along a street at a speed of from 10 to 15 miles an hour and skidded diagonally across the street into another car upon reaching an icy spot was held to be warranted. Linden v. Miller, 172 Wis. 20, 177 N. W. 909, 12 A.L.R. 665, affirming a judgment in favor of defendant.

[7] Annotation: 58 A.L.R. 281.

[8] Annotation: 24 A.L.R. 507, s. 47 A.L.R. 703, 62 A.L.R. 970.

[9] Riccio v. Ginsberg, 49 R. I. 32, 139 A. 652, 62 A.L.R. 967.

Annotation: 24 A.L.R. 507, s. 47 A.L.R. 703, 62 A.L.R. 970.

Riding a bicycle within a few feet of a truck is not negligence per se. Simpson v. Snellenburg, 96 N. J. L. 518, 115 A. 403, 24 A.L.R. 503.

use of the road in front of and to the side of him in any lawful manner.[10] Of course, the rule would be different on the streets of a city, where the passage of automobiles along the streets is constant and frequent, requiring of all drivers of motor vehicles a high degree of care and watchfulness, this, of itself, being sufficient notice of the near approach of other cars, and under the same circumstances, known to the driver, the same rule applied to city streets would apply to county highways.[11]

All operators of motor vehicles, in addition to exercising reasonable care and caution for the safety of others who have the right to use the highways, must do whatever the statute law of the jurisdiction requires whenever the conditions therein referred to arise, and a noncompliance with regulations imposed by law or ordinance may, in itself, constitute negligence and render the operator liable for consequential damages in the event that any person thereby sustains personal injuries. Nevertheless, if the driver of an automobile complies with all the requirements of a statute regulating the operation of motor vehicles, he may yet be liable for the failure to exercise ordinary care to avoid injury to another traveler on the highway.[12]

§ 281. **Stopping.**[13]—Ordinarily a signal, warning vehicles in the rear of an intention to stop, is required.[14] This is frequently required by statute. The absence of such a statute does not always relieve a driver, when he starts or stops or changes direction, of the obligation to use some care for traffic in the rear.[15] The sudden stopping of the vehicle in front without notice, if unexplained, is negligence.[16]

Notwithstanding this general rule, there is imposed upon the operators of vehicles following others the corresponding duty of having their vehicles under such control as to be able to stop in time to prevent running into the car ahead in case the latter vehicle comes to a sudden stop in case of an emergency.[17]

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[10] Gosma v. Adams, 102 Fla. 305, 135 So. 806, 78 A.L.R. 1193.

Annotation: 24 A.L.R. 507, s. 47 A.L.R. 703, 62 A.L.R. 970.

[11] Annotation: 24 A.L.R. 507, s. 47 A.L.R. 703, 62 A.L.R. 970.

[12] Annotation: 24 A.L.R. 507, s. 47 A.L.R. 703, 62 A.L.R. 970.

The precautions prescribed by statute with regard to the duty of the driver of an automobile in passing another car on the highway do not relieve him from his common-law duty to exercise ordinary care to avoid injury. Annotation: 24 A.L.R. 507, s. 47 A.L.R. 703, 62 A.L.R. 970.

[13] As to stopping generally, see infra, § 333.

[14] Simpson v. Snellenburg, 96 N. J. L. 518, 115 A. 403, 24 A.L.R. 503.

Annotation: 24 A.L.R. 507, s. 47 A.L.R. 703, 62 A.L.R. 970.

One operating a motor truck of such a size that it prevented persons riding behind it from observing conditions ahead which they should know for their safety is held bound to use reasonable care to give them timely warning of the approach of danger, and he is held guilty of negligence rendering him liable for an injury to a bicyclist who, with his knowledge, was riding close behind the truck, which stopped without warning when going rapidly down a hill, just as automobiles coming from the opposite direction were about to pass, thus forcing the bicyclist, in order to avoid collision with the truck, to go into the roadway directly in front of an approaching automobile. Simpson v. Snellenburg, 96 N. J. L. 518, 115 A. 403, 24 A.L.R. 503.

In Strever v. Woodward, 160 Iowa, 332, 141 N. W. 931, 46 L.R.A.(N.S.) 644, where a collision occurred between the plaintiff's buggy and the defendant's automobile traveling in the same direction, it was held that one driving along a highway is not bound to look or listen for vehicles which may be approaching from behind before stopping his vehicle, and that he is not bound to give warning of his intention to stop, and that his stopping constitutes negligence only when he is aware of the presence of another vehicle, with which his act may cause a collision.

[15] Riccio v. Ginsberg, 49 R. I. 32, 139 A. 652, 62 A.L.R. 967.

Annotation: 24 A.L.R. 507, s. 47 A.L.R. 703, 62 A.L.R. 970.

In the Riccio Case, 49 R. I. 32, 139 A. 652, 62 A.L.R. 967, the court held that under the circumstances, where the cars were moving slowly in a holiday line of traffic and approaching a street intersection, it was the duty of the operator in the rear to control the movement of his own automobile and to maintain a sufficient distance between his car and the car ahead to enable him to avoid a collision.

[16] Annotation: 24 A.L.R. 507, s. 47 A.L.R. 703, 62 A.L.R. 970.

In driving in districts governed by traffic signals, it is the duty of drivers proceeding in the same direction to have their cars under such control that they can stop at street intersections in obedience to traffic signals.[18] One who does not keep his car under such control is guilty of negligence in striking a car ahead which stops for a traffic light.[19]

§ 282. **Passing.**—The driver of an automobile is bound, in overtaking and attempting to pass another vehicle, to exercise ordinary care and skill in so doing.[20] He should attempt to pass a forward vehicle only when he can do so with safety to the travelers he is meeting, as well as to the vehicle he is passing.[1] He is, however, under no legal duty to anticipate that the driver of the car ahead, intending to turn in front of him, will fail in his duty to indicate by proper signal or warning, in ample time, that instead of proceeding, he intends to make such a turn.[2] It is the duty of the person operating the front car toward the one following at a more rapid pace, to yield room enough for the latter to pass when it is needful and practicable, and when requested by proper signal.[3]

The driver of the car ahead, even the driver of a slow-moving vehicle, is not bound to know at his peril that an automobile is desirous of passing.[4] Even a statute requiring one operating a vehicle on a highway to turn to the right to give an overtaking vehicle free passage on the left does not require him to keep a lookout for vehicles approaching from the rear, under penalty of being held liable for injuries resulting from failure to give them room for passage.[5] Knowledge of the desire to pass must be brought home to him,[6] and then he must turn to the right as soon as practicable.[7] He is not necessarily negligent if he does not so turn, where he does not hear the signal or know of the purpose to pass, or where it is not practicable and safe to turn aside when the signal is given.[8] He must be accorded a reasonable opportunity to heed the warning and to exercise due care and reasonable prudence, before he can be charged with negligence in the premises.[9] If he does not yield the road, the driver of the rear car must stop, if necessary, to prevent injury to the occupants of the first car.[10] Ordinarily the driver of the front car need not slacken his speed to permit the rear car to pass.[11] Under certain circumstances, however, the duty to exercise ordinary care may render it necessary for the driver of a motor vehicle to stop his car to allow another vehicle proceeding in the same direction to pass.[12] The jury may find that it is the duty of the driver of an automobile to stop in order to permit a faster car to pass, where for miles there would be no proper opportunity for it to pass while both cars were in motion, and stopping for a few seconds would permit it to do so, under a statute requiring an overtaking car to pass on the left, and the driver of the forward one, as soon as practicable, to "turn to the right, so as to allow free passage to the left."[13]

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[17] Annotation: 24 A.L.R. 507, s. 47 A.L.R. 703, 62 A.L.R. 970.

[18] Zandras v. Moffett, 286 Pa. 477, 133 A. 817, 47 A.L.R. 699.
Annotation: 16 B. R. C. 228.

[19] Ibid.

[20] Criez v. Sunset Motor Co. 123 Wash. 604, 213 P. 7, 32 A.L.R. 627.

The driver of an automobile owes no duty to the driver of a car following him to give notice or warning of intention to pass a car ahead of him, where the statute provides that all vehicles shall keep to the right of the center of the highway except when overtaking and passing another vehicle, that any vehicle overtaking another going in the same direction shall pass to the left of the vehicle so overtaken, and that the operator shall signal the vehicle intended to be passed by the use of his horn or other signaling device, and that any vehicle so overtaken shall promptly, upon signal, turn as far as reasonably possible to the right in order to allow free passage to the left. Meese v. Goodman, 167 Md. 658, 176 A. 621, 98 A.L.R. 480.

[1] Dreher v. Divine, 192 N. C. 325, 135 S. E. 29, 47 A.L.R. 696.
Annotation: 24 A.L.R. 513, 515, s. 47 A.L.R. 712, 714, 62 A.L.R. 980, 982.

[2] Annotation: 24 A.L.R. 513, s. 47 A.L.R. 712, 62 A.L.R. 980.

It is held that the act of a motorist in attempting to pass a car in front of him at a moment when another vehicle is approaching constitutes gross negligence and renders him liable. Annotation: 24 A.L.R. 517, s. 47 A.L.R. 718, 62 A.L.R. 984.

[3] Reader v. Ottis, 147 Minn. 335, 180 N. W. 117, 16 A.L.R. 463.
Annotation: 24 A.L.R. 515, s. 47 A.L.R. 714, 62 A.L.R. 982.

The driver of a buggy who refuses to yield the road when an automobile attempts to pass from behind cannot recover for injuries resulting from a collision between the vehicles. Ware v. Saufley, 194 Ky. 53, 237 S. W. 1060, 24 A.L.R. 500.

[4] Annotation: 24 A.L.R. 515, s. 47 A.L.R. 714, 62 A.L.R. 982.

[5] Dreher v. Divine, 192 N. C. 325, 135 S. E. 29, 47 A.L.R. 696.

[6] Dreher v. Divine, 192 N. C. 325, 135 S. E. 29, 47 A.L.R. 696.
Annotation: 24 A.L.R. 515, s. 47 A.L.R. 714, 62 A.L.R. 982.

[7] Annotation: 24 A.L.R. 515, s. 47 A.L.R. 714, 62 A.L.R. 982.

[8] Dreher v. Divine, 192 N. C. 325, 135 S. E. 29, 47 A.L.R. 696.
Annotation: 24 A.L.R. 514, s. 47 A.L.R. 713, 62 A.L.R. 982.

The view has been taken that the driver of the front car cannot increase his speed to prevent the passing.[14]

If there is convenient room for the rear car to pass, the driver of the car ahead is not required to turn his vehicle aside,[15] nor is the rear driver bound to bring home to the driver of the forward car actual knowledge of his presence and desire to pass, unless the statute so requires.[16] If the road is wide enough, and the way appears open, and it appears that passing may be accomplished without injury or accident, and the driver gives notice of his approach and desire to pass in the usual way, whether the driver of the forward car has actual knowledge of such warning or not, the driver of the rear car is not, on that account, guilty of negligence.[17]

To render the driver of an automobile colliding with a buggy which he attempts to pass from the rear on the public highway liable for the resulting injury, the jury must find from the evidence that failure of the driver of the automobile to exercise the duties imposed upon him by law was the direct and proximate cause of the injury.[18]

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[9] Annotation: 24 A.L.R. 515, s. 47 A.L.R. 714, 62 A.L.R. 982.

[10] Ware v. Saufley, 194 Ky. 53, 237 S. W. 1060, 24 A.L.R. 500; Dreher v. Divine, 192 N. C. 325, 135 S. E. 29, 47 A.L.R. 696.

Annotation: 24 A.L.R. 514, s. 47 A.L.R. 713, 62 A.L.R. 982.

[11] Annotation: 24 A.L.R. 515, s. 47 A.L.R. 714. 62 A.L.R. 982.

[12] Annotation: 24 A.L.R. 514, s. 47 A.L.R. 713, 62 A.L.R. 982.

[13] Mark v. Fritsch, 195 N. Y. 282, 88 N. E. 380, 22 L.R.A.(N.S.) 632, 133 Am. St. Rep. 800.

In the Mark Case, supra, the court said: "Under ordinary circumstances, the forward car would not be compelled to stop in order to let the rear one pass, but might wait until a space was reached where such passage might be accomplished in safety without any stop; but, on the other hand, a country highway might be such that for miles there would be no proper opportunity for one car to pass another while both were in motion, but plenty of opportunity for such passage if the forward car pulled aside and stopped for a few seconds. Under such circumstances, we think a jury might very well find that it was extremely unreasonable for a slow-moving car to hold up one in the rear desiring to pass it, by refusing, upon reasonable request, to give such an opportunity as has been suggested for passage. The statute upon this subject provides: 'Any such person so operating a motor vehicle shall, on overtaking any such . . . other vehicle, pass on the left side thereof, and the . . . driver of such . . . other vehicle shall, as soon as practicable, turn to the right, so as to allow free passage on the left.' [Laws 1904, chap. 538, p. 1315, § 4, subd. 1.] This statute is to be construed reasonably with reference to the rights of all parties. It certainly does not contemplate or permit reckless driving of a fast motor vehicle, whereby slower ones are wrongfully crowded or frightened out of the road. Neither should it be so construed as to encourage aggravating conduct upon the part of the slower going machine in front, whereby the faster one is unnecessarily and unreasonably held back and annoyed."

[14] Annotation: 24 A.L.R. 517, s. 47 A.L.R. 718, 62 A.L.R. 984.

[15] Annotation: 24 A.L.R. 515, s. 47 A.L.R. 714, 62 A.L.R. 982.

[16] Annotation: 24 A.L.R. 514, s. 47 A.L.R. 713, 62 A.L.R. 982.

[17] Annotation: 24 A.L.R. 508, s. 47 A.L.R. 703, 62 A.L.R. 970.

Statutes and ordinances sometimes prohibit passing at street intersections.[19] Such statutes and ordinances must be given a reasonable construction.[20] One who drives out of a single file of cars in motion just before entering a street intersection and proceeds abreast of it violates a traffic ordinance forbidding attempts to pass vehicles "at a street intersection."[1] The driver of the first car has the right to assume that the ordinance will be observed, and therefore there is no duty incumbent upon him to expect that the rear driver will attempt to pass, in violation of the ordinance, at the street intersection.[2]

§ 283. —Street Cars.—There is a difference of opinion upon the question whether the rule requiring a passing vehicle to pass to the left of a vehicle going in the same direction applies to the passing of street cars running on tracks in or near the center of the street. The view has been taken that an automobile overtaking a street car is within the terms of a statute providing that the driver of a carriage or other vehicle passing another carriage or other vehicle traveling in the same direction shall drive to the left.[3] On the other hand, a street car is held not to be a vehicle within the meaning of such a statute or ordinance.[4] Statutes and ordinances requiring the automobile driver to pass to the right of street cars occupying the center of the street are now quite common.[5] Circumstances to be considered on this question are the location of the tracks, whether in the center or on the side of the road, and the width and condition of the road.

§ 284. Duty Where Vehicle Attempts to Pass on Wrong Side.—Ordinarily, passing on the right side of the usual road vehicles is negligence or evidence of negligence. It has been held to be negligence per se to attempt to pass an overtaken car on the right-hand side, in violation of an ordinance requiring trucks and automobiles to pass each other on the left.[6] The driver of the car ahead has a right to assume that the ordinance will be observed, without being chargeable with negligence.[7] There may be circumstances in which passing on the right hand side is not negligence.[8] Some such cases present a question of fact as to the negligence.[9]

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[18] Ware v. Saufley, 194 Ky. 53, 237 S. W. 1060, 24 A.L.R. 500.

[19] As to what is a street intersection within the meaning of such regulation, see infra, § 289.

[20] Annotation: 78 A.L.R. 1206.

[1] Crosby v. Canino, 89 Colo. 434, 3 P. (2d) 792, 78 A.L.R. 1202.

[2] Gosma v. Adams, 102 Fla. 305, 135 So. 806, 78 A.L.R. 1193.
Annotation: 78 A.L.R. 1206.

[3] Foster v. Curtis, 213 Mass. 79, 99 N. E. 961, 42 L.R.A.(N.S.) 1188, Ann. Cas. 1913E, 1116.
Annotation: 42 L.R.A.(N.S.) 1188; Ann. Cas. 1913E, 1116; Ann. Cas. 1918E, 562.
The right of a street car passenger to rely upon the compliance by the driver of the automobile with his duty to pass to the left, so that his failure to do so is evidence of negligence, is answered differently in different cases. That he may rely upon compliance with this duty is held in Foster v. Curtis, 213 Mass. 79, 99 N. E. 961, 42 L.R.A.(N.S.) 1188, Ann. Cas. 1913E, 1116. On the other hand, in Marsh v. Boyden, 33 R. I. 519, 82 A. 393, 40 L.R.A.(N.S.) 582, it was held that he may not so rely.

[4] Harris v. Johnson, 174 Cal. 55, 161 P. 1155, L.R.A.1917C, 477 Ann. Cas. 1918E, 560.
Annotation: 42 L.R.A.(N.S.) 1188; Ann. Cas. 1913E, 1116, Ann. Cas. 1918E, 562.

[5] **The reader should consult** his statutory provisions and the provisions of his municipal ordinance.

[6] Annotation: 24 A.L.R. 516, s. 47 A.L.R. 717, 62 A.L.R. 984.

[7] Annotation: 24 A.L.R. 516, s. 47 A.L.R. 717, 62 A.L.R. 984.

[8] Zandras v. Moffett, 286 Pa. 477, 133 A. 817, 47 A.L.R. 699.
Annotation: 24 A.L.R. 516, s. 47 A.L.R. 717, 62 A.L.R. 984; 24 A.L.R. 1304, s. 63 A.L.R. 277.

[9] Annotation: 24 A.L.R. 516, s. 47 A.L.R. 717, 62 A.L.R. 984; 24 A.L.R. 1304, s. 63 A.L.R. 277.
Although, in view of a statute requiring the operator of a motor vehicle, when overtaking and passing another vehicle, to pass to the left "where the surface of the ground

§ 285. **Driving Too Close in Passing.**—It is a general rule of law that the driver of an automobile is bound, in overtaking and attempting to pass another vehicle, to exercise ordinary care and skill in so doing.[10] He is bound not to drive so close as to interfere with the operation of the front car.[11] It is asserted that to cut in ahead of another car in passing and crowd it off the road is sheer recklessness, and that one guilty of such conduct is not in a position to complain if a jury finds that he was wantonly indifferent to the safety of the occupants of the car he passed.[12]

5. Vehicles Meeting and Passing

§ 286. **Generally.**—It is generally held that a traveler upon the highway may occupy and use any part of the road he desires when it is not needed by another whose rights are superior to his own.[13] In fact, his right to travel on either side of the road is asserted to exist except as against one coming from the opposite direction.[14] When he meets another traveler, he must, if he is traveling on his right side, remain there, or if he is traveling upon his left side, he must turn to the right in order to give the other an opportunity to pass.[15] Failure to do so is negligence,[16] or at least prima facie evidence of negligence.[17] The rights of one on his left-hand side of the road are inferior to the rights of another coming from the opposite direction.[18] A driver on his right-hand side of the road has a right to assume that another driver coming from the opposite direction will obey the law of the road,[19] at least until such time as he sees or should see that he has no intention of so doing.[20]

There is some difference of opinion as to the right of an operator of an automobile to turn to the left in violation of the law of the road in attempting

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will permit," the violation of such statute is prima facie negligence, nevertheless, it has been held it might be a question of fact under all the circumstances as to whether or not it was negligence in a given case for the driver of the rear vehicle to attempt to pass the advance vehicle on the right, and whether he attempted to do so in a careful manner. Annotation: 24 A.L.R. 516, s. 47 A.L.R. 717, 62 A.L.R. 984.

[10] Criez v. Sunset Motor Co. 123 Wash. 604, 213 P. 7, 32 A.L.R. 627.

[11] Annotation: 24 A.L.R. 517, s. 47 A.L.R. 718, 62 A.L.R. 984.

If he returns to the right side of the road, so close to the car as to disconcert its driver by striking the car and causing it to swerve over an embankment, he is liable for the injury inflicted upon the occupants of the car, although the blow was not sufficient to propel the car over the embankment. Granger v. Farrant, 179 Mich. 19, 146 N. W. 218, 51 L.R.A.(N.S.) 453.

[12] Annotation: 24 A.L.R. 517, s. 47 A.L.R. 718, 62 A.L.R. 984.

[13] Cupples Mercantile Co. v. Bow, 32 Idaho, 774, 189 P. 48, 24 A.L.R. 1296; Sims v. Eleazer, 116 S. C. 41, 106 S. E. 854, 24 A.L.R. 1293.

As to meeting and passing on curves and hills, see § 341, infra.

[14] Sims v. Eleazer, 116 S. C. 41, 106 S. E. 854, 24 A.L.R. 1293.

[15] Cupples Mercantile Co. v. Bow, 32 Idaho, 774, 189 P. 48, 24 A.L.R. 1296; Sims v. Eleazer, 116 S. C. 41, 106 S. E. 854, 24 A.L.R. 1293.

One driving towards another on the left may be negligent, and his negligence may be the proximate cause of an accident, where, in trying to pass him, the latter turns off the road. Murphy v. Hawthorne, 117 Or. 319, 244 P. 79, 44 A.L.R. 1397.

The driver of a motor truck with an overhanging rack which took more space than would an ordinary motor vehicle may properly be found guilty of negligence, on seeing a car approaching from the opposite direction, in proceeding, on a foggy night when the presence of vehicles was manifested only by their lights, to where the roadway was narrowed by a small bridge or culvert, upon or just beyond which the rack came into contact with the other car. Baldwin v. Bell [1923] (Can.) S. C. R. 1, 85 A.L.R. 1166.

[16] Hubbard v. Bartholomew, 163 Iowa, 58, 144 N. W. 13, 49 L.R.A.(N.S.) 443.

[17] Bragdon v. Kellogg, 118 Me. 42, 105 A. 433, 6 A.L.R. 669.

[18] Hiscock v. Phinney, 81 Wash. 117, 142 P. 461, Ann. Cas. 1916E, 1044.

One driving an automobile on the wrong side of the highway is not entitled to rely on a machine coming from the opposite direction not exceeding the legal rate of speed. Bragdon v. Kellogg, 118 Me. 42, 105 A. 433, 6 A.L.R. 669.

[19] Murphy v. Hawthorne, 117 Or. 319, 244 P. 79, 44 A.L.R. 1397.

[20] O'Malley v. Eagan, 43 Wyo. 233, 2 P. (2d) 1063, 77 A.L.R. 582, rehearing denied in 43 Wyo. 350, 5 P. (2d) 276, 79 A.L.R. 597.

to avoid another vehicle approaching from the opposite direction, on the wrong side, when a collision is threatened.[1] The rule applicable to vehicles generally,[2] which has been applied in the case of automobiles, is that the operator is not necessarily guilty of negligence because he does turn to the left in such a situation.[3] Other cases, however, take the view that the operator is never justified in turning to the left.[4]

6. Street or Highway Intersections

a. In General

§ 287. Generally.—The general rule that the operator of a motor vehicle is obligated to exercise ordinary, due, or reasonable care applies to the care required at street crossings and intersecting highways. The circumstances, however, require more precaution than is necessary when driving in a street or highway at a place other than an intersection.[5] The driver must approach street crossings with his machine under control.[6]

In practically all jurisdictions, statutory enactments are adopted governing the conduct of motorists at street crossings and intersecting highways.

§ 288. What Constitutes Intersection.—The weight of authority is to the effect that an "intersection," within the meaning of traffic statutes or regulations, arises from the meeting of one street with another at an angle, although one of the streets stops at and does not cross the other.[7] Other cases require the streets to cross in order that they shall be considered intersecting streets.[8] It is not necessary that the roads or streets approach and intersect at right angles.[9]

The underlying reason for the majority rule has been expressed as follows: "While, therefore, the word 'intersect' literally means to cut into or between, or to cross, and does not ordinarily mean to begin at, or start from, a given line, yet, in view of the purpose of the act and the intention of the legislature, it would be an absurd refinement to give it so narrow and limited an interpretation as would result from holding that the phrase 'intersecting roads,' as used in the act, does not include all roads joining each other at an angle, whether they cross each other or not." [10] The "intersection" or "point of intersection" is the space common to both streets or highways formed by continuing the curb lines.[11]

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[1] See infra, § 322.

[2] Annotation: 24 A.L.R. 1304, s. 63 A.L.R. 277.

[3] Bragdon v. Kellogg, 118 Me. 42, 105 A. 433, 6 A.L.R. 669; Sims v. Eleazer, 116 S. C. 41, 106 S. E. 854, 24 A.L.R. 1293; Lawson v. Dye, 106 W. Va. 494, 145 S. E. 817, 67 A.L.R. 271.

Wallace v. Bergius, 52 Scot. L. R. 130, [1915] S. C. 204, 7 B. R. C. 692.

Annotation: 24 A.L.R. 1304, s. 63 A.L.R. 277.

[4] Cupples Mercantile Co. v. Bow, 32 Idaho, 774, 189 P. 48, 24 A.L.R. 1296.

Annotation: 24 A.L.R. 1304, s. 63 A.L.R. 277.

[5] Crawford v. McElhinney, 171 Iowa, 606, 154 N. W. 310, Ann. Cas. 1917E, 221; Deputy v. Kimmell, 73 W. Va. 595, 80 S. E. 919, 51 L.R.A.(N.S.) 989, Ann. Cas. 1916E, 656.

If it is imprudent or dangerous to use the crossing at the time, ordinary care requires stopping the car or seeking another crossing. Crawford v. McElhinney, 117 Iowa, 606, 154 N. W. 310, Ann. Cas. 1917E, 221.

Where anything obscures his view of a crossing, when the presence thereon of others may reasonably be anticipated, extra vigilance and caution are required of the auto operator in order to prevent injury to persons on such crossing. Deputy v. Kimmell, 73 W. Va. 595, 80 S. E. 919, 51 L.R.A. (N.S.) 989, Ann. Cas. 1916E, 656.

[6] Baker v. Clore, 204 N. Y. 92, 97 N. E. 501, 38 L.R.A.(N.S.) 487.

[7] Pangborn v. John Widdicomb Co. 223 Mich. 181, 193 N. W. 817, 31 A.L.R. 485; Holman v. Ivins, 150 Minn. 285, 184 N. W. 1026, 21 A.L.R. 964; Mapp v. Holland, 138 Va. 519, 122 S. E. 430, 37 A.L.R. 478.

Annotation: 31 A.L.R. 488, s. 78 A.L.R. 1198.

This is true at least where the streets meet at right angles. Gosma v. Adams, 102 Fla. 305, 135 So. 806, 78 A.L.R. 1193.

A beaten pathway across a highway and common is not an intersection of highways within the meaning of a statute requiring drivers of automobiles to give signals on approaching intersections of highways. Annotation: 31 A.L.R. 488, s. 78 A.L.R. 1198.

[8] Annotation: 31 A.L.R. 488, s. 78 A.L.R. 1198.

[9] Annotation: 31 A.L.R. 488, s. 78 A.L.R. 1198.

The intersection of public thoroughfares with private ways does not come within the terms of a statute which, by language or definition, relates to the intersection of "highways," or which defines the intersecting way as any "public highway, street, avenue, road, alley, park, or parkway." [12] Moreover, the definition of the term "way" as including a private way laid out under authority of statute does not include an intersection with a private way not laid out under statutory authority.[13]

b. Right of Way at Street or Highway Intersections

§ 289. Generally.—In the absence of a statute or ordinance regulating the matter, it is a general rule that the vehicle entering an intersection of streets first is entitled to the right of way, and it is the duty of the driver of another vehicle approaching the crossing to proceed with sufficient care to permit the exercise of such right without danger of collision.[14]

§ 290. Regulation by Statute or Ordinance.[15] — Under the more common form of statute and ordinance upon this subject, the vehicle approaching a street or highway intersection from the right is given the right of way.[16] A form of ordinance that is not uncommon makes the determination of the right of way depend upon the direction in which the vehicles are traveling. In some cities it is given to those proceeding in a northerly or southerly direction, while in others it is given to those proceeding in an easterly or westerly direction.[17] The effect, as negligence, of a violation of such a statute or ordinance depends upon the general view that obtains in the state as to violation of a statute or ordinance.[18] It has been regarded as negligence in some jurisdictions.[19]

§ 291. Extent of Right.[20]—The words, "grant the right of way," in such a statute mean that the driver of the vehicle not having the right of way has an affirmative duty to keep out of the other's way, which requires him to slow down, stop, and, if need be, reverse, if otherwise the crossing vehicles are likely to collide.[1] The driver having the right of way is not guilty of negligence in failing to stop at a street intersection upon seeing another automobile approaching at a high rate of speed and in assuming that the latter car will slow down on nearing the crossing.[1a]

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[10] Annotation: 31 A.L.R. 488, s. 78 A.L.R. 1198.

[11] Neumann v. Apter, 95 Conn. 695, 112 A. 350, 21 A.L.R. 970.

Annotation: 31 A.L.R. 488, s. 78 A.L.R. 1198.

In an action for injuries to a pedestrian who, while crossing the street, was struck by a car which failed to keep to the right of the center of the intersection, as required by statute, it was held, in Stewart v. Olson, 188 Wis. 487, 206 N. W. 909, 44 A.L.R. 1292, that the center of intersection of the street is the point where the center line of one street meets the center line of the other street, both lines being drawn parallel to and halfway between the curbs and projected to the point of meeting, and not a point on a line drawn from the end of the sidewalk or any part of the sidewalk.

[12] Annotation: 31 A.L.R. 488, s. 78 A.L.R. 1198.

[13] Annotation: 31 A.L.R. 488, s. 78 A.L.R. 1198.

[14] Barrett v. Alamito Dairy Co. 105 Neb. 658, 181 N. W. 550, 21 A.L.R. 966.

Annotation: 21 A.L.R. 974, s. 37 A.L.R. 493, 47 A.L.R. 595.

[15] As to regulations relating to fire departments, etc., see infra, § 294.

As to regulations relating to a pedestrian's right of way, see infra, § 293.

[16] Primock v. Goldenberg, 161 Minn. 160, 200 N. W. 920, 37 A.L.R. 484; Mapp v. Holland, 138 Va. 519, 122 S. E. 430, 37 A.L.R. 478; Burdette v. Henson, 96 W. Va. 31, 122 S. E. 356, 37 A.L.R. 489.

Annotation: 21 A.L.R. 975, s. 37 A.L.R. 494, 47 A.L.R. 596.

[17] Annotation: 21 A.L.R. 975, s. 37 A.L.R. 494, 47 A.L.R. 596.

[18] See supra, § 163.

[19] Annotation: 21 A.L.R. 975, s. 37 A.L.R. 494, 47 A.L.R. 596.

[20] As to the extent of a pedestrian's right, see infra, § 293.

The cases have characterized the right of way of the driver approaching from the right as an absolute right,[2] especially under some statutes.[3] There are, however, limitations upon this right. The car approaching from the right must be proceeding lawfully.[4]

It is generally only when the cars reach the crossing at the same time that the driver approaching from the right has the right of way.[5]

The right is also further qualified by the limitation that if, just as the driver who has the right of way is approaching or entering the intersection, he discovers that the driver of another vehicle not having the right of way is not yielding the right and has placed himself in a perilous situation, it is his duty to use ordinary care not to injure the other, after becoming aware of his perilous situation.[6]

§ 292. As between Horse-drawn Vehicle and Automobile.—Right of way exists between an automobile and a horse-drawn vehicle. The law does not require the drivers of wagons or other horse-drawn vehicles, simply because they are slower, to stop at a crossing to let automobiles pass with undiminished speed.[7] The view is taken that a greater duty rests upon the driver of an automobile than upon the driver of a horse-drawn vehicle to avoid a collision.[8]

§ 293. As between Pedestrian and Automobile.—According to the general view, the rights of a pedestrian and of an automobile driver in the use of a street at a regular crossing are equal; the one which first reaches the crossing and occupies it has a superior right as against the other.[9] Each must exercise ordinary care to avoid a collision.[10] The pedestrian is under no legal duty to give way to automobiles.[11]

By the terms of some statutes and ordinances, pedestrians are given the right of way over vehicles at street intersections.[12] The pedestrian's right under such a statute or ordinance is not absolute, but relative; he must still exercise ordinary care and prudence under the circumstances,[13] and this is true even though he is proceeding according to traffic signals.[14]

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[1] Annotation: 21 A.L.R. 975, s. 37 A.L.R. 494, 47 A.L.R. 596.
And see infra, § 297, as to lawfulness of driving, speed, and distance.

[1a] Aikens v. City of Kingston, 53 Ont. L. Rep. 41 [1923] D. L. R. 869, 13 B. R. C. 469.

[2] Annotation: 89 A.L.R. 838.

[3] Morris v. Bloomgren, 127 Ohio St. 147, 187 N. E. 2, 89 A.L.R. 831.

[4] Ibid.

[5] See infra, § 297.

[6] Morris v. Bloomgren, 127 Ohio St. 147, 187 N. E. 2, 89 A.L.R. 831.
Annotation: 89 A.L.R. 838.
The fact that the driver of a vehicle approaching from the right, and having the right of way under the statute, would, in the exercise of such right, not only put himself in jeopardy, but would also endanger the safety of a person who unlawfully refused to recognize that right, does not operate to destroy the right, though to exercise it may be an act of gross negligence. Annotation: 21 A.L.R. 975, s. 37 A.L.R. 494, 47 A.L.R. 596.

[7] Barrett v. Alamito Dairy Co. 105 Neb. 658, 181 N. W. 550, 21 A.L.R. 966.
Annotation: 21 A.L.R. 976, s. 37 A.L.R. 497, 47 A.L.R. 599.

[8] Annotation: 21 A.L.R. 976, s. 37 A.L.R. 497, 47 A.L.R. 599.

[9] Ritter v. Hicks, 102 W. Va. 541, 135 S. E. 601, 50 A.L.R. 1505.
Annotation: 21 A.L.R. 976, s. 37 A.L.R. 497, 47 A.L.R. 599.

[10] Annotation: 21 A.L.R. 976, s. 37 A.L.R. 497, 47 A.L.R. 599.

[11] Annotation: 21 A.L.R. 976, s. 37 A.L.R. 497, 47 A.L.R. 599.

[12] Annotation: 21 A.L.R. 976, s. 37 A.L.R. 497, 47 A.L.R. 599.

[13] Horwitz v. Eurove, 129 Ohio St. 8, 193 N. E. 644, 96 A.L.R. 782.

In street intersections controlled by traffic lights or signals, the pedestrian must, of course, observe the lights. Starting to cross against traffic signals constitutes negligence.[15] Where a pedestrian starts across an intersecting street in obedience to the lights or traffic signal, he has the right of way over vehicles on the street until he reaches the other side, even though before he reaches such side, the light or traffic signal changes.[16]

The view has been taken that statutory rules governing the right of way of vehicles at street intersections do not apply to pedestrians and automobiles crossing each other's line of travel at a street intersection.[17]

§ 294. Right of Way of Police and Fire Apparatus, Ambulances, etc.[18]**—** By the terms of some statutes and ordinances, police, fire department, fire patrol, and United States mail vehicles, ambulances, and sometimes "emergency vehicles," have the right of way in any street.[19] Such statutes and ordinances are valid.[20] They do not, however, protect the driver of any such vehicle from consequences of his arbitrary exercise of the right, or from liability for injuries wilfully inflicted.[1]

To impose upon a traveler on a highway the duty of giving the right of way to fire apparatus going to a fire, notice to him of the approach of the apparatus is necessary, and he must also be given a reasonable opportunity to stop or otherwise yield the right of way.[2]

§ 295. Effect of Ignorance of Regulations.—The fact that an operator of a motor vehicle does not know of regulations governing the right of way at street or highway intersections constitutes no excuse for failing to observe them.[3]

§ 296. Streets or Roads Subject to Rule.—Statutes and ordinances such as those under consideration obviously apply where there are two intersecting streets. They are not, however, limited to the crossing of two streets, but relate to the intersection of three or more streets.[4] Such a statute is applicable where a driver attempts to cross the street along which he is driving in order to enter a cross street which does not continue on the other side of the first-mentioned street.[5]

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[14] Annotation: 21 A.L.R. 976, s. 37 A.L.R. 497, 47 A.L.R. 599.

[15] Annotation: 21 A.L.R. 976, s. 37 A.L.R. 497, 47 A.L.R. 599.

[16] Riddel v. Lyon, 124 Wash. 146, 213 P. 487, 37 A.L.R. 486.
Annotation: 21 A.L.R. 976, s. 37 A.L.R. 497, 47 A.L.R. 599.

[17] Annotation: 21 A.L.R. 976, s. 37 A.L.R. 497, 47 A.L.R. 599.

[18] See supra, § 89, as to general exemption.

[19] Annotation: 21 A.L.R. 978, s. 37 A.L.R. 500, 47 A.L.R. 601.

Where a collision occurred at a street intersection between the fire insurance patrol and a truck of the fire department, the court construed statutes giving the fire department the right of way on the streets when going to a fire and a statute giving the apparatus of the fire patrol the same right of way while going to a fire as the fire department, but providing that nothing in the act should be so construed as to lessen in any way the authority of the fire department, to give the paramount right of way to the fire department, holding that the right of that department was wholly unaffected by the right granted to the patrol. Coleman v. Fire Ins. Patrol, 122 La. 626, 48 So. 130, 21 L.R.A.(N.S.) 810, 16 Ann. Cas. 1217.

[20] Annotation: 21 A.L.R. 978, s. 37 A.L.R. 500, 47 A.L.R. 601.

[1] West v. Jaloff, 113 Or. 184, 232 P. 642, 36 A.L.R. 1391.

[2] Balthasar v. Pacific Electric R. Co. 187 Cal. 302, 202 P. 37, 19 A.L.R. 452.
Annotation: 21 A.L.R. 978, s. 37 A.L.R. 500, 47 A.L.R. 601.

[3] Annotation: 21 A.L.R. 979, s. 37 A.L.R. 500, and 47 A.L.R. 601.

[4] Annotation: 21 A.L.R. 979, s. 37 A.L.R. 500, and 47 A.L.R. 601.

[5] Holman v. Ivins, 150 Minn. 285, 184 N. W. 1026, 21 A.L.R. 964.

Another statute requiring vehicles, in turning into an intersecting street or in making a turn at an intersection, to keep to the right of the center thereof was held

The general question as to what constitutes the intersection of a street within the meaning of traffic statutes or regulations is discussed elsewhere in this article.[6] Here we are concerned only with that question as it relates to the right of way at street intersections. By the "intersection" of public streets or highways, as that word is used in a statute giving the right of way to a vehicle approaching from the right at such place, is meant the space of the street or highway common to both streets or highways, and not merely the intersection of the centers of the streets.[7] A road which merely enters, but does not cross, another, is an intersecting road within the meaning of such regulations, especially where it enters at right angles.[8]

§ 297. Effect of Speed, Lawfulness of Driving, and Distance.—The right of way at a crossing is not an absolute right to be exercised in all cases, regardless of circumstances, but is subject to, and affected by, the relative speed of the cars and the distances thereof from the point of intersection. Such right, whether given by law or established by custom, has no proper application except where the vehicles on the intersecting streets approach the crossing so nearly at the same time and at such rate of speed that if both proceed without regard to each other, a collision or interference between them is reasonably to be apprehended.[9] Moreover, these regulations contemplate a situation where the vehicles are being driven on the prescribed side of the road and within the prescribed speed limit, and do not apply when one or both are being driven in violation of the statutory regulations in these respects.[10]

The person not having the right of way at a street intersection is not precluded from crossing the intersection by the fact that he sees other cars approaching on the street having the right of way if such cars are at such a distance as reasonably to indicate no danger of interference or collision.[11] The driver of the vehicle not having the right of way is not warranted in taking close chances; if there is reasonable danger of collision if both proceed, then it is his duty to yield the right of way.[12] The person who has the right of way must proceed in a lawful manner as to speed.[13] In fact, his speed must not be excessive under the circumstances.[14] He is not relieved of the duty of exercising ordinary care to avoid collision with vehicles approaching from his left.[15]

§ 298. Care Required by One Having Right of Way.—The mere fact that

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not to suspend the operation of the right-of-way statute while the turn was being made. Ibid.

[6] See § 288 supra.

[7] Neumann v. Apter, 95 Conn. 695, 112 A. 350, 21 A.L.R. 970.

Annotation: 21 A.L.R. 979, s. 37 A.L.R. 500, and 47 A.L.R. 601.

[8] Mapp v. Holland, 138 Va. 519, 122 S. W. 430, 37 A.L.R. 478.

Annotation: 21 A.L.R. 979, s. 37 A.L.R. 500, and 47 A.L.R. 601.

[9] Morris v. Bloomgren, 127 Ohio St. 147, 187 N. E. 2, 89 A.L.R. 831, disapproving of Heidle v. Baldwin, 118 Ohio St. 375, 161 N. E. 44, 58 A.L.R. 1186.

Annotation: 21 A.L.R. 975, 982, s. 37 A.L.R 494, 502, and 47 A.L.R. 596, 603.

[10] Garrett v. Byerly, 155 Wash. 351, 284 P. 343, 68 A.L.R. 254.

[11] Burdette v. Henson, 96 W. Va. 31, 122 S. E. 356, 37 A.L.R. 489.

Annotation: 21 A.L.R. 975, 982, s. 37 A.L.R. 494, 502, and 47 A.L.R. 596, 602.

[12] Gibbs v. Almstrom, 145 Minn. 35, 176 N. W. 173, 11 A.L.R. 227.

[13] Morris v. Bloomgren, 127 Ohio St. 147, 187 N. E. 2, 89 A.L.R. 831, disapproving of Heidle v. Baldwin, 118 Ohio St. 375, 161 N. E. 44, 58 A.L.R. 1186.

Annotation: 89 A.L.R. 838.

[14] Primock v. Goldenberg, 161 Minn. 160, 200 N. W. 920, 37 A.L.R. 484.

The fact that the person not having the right of way entered the intersection when he observed the person having the right of way approaching 125 feet away at 35 miles an hour—a speed at which, if both proceeded into the intersection, there would be a collision—does not require him to yield the right of way; he has a right to assume that since he is first on the intersection, the person having the right of way will reduce his speed so as to permit crossing in safety. Ibid.

[15] See infra, § 298.

one vehicle has the right of way over another at a street intersection does not relieve the driver of the vehicle thus favored from the duty of exercising due care not to injure others at the street intersection.[16] He must not approach the intersection at an unlawful rate of speed or at an excessive speed.[17] He is bound to look to the left as well as to the right for approaching vehicles.[18] If he has reason to think that because of the other driver's negligence he will not be accorded the right of way, it becomes his duty to do what he can to avoid collision, as by stopping or turning aside, failure to do which is contributory negligence.[19] This rule applies to the drivers of police patrols, fire apparatus, ambulances, etc., which may be given the right of way.[20]

§ 299. Right to Assume Care on Part of Other Traveler.—The driver having the right of way,[1] as well as the driver not having such right of way,[2] may assume, in the absence of something to put him on notice to the contrary, that the other traveler will exercise ordinary care.

c. INTERSECTION OF ARTERIAL OR OTHER FAVORED HIGHWAY BY UNFAVORED HIGHWAY

§ 300. Generally.—It has now become quite common to designate certain streets and highways as "stop streets" or "arterial highways." Traffic coming into such streets or highways from intersecting streets or highways is usually required to stop, or at least to take some precautions, before entering the same. These streets or highways are sometimes designated arbitrarily by name; in other instances streets or highways running in a certain direction—as, for example, north and south or east and west—and in still other instances those having street car tracks, are made preferential streets or highways.

In the case of streets which do not run exactly north and south or east and west, that which comes the nearest to the preferential direction has the preference.[3]

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[16] Primock v. Goldenberg, 161 Minn. 160, 200 N. W. 920, 37 A.L.R. 484; Thrapp v. Meyers, 114 Neb. 689, 209 N. W. 238, 47 A.L.R. 585; Erwin v. Traud, 90 N. J. L. 289, 100 A. 184, L.R.A.1917D, 690; Webber v. Park Auto. Transp. Co. 138 Wash. 325, 244 P. 718, 47 A.L.R. 590; Burdette v. Henson, 96 W. Va. 31, 122 S. E. 356, 37 A.L.R. 489.

Annotation: 21 A.L.R. 988, s. 37 A.L.R. 509, and 47 A.L.R. 613.

The fact that a driver has the right of way under a statute, does not of itself justify him in holding to his course and in assuming up to the moment of collision that the driver of an automobile approaching from the left will yield to him the right of way which is properly his; his conduct in proceeding, having misjudged the situation, when he has ample time to avoid collision is such contributory negligence as to bar recovery, although the driver of the other vehicle was negligent in failing to observe him in time to permit him to take precedence. Carter v. Vadeboncoeur, 32 Manitoba L. R. 102, 11 B. R. C. 1113, wherein the court said: "The statutory rule of the road does not abrogate the principles of the common law which govern a person using a highway, and impose upon him the obligation 'sic utere tuo ut alienum non lædas;' the rule does afford an evidential test as to the negligence of one or other driver, which may be decisive in many cases in fixing responsibility, but it does not justify a driver in taking the risk of a collision which he might easily avoid under circumstances which would indicate to a man of ordinary prudence that an accident was likely to occur."

[17] See supra, § 297.

[18] Annotation: 21 A.L.R. 988, s. 37 A.L.R. 509, and 47 A.L.R. 613.

[19] Annotation: 21 A.L.R. 988, s. 37 A.L.R. 509, and 47 A.L.R. 613.

[20] Annotation: 21 A.L.R. 988, s. 37 A.L.R. 509, and 47 A.L.R. 613.

A statute providing that "patrol wagons, ambulances, [etc.], shall, in all cases, with due regard to the safety of the public, have right of way . . . but this act shall not protect the driver of any such vehicle from consequences resulting from the arbitrary exercise of this right or for injuries wilfully inflicted," does not restrict the civil liability of the driver of a private ambulance for injuries sustained at a street intersection to the causes enumerated by the statute, or relieve him from liability for mere common-law negligence, as in driving at an excessive rate of speed. West v. Jaloff, 113 Or. 184, 232 P. 642, 36 A.L.R. 1391.

[1] Aikens v. City of Kingston, 53 Ont. L. Rep. 41 [1923] D. L. R. 869, 13 B. R. C. 469.
Annotation: 21 A.L.R. 992, s. 37 A.L.R. 517, and 47 A.L.R. 622.

[2] Primock v. Goldenberg, 161 Minn. 160, 200 N. W. 920, 37 A.L.R. 484; Burdette v. Henson, 96 W. Va. 31, 122 S. E. 356, 37 A.L.R. 489.

Annotation: 21 A.L.R. 988, s. 37 A.L.R. 509, and 47 A.L.R. 613.

A preference in certain streets or highways must be created by statute or ordinance. In the absence of such a statute or ordinance, there is no preference—as, for example, between hard surface roads and intersecting unpaved roads.[4]

The effect of conflicts between municipal ordinances and state statutes in regard to stop streets and arterial highways is governed by the general rules applicable in such situations.[5]

§ 301. When Statute or Ordinance Comes into Operation.—The preference in the case of arterial highways or stop streets and other highways or streets comes into operation only when cars approach such an intersection at approximately the same time and under such circumstances as to make it reasonably necessary that one yield the right of way to the other.[6] In some jurisdictions the driver on the unfavored highway who reaches the intersection in advance of the other is not required to yield, although the failure to yield may serve in some measure to interfere with the passage of a machine traveling the dominant highway.[7]

§ 302. Rights and Duties of Driver on Favored Highway.—The driver on the favored highway does not have the absolute right of way in the sense that he is not bound to exercise any care toward traffic on intersecting highways; he is bound to exercise ordinary care.[8] Some cases make the right of way a little more "absolute" and say that he is entitled to proceed uninterruptedly in a lawful manner[9] and is bound to exercise ordinary care only after discovery of the refusal of the other driver to yield the right of way.[10] He may assume that the driver of a car on the unfavored highway will observe the law. If that requires him to stop, the driver on the favored highway may assume that he will stop.[11]

The driver on the favored highway can be charged with negligence in his conduct only from the time that he has knowledge that the driver on the unfavored highway does not intend to obey the law; after such knowledge he is bound to use the care of an ordinarily prudent person.[12]

§ 303. Rights and Duties of Driver on Unfavored Highway.—The duty of the driver on the unfavored highway is usually prescribed by statute and ordinance. One common requirement is that the driver on such street or highway must bring his car to a stop before entering the arterial highway. And some of the requirements are that the vehicle must be brought to a full stop before entering.[13] A regulation merely requiring a "stop" has been interpreted to require the vehicle on the unfavored highway to be brought to a full stop.[14]

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[3] Annotation: 58 A.L.R. 1198, s. 81 A.L.R. 185.

[4] Annotation: 58 A.L.R. 1198, s. 81 A.L.R. 185.

[5] See supra, §§ 68 et seq.

An ordinance prescribing that vehicles on avenues running in a certain direction shall have the right of way over vehicles crossing such avenues at intersections does not conflict with a statute fixing the right of way in case of vehicles turning into one street from another. Seager v. Foster, 185 Iowa, 32, 169 N. W. 681, 8 A.L.R. 690.

[6] Heidle v. Baldwin, 118 Ohio St. 375, 161 N. E. 44, 58 A.L.R. 1186.

Annotation: 58 A.L.R. 1199, s. 81 A.L.R. 185.

[7] Bradley v. Schmidt, 223 Ky. 784, 4 S. W. (2d) 703, 57 A.L.R. 1100.

[8] Annotation: 58 A.L.R. 1199, s. 81 A.L.R. 185.

[9] Heidle v. Baldwin, 118 Ohio St. 375, 161 N. E. 44, 58 A.L.R. 1186, as modified in Morris v. Bloomgren, 127 Ohio St. 147, 187 N. E. 2, 89 A.L.R. 831.

[10] Annotation: 89 A.L.R. 838.

In Morris v. Bloomgren, 127 Ohio St. 147, 187 N. E. 2, 89 A.L.R. 831, the Supreme Court of Ohio disapproved of some of the language in Heidle v. Baldwin which denied the vehicle approaching from the right his statutory privilege of proceeding uninterruptedly if it proceeded in a lawful manner and by placing the drivers of both vehicles upon an equal plane in approaching an intersection. The text, therefore, states the rule of Heidle v. Baldwin as modified by Morris v. Bloomgren.

[11] Keir v. Trager, 134 Kan. 505, 7 P. (2d) 49, 81 A.L.R. 181.

[12] Ibid

Whether, under the statute or ordinance, he is required to stop or whether he is merely required to give the right of way to the driver on the arterial highway, it is his duty to look both to right and left; and if a vehicle is approaching on the main or arterial highway, it is his duty to wait until such vehicle has passed,[15] unless a prudent person would have reasonable ground to believe that such other vehicle proceeding at a lawful speed is so far distant from the intersection that he could safely cross in advance thereof.[16] It is not the duty of such driver whose view is obstructed by a bluff to stop his car and get out and ascertain if there is any approaching traffic on the main highway.[17]

Generally speaking, it is the duty of one approaching an arterial highway to stop at a point somewhere between the stop sign and the highway where he may effectively observe traffic approaching on the arterial highway.[18] It has been held sufficient if the stop is made at the curb line, although the vehicle thereby crosses a line marked for the use of pedestrians, where the ordinance defines a street as that portion of a highway open to the use of vehicles.[19]

After the driver on the nonfavored highway has stopped, he may, in the exercise of due care, then proceed into the intersection; the right-of-way rule, at least that provided for by a statute giving a vehicle approaching another from the right, then comes into operation.[20]

§ 304. Effect of Failure to Comply with Statute or Ordinance.—The effect of the failure on the part of one or the other of the drivers to yield the right of way at the intersection of cross streets with arterial highways or stop streets depends upon the general view prevailing in the jurisdiction as to the effect of violation of a statute or ordinance as negligence.[1] The view has been taken in a jurisdiction which adheres to the rule that the violation of a statute imposing not a specific requirement to do or to omit to do a definite act, but rather a rule of conduct, applies to a statute giving the vehicle on the main thoroughfare a preference which amounts to a privilege not to be exercised in a total disregard of the rights of others.[2] But the violation of an ordinance which requires the vehicle on the intersecting highway to be brought to a full stop is negligence per se.[3] Frequently a jury question is presented in these cases.[4]

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[13] Carrigan v. Ashwell, 147 Wash. 597, 266 P. 686, 58 A.L.R. 1194.

[14] Annotation: 58 A.L.R. 1201, s. 81 A.L.R. 186.

[15] Heidle v. Baldwin, 118 Ohio St. 375, 161 N. E. 44, 58 A.L.R. 1186.

Annotation: 58 A.L.R. 1199, s. 81 A.L.R. 185.

[16] Annotation: 58 A.L.R. 1199, s. 81 A.L.R. 185.

[17] Annotation: 58 A.L.R. 1204, s. 81 A.L.R. 192.

[18] Annotation: 58 A.L.R. 1201, s. 81 A.L.R. 186.

[19] Carrigan v. Ashwell, 147 Wash. 597, 266 P. 686, 58 A.L.R. 1194.

[20] Annotation: 58 A.L.R. 1204, s. 81 A.L.R. 192.

[1] See supra, § 163.

[2] Heidle v. Baldwin, 118 Ohio St. 375, 161 N. E. 44, 58 A.L.R. 1186.

[3] Ibid.

[4] **Upon issues of negligence and contributory negligence,** where the evidence is in conflict as to the speed of each of the vehicles and the evidence is likewise in conflict as to the distance of each of the vehicles from the intersection at the time when each driver first had reasonable opportunity to observe the approach of the other, elements are presented which the triers of the facts must consider in their estimate of conduct. Ibid.

d. Private Crossings or Driveways

§ 305. Turning into Driveway.[5]—A person must, in turning into a driveway, exercise care toward pedestrians who may be in the course of travel on the sidewalk crossing such driveway.[6] In fact, it has been said that a driver must have his car under control so as to avoid striking persons along the street or crossing his line of travel.[7] Such care may, and ordinarily does, require a warning to pedestrians.[8] At night such warning may be made by the lights or by the horn.[9] The driver cannot be found to be negligent in failing to sound his horn to warn pedestrians of his approach if, in the exercise of his reasonable judgment, the shining of his lights upon the ground is adequate for that purpose.[10]

As to vehicular traffic in the street, an automobile driver is likewise bound to exercise care.[11]

§ 306. Entering Street from Driveway.[12]—Toward vehicles using the streets the view has been taken that one coming from a private driveway must yield the right of way.[13] It is the duty of the driver who enters a street or highway from his private drive to look for approaching vehicles, and not to proceed into the street or highway if he sees one coming, unless as a reasonably prudent and cautious person he believes and has a right to believe that he can pass in front of the other in safety.[14] The statutory rule of the road giving vehicles approaching from the right at road intersections the right of way does not apply in favor of vehicles entering a public highway, or street from a private driveway.[15]

If, in entering the street from a driveway, he crosses a sidewalk, he is bound to exercise care toward pedestrians thereon.[16] The fact that he did not know that a pedestrian walking along the sidewalk was somewhat deaf and with impaired eyesight does not in any way minimize his responsibility.[17]

§ 307. Duty toward Others Using Driveway.—A person backing an automobile from a garage through a driveway into the street cannot be said, as a matter of law, to be negligent because he did not discover the presence of a delivery truck which had been driven into his driveway to make a delivery. The facts and circumstances of the case must be considered, including the fact that the driveway was a private one not frequented by the general public.[18]

e. Reliance upon, or Disregard of, Traffic Signals

§ 308. As between Vehicle and Pedestrian.—A pedestrian who enters a street intersection to cross a street under the direction of a traffic officer or in accord with a traffic signal has the right of way over vehicular traffic until he reaches the opposite curb, notwithstanding a change in the signal while he is in the act of crossing.[19] While crossing with the traffic signal in his favor he is not bound to continue to look for approaching vehicles as he crosses,[20] even though before he reaches the other side the traffic signal changes.[1] The drivers of automobiles approaching on intersecting streets in accord with the traffic signal are not relieved of the duty of exercising reasonable care for the safety of persons in the street,[1a] especially persons who have started to cross before the signal changed and have not yet completed the crossing.[2] It is substantive evidence of negligence for an automobile driver to start his car when the traffic signal is given while persons who have started across the street on a crossing with traffic signals in their favor are still in the act of crossing.[3]

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[5] As to turning in traffic, see infra, §§ 323 et seq.

[6] Annotation: 24 A.L.R. 946.

[7] Annotation: 24 A.L.R. 946.

[8] Annotation: 24 A.L.R. 946.

[9] Henderson v. O'Leary, 177 Wis. 130, 187 N. W. 994, 24 A.L.R. 942.

[10] Ibid.
Annotation: 24 A.L.R. 946.

[11] Annotation: 24 A.L.R. 946.
As to duties where vehicles are proceeding in the same direction, see generally, supra, §§ 280 et seq.
As to duties where vehicles are coming from opposite directions, see supra, § 286.

[12] As to backing from driveway, see infra, §§ 328 et seq.

[13] Snibbe v. Robinson (Surratt v. Robinson) 151 Md. 658, 135 A. 838, 50 A.L.R. 280.
Annotation: 50 A.L.R. 283.

[14] Annotation: 24 A.L.R. 948; 50 A.L.R. 283.

[15] Snibbe v. Robinson (Surratt v. Robinson) 151 Md. 658, 135 A. 838, 50 A.L.R. 280.
Annotation: 50 A.L.R. 283.

[16] Annotation: 24 A.L.R. 948.

[17] Annotation: 24 A.L.R. 948.

[18] Annotation: 24 A.L.R. 948.

§ 309. **As between Vehicles.**—Similar rules apply as between vehicles at intersections governed by traffic signals as apply between a vehicle and an automobile. A car having started to cross in accord with the signal light is entitled to complete the crossing notwithstanding a change of lights.[4] A correlative duty rests upon the automobiles approaching on intersecting streets after the change of lights to exercise due care to avoid hitting such vehicles.[5]

§ 310. **Disregard of Signal.**—A motorist must have his car under control so that he can obey traffic signals.[6] He can be held guilty of negligence if he moves against the signal, even though he proceeds slowly.[7] These rules apply as between a vehicle and a pedestrian,[8] traffic officers or flagmen and vehicles,[9] and as between vehicles.[10] It has been held that although municipal authorities have no authority to set up stop signs which override the statutory right of way, yet so long as the stop signals are in position the public have a right to rely on them and those who decline to obey them are guilty of actionable negligence if injury is caused by their so doing.[10a]

f. CARE AS BETWEEN STREET CARS AND AUTOMOBILES AT STREET CROSSINGS

§ 311. **Generally.**—In the absence of special regulations by statute or ordinance, street cars and automobiles have equal rights at street intersections. The right of each must be exercised with due regard to the right of the other in a reasonable and careful manner.[11] There is, however, some authority to the effect that even in the absence of statute or ordinance, a street car has the right of way at the intersection.[12]

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[19] Railway Exp. Agency v. Little (C. C. A. 3d) 50 F. (2d) 59, 75 A.L.R. 963; Riddel v. Lyon, 124 Wash. 146, 213 P. 487, 37 A.L.R. 486.
Annotation: 21 A.L.R. 982, s. 37 A.L.R. 502, and 47 A.L.R. 603; 75 A.L.R. 970.

[20] Railway Exp. Agency v. Little (C. C. A. 3d) 50 F. (2d) 59, 75 A.L.R. 963.

[1] Riddel v. Lyon, 124 Wash. 146, 213 P. 487, 37 A.L.R. 486.
Annotation: 21 A.L.R. 982, s. 37 A.L.R. 502, and 47 A.L.R. 603; 75 A.L.R. 970.

[1a] Annotation: 16 B. R. C. 228.

[2] Railway Exp. Agency v. Little (C. C. A. 3d) 50 F. (2d) 59, 75 A.L.R. 963; Melville v. Rollwage, 171 Ky. 607, 188 S. W. 638, L.R.A.1917B, 133; Riddel v. Lyon, 124 Wash. 146, 213 P. 487, 37 A.L.R. 486.
Annotation: 21 A.L.R. 982, s. 37 A.L.R. 502, and 47 A.L.R. 603; 75 A.L.R. 970.

[3] Railway Exp. Agency v. Little (C. C. A. 3d) 50 F. (2d) 59, 75 A.L.R. 963.

[4] Annotation: 75 A.L.R. 970.

[5] Annotation: 75 A.L.R. 970.
As to stopping in accord with traffic signal, see § 281, supra.

[6] Railway Exp. Agency v. Little (C. C. A. 3d) 50 F. (2d) 59, 75 A.L.R. 963.

[7] Ibid.
Annotation: 16 B. R. C. 232.

[8] Annotation: 75 A.L.R. 975.

[9] Annotation: 75 A.L.R. 977.

[10] Annotation: 75 A.L.R. 977.

[10a] Nelson v. Dennis, 37 Manitoba L. Rep. 553, 16 B. R. C. 214.

[11] Bradley v. Minneapolis Street R. Co. 161 Minn. 322, 201 N. W. 606, 46 A.L.R. 993; Norman v. Charlotte Electric R. Co. 167 N. C. 533, 83 S. E. 835, Ann. Cas. 1916E, 508.
Annotation: 28 A.L.R. 217, s. 46 A.L.R. 1001.

The emergency rule[13] applies as between the automobilist and the street car.[14]

§ 312. As Affected by Statutes and Ordinances on Right of Way.—Statutes and ordinances frequently grant a right of way.[15] There is some difference of opinion as to whether statutes or ordinances regulating traffic generally and giving the right of way to vehicles approaching from the right or giving priority to traffic in a certain direction apply as between street cars and automobiles,[16] some authorities holding that these statutes and ordinances do apply,[17] and others holding that they do not.[18]

§ 313. Care of Automobilist.—The automobilist, in coming into an intersection through which street cars run, is bound to exercise reasonable care and diligence; it is sometimes said that it is his duty to take care commensurate with the circumstances.[19] Another statement of the rule is that he must act as a reasonably prudent man would under the circumstances, or, as expressed in other words, with the care and prudence which the majority of men would exercise under the same or similar circumstances.[20] He is not, however, held to that high degree of care which is required in crossing the right of way of an ordinary steam railroad running through the country.[1]

A driver has the right to assume that a street car will be lawfully operated, until he has notice to the contrary.[2] He is not required to apprehend the speed of a car exceeding the limit fixed by ordinance, or that the motorman has lost control of it and will fail to signal its approach.[3]

A motorist must recognize any right of way that is created by statute or ordinance.[4] Also, he must obey the directions of a traffic officer or traffic signals.[5]

The view is taken in some cases that it is the duty of the automobilist to give warning of his approach.[6]

In the ordinary case, the negligence of the automobilist is for the jury,[7] although in some cases negligence is found as a matter of law.[8]

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[12] Annotation: 28 A.L.R. 217, s. 46 A.L.R. 1002.

[13] As to which, see supra, §§ 171 et seq.

[14] Annotation: 28 A.L.R. 251, s. 46 A.L.R. 1026.

[15] Annotation: 28 A.L.R. 222, s. 46 A.L.R. 1003.

[16] Annotation: 28 A.L.R. 222, s. 46 A.L.R. 1003.

[17] Bradley v. Minneapolis Street R. Co. 161 Minn. 322, 201 N. W. 606, 46 A.L.R. 993.
Annotation: 28 A.L.R. 222, s. 46 A.L.R. 1004.

[18] Annotation: 28 A.L.R. 222, s. 46 A.L.R. 1004.

[19] Annotation: 28 A.L.R. 225, s. 46 A.L.R. 1005.

[20] Annotation: 28 A.L.R. 225, s. 46 A.L.R. 1005.

[1] Union Traction Co. v. Moneyhun, 192 Ind. 288, 136 N. E. 18, 28 A.L.R. 211; Bradley v. Minneapolis Street R. Co. 161 Minn. 322, 201 N. W. 606, 46 A.L.R. 993.
Annotation: 28 A.L.R. 225, s. 46 A.L.R. 1005.

[2] Annotation: 28 A.L.R. 253, s. 46 A.L.R. 1026.

[3] Union Traction Co. v. Moneyhun, 192 Ind. 288, 136 N. E. 18, 28 A.L.R. 211.

[4] Bradley v. Minneapolis Street R. Co. 161 Minn. 322, 201 N. W. 606, 46 A.L.R. 993.
Annotation: 28 A.L.R. 227, s. 46 A.L.R. 1008.

[5] Annotation: 28 A.L.R. 227.

[6] Annotation: 28 A.L.R. 228.

[7] Annotation: 28 A.L.R. 257, s. 46 A.L.R. 1028.

[8] **The cases in which negligence** is found as a matter of law are usually those cases where the automobilist drives in front of a street car which is clearly visible to him, especially where the car is moving rapidly. In many of the cases the automobilist was the plaintiff, and his negligence was held contributory, so as to prevent recovery. Annotation: 28 A.L.R. 264, s. 46 A.L.R. 1032.

Failure to look before entering upon the tracks is also frequently held to constitute contributory negligence as a matter of law. Annotation: 28 A.L.R. 264, s. 46 A.L.R. 1032.

§ 314. —Stopping, Looking, and Listening.—It is the duty of the driver of an automobile approaching a street intersection over which street cars are operated to be on the lookout for an approaching car while he is still in a place of safety.[9] The principle of look and listen, of general application in cases of steam railroad crossings, however, is not applied in its strict sense to the crossing at a street intersection of street railway tracks.[10] The driver is not in every case required as a matter of law to stop in order to look and listen for an approaching car,[11] although there may be circumstances in which he must stop.[12] Where there are obstructions to his view, he may be required to listen and even to stop.[13] He is not, however, required to get out of his car, go forward, and look from a place where he can see along the tracks.[14]

The driver is not bound to look at any special place.[15] He must, however, look where his observations will be of some avail.[16] Where the view is obstructed, he must look from a position from which he can see.[17] In some jurisdictions it has been held to be his duty to look immediately before entering on the tracks.[18] These precautions must be continued as he crosses. An automobilist cannot approach a street railway crossing a place of known danger and, after looking once from a point of safety to ascertain if a car is coming, and seeing none, pay no further attention to his safety and proceed blindly across, trusting to the railway operatives to obey their orders and the rules of the road.[19] The fact that a street car has stopped at the customary place to discharge and take on passengers is no invitation to an automobilist to cross ahead of it so as to relieve him from continuing to look.[20] Where the motorist has the statutory right of way, he cannot be expected continuously to watch a street car which he sees approaching from the left in anticipation of negligence on the part of the motorman; he has a right to assume that the car will be properly operated and will yield to him the preference.[1]

The cases are not agreed as to whether failure to look and listen amounts to negligence as a matter of law or whether it is only evidence of negligence.[2]

§ 315. —Speed.—The speed must be no greater than is consistent with safety; the driver should have his automobile under control.[3] He is not, however, required to run at such a speed as will enable him to stop or slow down in time to avoid street cars running in excess of the limits fixed by ordinance.[4] The conflict of authority which exists generally as to the effect of the violation of a statute or ordinance[5] exists in the case of the violation of a statute or ordinance relating to speed, some authorities holding that such violation constitutes negligence per se,[6] and others holding that it is evidence of negligence merely.[7] A distinction is likewise made in some cases between the violation of a statute and the violation of an ordinance, while others deny such distinction.[8]

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[9] Union Traction Co. v. Moneyhun, 192 Ind. 288, 136 N. E. 18, 28 A.L.R. 211.
Annotation: 28 A.L.R. 229, s. 46 A.L.R. 1008.

[10] Union Traction Co. v. Moneyhun, 192 Ind. 288, 136 N. E. 18, 28 A.L.R. 211.
Annotation: 28 A.L.R. 229, s. 46 A.L.R. 1008.

[11] Union Traction Co. v. Moneyhun, 192 Ind. 288, 136 N. E. 18, 28 A.L.R. 211.
Annotation: 28 A.L.R. 248, s. 46 A.L.R. 1021.

[12] Annotation: 28 A.L.R. 248, s. 46 A.L.R. 1021.

[13] Annotation: 28 A.L.R. 229, 248, s. 46 A.L.R. 1008, 1021.

[14] Annotation: 28 A.L.R. 234, s. 46 A.L.R. 1011.

[15] Union Traction Co. v. Moneyhun, 192 Ind. 288, 136 N. E. 18, 28 A.L.R. 211.

[16] Annotation: 28 A.L.R. 234, s. 46 A.L.R. 1011.

[17] Annotation: 28 A.L.R. 235, s. 46 A.L.R. 1014.

[18] Frey v. Rhode Island Co. 37 R. I. 96, 91 A. 1, Ann. Cas. 1918A, 920.
Annotation: 28 A.L.R. 234, s. 46 A.L.R. 1011.

[19] Annotation: 28 A.L.R. 235, s. 46 A.L.R. 1014.

[20] Dering v. Milwaukee Electric R. & Light Co. 171 Wis. 8, 176 N. W. 343, 14 A.L.R. 809.
Annotation: 14 A.L.R. 811.

[1] Bradley v. Minneapolis Street R. Co. 161 Minn. 322, 201 N. W. 606, 46 A.L.R. 993.

[2] Annotation: 28 A.L.R. 229, s. 46 A.L.R. 1008.

[3] Annotation: 28 A.L.R. 244, s. 46 A.L.R. 1020.

[4] Annotation: 28 A.L.R. 244, s. 46 A.L.R. 1020.

[5] See supra, § 163.

§ 316. Care of Street Car Company.—Street car companies are held to a degree of care and caution commensurate with the situation in crossing streets in cities where a large number of automobilists are usually found crossing the tracks; this is sometimes said to be a greater degree of caution than is necessary at other places.[9] However, the mere fact that a collision takes place between a street car and an automobile at a street intersection does not establish the fact of negligence of the street car company. Negligence is not presumed; it must be proved.[10]

The operators of street cars are not bound to anticipate that the driver of an automobile will not take proper precautions for his own safety.[11]

Ordinarily the issue of negligence is for the jury.[12]

§ 317. —Notice of Approach.—As a general rule, it is the common-law duty of those in charge of a street car, when approaching a street intersection, to give notice of the approach by reasonable warnings.[13] However, where the driver of an automobile sees the street car coming, there is no need of warning.[14]

§ 318. —Lookout.—The operator of a street car must keep a lookout for automobile traffic and have his car under control.[15] Under so-called "vigilant watch" ordinances requiring a vigilant watch for all vehicles, etc., and, on the first appearance of danger to them, stopping the car in the shortest time and space possible, something more than ordinary care is required of motormen, although at certain points in a travel-congested street, the degree of care required by the ordinance is practically the same as that required at common law.[16]

The care required may necessitate stopping the car in certain situations.[17] However, it is not the duty of a street car operator to stop or slacken speed every time an automobile is seen approaching the crossing with apparent intent to cross; he may properly assume that the automobilist will exercise due care for his own safety.[18]

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[6] Annotation: 28 A.L.R. 244, s. 46 A.L.R. 1020.

[7] Annotation: 28 A.L.R. 244, s. 46 A.L.R. 1020.

[8] Annotation: 28 A.L.R. 244, s. 46 A.L.R. 1020.

[9] Annotation: 28 A.L.R. 267, s. 46 A.L.R. 1034.

[10] Annotation: 28 A.L.R. 267, s. 46 A.L.R. 1034.

[11] Annotation: 28 A.L.R. 268, s. 46 A.L.R. 1034.

[12] Annotation: 28 A.L.R. 271, s. 46 A.L.R. 1035.

[13] Annotation: 28 A.L.R. 273, s. 46 A.L.R. 1038.

[14] Stoker v. Tri-City R. Co. 182 Iowa, 1090, 165 N. W. 30, L.R.A.1918F, 515.
Annotation: 28 A.L.R. 273, s. 46 A.L.R. 1039.

[15] Stoker v. Tri-City R. Co. 182 Iowa, 1090, 165 N. W. 30, L.R.A.1918F, 515; Gulesserian v. Madison R. Co. 172 Wis. 400, 179 N. W. 573, 15 A.L.R. 406.
Annotation: 28 A.L.R. 275, s. 46 A.L.R. 1040.

[16] Annotation: 28 A.L.R. 275, s. 46 A.L.R. 1041.

[17] Annotation: 28 A.L.R. 281, s. 46 A.L.R. 1045.

[18] Annotation: 28 A.L.R. 282, s. 46 A.L.R. 1047.

Failure of a motorman to slacken the speed of his car in recognition of the automobilist's statutory right of way, he being on the right, is held sufficient to justify the jury in concluding that the company was negligent. Bradley v. Minneapolis Street R. Co. 161 Minn. 322, 201 N. W. 606, 46 A.L.R. 993.

§ 319. —Speed.—Statutes and ordinances frequently fix the speed of street cars. However, a street car should maintain a reasonable speed and one which makes it possible for the operator to have his car under control, even in the absence of statutory or municipal regulation.[19] The mere fact that street car was not exceeding the speed limit fixed by statute or ordinance is not conclusive upon the question whether it was running at a negligently excessive rate of speed, since a speed less than a maximum allowed may at certain times and places be negligent.[20]

The general rules as to the effect of the violation of a statute or ordinance regulating the speed of a street car at street intersections as a ground of negligence is governed by the general rules on this subject.[1] Some cases take the view that such a violation constitutes negligence per se,[2] while others hold that it is only evidence of negligence.[3] The distinction between violation of a statutory regulation and violation of a municipal violation is also drawn in these cases.[4]

§ 320. —Doctrine of Last Clear Chance.—The doctrine of last clear chance operates in cases of collisions between automobiles and street cars. Thus, if the operator of the street car, knowing of the perilous position of the automobile, could, by the exercise of ordinary care, have prevented the collision, the street car company may be held liable, notwithstanding the negligence of the automobilist.[5] In some states, however, the doctrine does not prevail.[6]

7. Measure of Care at Railroad Crossings

§ 321. Generally.—An automobilist, in approaching a steam railroad crossing, must exercise such care as an ordinarily prudent person would exercise under the circumstances.[7] There are two rules as to what constitutes such care. According to one rule, commonly known as the Pennsylvania rule, it is the duty of the automobilist under all circumstances to stop, look, and listen for approaching trains, engines, or cars before crossing a railroad track.[8] In other jurisdictions the rule is not so stringent. Circumstances enter into the determination of the duty, and they may in some cases require the automobilist to stop, look, and listen.[9] In those jurisdictions which adhere to the hard and fast rule that it is the duty of the traveler to stop, look, and listen, failure to do so is negligence as a matter of law.[10] In some jurisdictions which adhere to a less stringent rule, it is, nevertheless, negligence as a matter of law, where the circumstances are such as to require the traveler to stop, look and listen.[11] It is the view of some cases that it is not negligence per se in all cases for travelers upon a public street or road, on approaching a railroad crossing, not to stop, as well as to look and listen, before attempting to cross the track. Whether one has been negligent in failing to stop is generally presented as a mixed question of law and fact to be submitted to the jury.[12] The foregoing general rules are subject to many modifications and limitations which are discussed at other points.[13] The question is primarily one of contributory negligence and is discussed under that heading.

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[19] Annotation: 28 A.L.R. 277, s. 46 A.L.R. 1042.

[20] Annotation: 46 A.L.R. 1044.

[1] As to which general rules, see supra, § 163.

[2] Annotation: 28 A.L.R. 279, s. 46 A.L.R. 1044; Ann. Cas. 1913E, 1100 (general operation).

[3] Norma v. Charlotte Electric R. Co. 167 N. C. 533, 83 S. E. 835, Ann. Cas. 1916E, 508.

Annotation: 28 A.L.R. 279, s. 46 A.L.R. 1044; Ann. Cas. 1913E, 1100 (general operation).

[4] Annotation: 28 A.L.R. 279, s. 48 A.L.R. 1044.

[5] Norman v. Charlotte Electric R. Co. 167 N. C. 533, 83 S. E. 835, Ann. Cas. 1916E, 508.

Annotation: 28 A.L.R. 283, s. 46 A.L.R. 1047.

[6] Annotation: 28 A.L.R. 283, s. 46 A.L.R. 1049.

[7] Annotation: 1 A.L.R. 203, s. 2 A.L.R. 767, 41 A.L.R. 405.

[8] Benner v. Philadelphia & R. R. Co. 262 Pa. 307, 105 A. 283, 2 A.L.R. 759; Serfas v. Lehigh & N. E. R. Co. 270 Pa. 306, 113 A. 370, 14 A.L.R. 791.

Annotation: 1 A.L.R. 203, s. 2 A.L.R. 767, 41 A.L.R. 405.

[9] Pennsylvania R. Co. v. Yingling, 148 Md. 169, 129 A. 36, 41 A.L.R. 398.

Annotation: 1 A.L.R. 204, s. 41 A.L.R. 405.

If a railroad track at a public highway crossing is not fully in view in both directions in the immediate approach to the crossing, due care requires a traveler to stop, look, and listen before attempting to cross. Pennsylvania R. Co. v. Yingling, 148 Md. 169, 129 A. 36, 41 A.L.R. 398.

[10] Benner v. Philadelphia & R. R. Co. 262 Pa. 307, 105 A. 283, 2 A.L.R. 759.

Annotation: 1 A.L.R. 203, s. 2 A.L.R. 767, 41 A.L.R. 405.

8. Right and Duty to Violate Traffic Rules

§ 322. Generally.—There is a difference of opinion as to the right or duty of a driver to turn, in violation of the law of the road, where he is confronted with an obstruction, person, or other vehicle. The general rule is that the violation of the law of the road in such a situation does not necessarily render the automobilist guilty of negligence and if ordinary care so dictates, he may, in order to avoid such obstruction, person, or other vehicle, turn in violation of such rule.[14] On the other hand, there is authority to the effect that the driver of an automobile is never justified in violating the law of the road, at least that created by statute.[15]

Under the general rule the driver may, without being guilty of negligence as a matter of law in passing a vehicle going in the same direction, pass to the right, where the way on the right is clear, and especially if the way on the left is not.[16] In doing so, he must exercise care to give proper signals and he must not pass at a high rate of speed.

According to the general rule it is not necessarily negligence for the driver of an automobile to turn to the left in meeting and passing a car coming from the opposite direction, in an attempt to avoid such car, coming on the wrong side, with which a collision is threatened; the question whether negligence exists depends upon the facts and circumstances of the particular case.[17] The view has been taken, however, that a person in such a situation is never justified in turning to the left.[18] Where, under the law of the state, an automobile overtaking and passing a street car must pass to the right, the driver is not justified in passing to the left, although the space at the right of the car is temporarily blocked with traffic.[19]

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[11] Annotation: 1 A.L.R. 203, s. 2 A.L.R. 767, 41 A.L.R. 405.

It is negligence per se to attempt to cross a railroad on a public highway without looking and listening for approaching trains. Pennsylvania R. Co. v. Yingling, 148 Md. 169, 129 A. 36, 41 A.L.R. 398.

[12] Elkins v. Western Maryland R. Co. 76 W. Va. 733, 83 S. E. 762, 1 A.L.R. 198.

[13] See infra, §§ 416, 437.

See generally Railroads [Also 22 R. C. L. p. 1028, §§ 260 et seq.]

[14] Hubbard v. Bartholomew, 163 Iowa, 58, 144 N. W. 13, 49 L.R.A.(N.S.) 443; Sims v. Eleazar, 116 S. C. 41, 106 S. E. 854, 24 A.L.R. 1293.

Wallace v. Bergius [1915] S. C. 205, 52 Scot. L. R. 130, 7 B. R. C. 692.

Annotation: 24 A.L.R. 1306, s. 63 A.L.R. 279, 7 B. R. C. 705.

One driving an automobile upon a public highway at night may be found to have been negligent in turning abruptly to the wrong side of the road in the path of a coasting sled, although he thought he saw pedestrians on the road in front of him. Idell v. Day, 273 Pa. 34, 116 A. 506, 20 A.L.R. 1429.

One approaching a blind corner in an automobile is not negligent if, when another car suddenly turns the corner on the wrong side of the street, he, in the emergency, turns his car to the left to avoid the collision, although the other car also turns to that side of the street, so that he is on the wrong side of the road when the accident occurs. Bragdon v. Kellogg, 118 Me. 42, 105 A. 433, 6 A.L.R. 669.

A bicyclist cannot be said, as a matter of law, to have been guilty of contributory negligence in swerving from his proper side of the highway in the endeavor to avoid an automobile which suddenly turned from an intersecting street on the wrong side of the road, at high speed, so as to place him in imminent danger of collision. Calahan v. Moll, 160 Wis. 523, L.R.A. 1916A, 744, 152 N. W. 179.

[15] Couples Mercantile Co. v. Bow, 32 Idaho, 774, 189 P. 48, 24 A.L.R. 1296.

Annotation: 24 A.L.R. 1306, s. 63 A.L.R. 279.

[16] Grein v. Gorden, 280 Pa. 576, 124 A. 737, 34 A.L.R. 1511.

Annotation: 24 A.L.R. 1306, s. 63 A.L.R. 278.

[17] Hubbard v. Bartholomew, 163 Iowa, 58, 144 N. W. 13, 49 L.R.A.(N.S.) 443; Sims v.

The automobilist may, in an emergency and to avoid colliding with a car suddenly turning a corner on the wrong side of the street, turn his car to the left.[20]

9. Turning

§ 323. Generally.—The general rule that the driver of an automobile must exercise ordinary care applies to his action in turning from his course.[1] It is the duty of the operator of a motor vehicle, prior to changing his course and turning,[2] to exercise such caution as traffic conditions demand, to give vehicles following him notice of his intention, or to bring his car to a standstill, if necessary, until he is afforded a free passage.[3] The driver of the car ahead has no right, merely because he is in the lead and traveling at the maximum statutory rate, to assume that no one will attempt to pass him.[4]

Where the traffic has not become heavy, it cannot be said, as a matter of law, that a driver of an automobile is guilty of negligence if he fails to stop, look, and listen for cars approaching from the rear, before crossing to turn into a road on the left.[5]

In turning across traffic coming from the opposite direction, the driver of an automobile must exercise ordinary care to avoid colliding with machines passing at the time and place.[6] He is not, however, required to avoid all interference with the passing of other vehicles.[7]

Turning in the center of a block in front of an approaching automobile without giving any warning of an intention to make the turn, and without making the least observation to determine whether any car is approaching, is sufficient to establish negligence.[8]

Liability for negligence in turning depends upon the absence of contributory negligence on the part of the driver of the colliding car,[9] although it has been held that the driver of a truck which was struck by the plaintiff's car as the truck was making a left turn on a main city street, into an intersecting street, without any warning being given, was guilty of the grossest negligence, which was the main contributing cause of the collision, rendering him liable for the injury, even if the plaintiff's negligence contributed thereto.

§ 324. Into Intersecting Street.—In turning to the left into an intersecting

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Eleazar, 116 S. C. 41, 106 S. E. 854, 24 A.L.R. 1293; Lawson v. Dye, 106 W. Va. 494, 145 S. E. 817, 63 A.L.R. 271.

Wallace v. Bergius [1915] S. C. 205, 52 Scot. L. R. 130, 7 B. R. C. 692.

Annotation: 24 A.L.R. 1308, s. 63 A.L.R. 280.

[18] Couples Mercantile Co. v. Bow, 32 Idaho, 774, 189 P. 48, 24 A.L.R. 1296.

Annotation: 24 A.L.R. 1308, s. 63 A.L.R. 280.

[19] Harris v. Johnson, 174 Cal. 55, 161 P. 1155, L.R.A.1917C, 477, Ann. Cas. 1918E, 560.

Annotation: 24 A.L.R. 1315, s. 63 A.L.R. 284.

[20] Bragdon v. Kellogg, 118 Me. 42, 105 A. 433, 6 A.L.R. 669.

Annotation: 24 A.L.R. 1312, s. 63 A.L.R. 282.

[1] Annotation: 57 A.L.R. 1106.

[2] Zandras v. Moffett, 286 Pa. 477, 133 A. 817, 47 A.L.R. 699.

[3] Annotation: 24 A.L.R. 511, s. 47 A.L.R. 709, 62 A.L.R. 976.

[4] Annotation: 24 A.L.R. 513, s. 47 A.L.R. 712, 62 A.L.R. 980.

[5] Annotation: 24 A.L.R. 513, s. 47 A.L.R. 712, 62 A.L.R. 980.

[6] Bradley v. Schmidt, 223 Ky. 784, 4 S. W. (2d) 703, 57 A.L.R. 1100.

[7] Annotation: 57 A.L.R. 1106.

[8] Annotation: 57 A.L.R. 1106.

[9] See infra, §§ 432 et seq.

street, the driver is bound to give the right of way to cars coming from the opposite direction on the street from which he is turning, the path of which he would cross after the turn.[10] This is required by a statute providing that one of two automobiles approaching a highway intersection must give the right of way to the car on its right.[11] The relative position of the cars, however, is important. The right-of-way rule applies only when a man of ordinary prudence would believe that the approaching cars would arrive at the intersection of the streets at approximately the same instant that his turn is made.[12] Even though he turns into a street on which he would have had the right of way had he been traveling thereon, he is not ordinarily entitled to the full protection of the rule, but is bound to exercise care to avoid colliding with machines the path of which he would cross.[13]

As to traffic following him, he must exercise such care as the traffic conditions demand. This may, and usually does, require a signal.[14]

A person turning to the right into an intersecting street is not, after he has turned into the intersecting street, bound to give the right of way to approaching vehicles which would have had the right of way over him at the intersection.[15]

§ 325. —Regulations as to Line of Traffic.—Various regulations have been prescribed for the making of left-hand turns. Perhaps the most common of these regulations is that requiring traffic desiring to make left-hand turns, where there are several lines of traffic proceeding in each direction, to turn into the line of traffic nearest the center of the street and continue in such line until the turn is made.[16] Such a course is expressly provided for in some statutes and ordinances. It is not always negligence to fail to observe such a statutory requirement.[17] A truck driver conforming to police regulations requiring slowly moving vehicles to keep next to the curb is not negligent in making a left-hand turn from this position as against traffic coming from the opposite direction.[18] The provision requiring those desiring to make a left-hand turn to keep in the center line of traffic has been said to be for the safety and convenience of those behind the vehicle making the turn.[19]

In some cities where the intersections are controlled by traffic signals or officers, traffic desiring to make a left-hand turn is required to draw up to the right of the curb and wait until the traffic signal changes and then proceed into the intersecting street.

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[10] Neumann v. Apter, 95 Conn. 695, 112 A. 350, 21 A.L.R. 970; Webber v. Park Auto Transp. Co. 138 Wash. 325, 244 P. 718, 47 A.L.R. 590.

Annotation: 21 A.L.R. 981, s. 37 A.L.R. 502, 47 A.L.R. 602.

[11] Webber v. Park Auto Transp. Co. 138 Wash. 325, 244 P. 718, 47 A.L.R. 590.

[12] Neumann v. Apter, 95 Conn. 695, 112 A. 350, 21 A.L.R. 970.

[13] Annotation: 21 A.L.R. 981, s. 37 A.L.R. 502, 47 A.L.R. 602.

[14] Annotation: 24 A.L.R. 513, s. 47 A.L.R. 712, 62 A.L.R. 980.

[15] Annotation: 21 A.L.R. 981, s. 37 A.L.R. 502, 47 A.L.R. 602.

A vehicle on the street which is on its left-hand side does not have the right of way over the car that has just turned into the street. Annotation: 21 A.L.R. 981, s. 37 A.L.R. 502, 47 A.L.R. 602.

A driver of a motor vehicle who negligently, because of excessive speed or not having his machine under control, fails to keep to the right of the intersection of a public street, when turning to the right, as required by statute, but crosses to the left instead, and collides with another vehicle lawfully upon that side of the street, whose driver is free from negligence, is responsible for the consequent damages. Molin v. Wark, 41 L.R.A.(N.S.) 346, 113 Minn. 190, 129 N. W. 383.

[16] Annotation: 87 A.L.R. 1165.

[17] Richards v. Warner Co. 311 Pa. 50, 166 A. 496, 87 A.L.R. 1159.

[18] Ibid., holding that at least he is not liable where the injury sued for was not the proximate result of the turning.

[19] Richards v. Warner Co. 311 Pa. 50, 166 A. 496, 87 A.L.R. 1159.

§ 326. **—Cutting Corners.**—The violation by the driver of an automobile of a statute or ordinance requiring one, in making a left-hand turn into an intersecting street, to keep to the right of the center of the intersection is negligence per se, or at least an element of negligence.[20] Negligence in cutting a corner and striking a traffic officer imposes liability therefor.[1] The fact that traffic at the time of the accident is congested is no reason for violating the rule.[2] Such a regulation applies even though the streets do not cross, one running into the other and stopping.[3]

The fact that the collision occurs after the turn is made is not conclusive against liability if, except for the short turn, the accident would not have happened.[4]

§ 327. **Signals.**—Signals of an intent to turn are frequently required by statute or ordinance. The driver should not only hold out his hand as required by ordinance, but should make sure that by suddenly turning, he does not drive across the path of another oncoming automobile.[5]

In the absence of a statute or ordinance requiring a signal, the duty to signal has been made to depend upon knowledge of the proximity of the car following.[6]

Such signal must be given a sufficient length of time before making the turn to warn the driver of the car following in the rear and enable him so to regulate the course and speed of his own car as not to be thrown into a position of peril.[7]

The effect of the violation of a statute or ordinance in this regard has the same general effect as the violation of statutes and ordinances relating to other matters.[8] The view is taken that it is negligence per se for a driver to make a left turn into a private driveway without signaling his intention to cars approaching from his rear, as required by statute [9] or ordinance.[10]

10. BACKING

§ 328. **Generally.**—The law does not forbid the backing of an automobile upon the streets or highways.[11] The mere backing of an automobile on a public street is not negligence,[12] at least not negligence per se.[13]

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[20] Stubbs v. Molberget, 108 Wash. 89, 182 P. 936, 6 A.L.R. 318; Calahan v. Moll, 160 Wis. 523, 152 N. W. 179, L.R.A.1916A, 744. Annotation: 6 A.L.R. 321.

[1] Annotation: 6 A.L.R. 325.

[2] Stubbs v. Molberget, 108 Wash. 89, 182 P. 936, 6 A.L.R. 318.

[3] Annotation: 6 A.L.R. 325.

[4] Annotation: 6 A.L.R. 325.

In one case, although the collision occurred 65 feet or more from the intersection, the failure to comply with the statute in making the turn was required to be taken into consideration in determining whose negligence caused the accident. The jury was authorized to find that if the driver of the car had gone to the right of the center of the intersection before turning, the collision would not have occurred. Annotation: 6 A.L.R. 325.

[5] Annotation: 24 A.L.R. 513, s. 47 A.L.R. 712, 62 A.L.R. 980.

[6] Annotation: 24 A.L.R. 512, s. 47 A.L.R. 712, 62 A.L.R. 978.

[7] Annotation: 24 A.L.R. 513, s. 47 A.L.R. 712, 62 A.L.R. 980.

[8] See supra, § 163.

[9] Annotation: 24 A.L.R. 512, s. 47 A.L.R. 712, 62 A.L.R. 978.

[10] Armstead v. Lounsberry, 129 Minn. 34, 151 N. W. 542, L.R.A.1915D, 628.

There is a compliance with an ordinance requiring every person using any vehicle to look to the rear before turning around and making a violation thereof gross negligence if one riding with the driver looks and directs him to go ahead. Armstead v. Lounsberry, 129 Minn. 34, 151 N. W. 542, L.R.A.1915D, 628, wherein the evidence was held to charge the defendant with negligence, where he saw the plaintiff's automobile in front of him headed in the same direction and saw that it had commenced to turn in the street, which required practically the whole width of the street, and, although the defendant could have stopped his car and avoided a collision, he increased his speed and attempted to pass ahead of the plaintiff's car and a collision resulted, and wherein the evidence was held sufficient to sustain a finding that the plaintiff was not negligent in making the turn, it appearing, among other things, that he had complied with a statute requiring one intending to turn to look to the rear.

The driver must exercise ordinary care in so backing.[14] Backing without taking the necessary precaution is negligence.[15] In this situation, as elsewhere, negligence is ordinarily a question of fact. The jury must consider all the facts in the case, including the direction in which the car was traveling, the rate of speed, whether any signal or warning was given, the condition of the street, the situation and surroundings of the parties, the manner in which the injured person was crossing the street, and what observations, if any, the one driving the car made while backing.[16]

The fundamental rule of negligence law that the negligence must be the proximate cause of the injury applies here. If the act of negligence relied upon, such as the failure to give signals and warnings, is not the proximate cause of the injury, no liability exists.[17]

§ 329. On Right-hand Side of Street.—Backing an automobile a short distance to occupy space for parking purposes on the right-hand side of the street does not, although it results, when viewed in the direction in which the machine is moving, in propelling it on the left side of the street, violate a municipal ordinance requiring vehicles to travel on the right-hand side and near the right-hand curb.[18]

§ 330. Looking.—One precaution that must be taken before starting to back is that of looking to see that the way is clear.[19] The driver must continue to look while he is in the act of backing.[20]

One is not negligent per se in backing an automobile, when he cannot see over the back of the car so as to know what might be in his way, if he takes reasonable precautions, before starting to back, to make proper observations by looking to the right and to the left of the car and by standing up and looking over the back.[1]

Looking is especially required in backing an automobile on the wrong side of a public street. So to back without looking in the direction in which the car is moving to ascertain if anyone is in danger of being hit is negligence.[2]

§ 331. Signaling.—Another precaution required is that of giving warning when persons or vehicles are in the way of the backing car. When a reasonable necessity for a signal exists, such signal must be given.[3] Approaching vehicles must be given timely warning of an intention to back.[4] Where the driver is backing in a narrow street where other automobiles are parked and children are playing, it is his duty to sound his horn repeatedly when backing.[5]

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[11] Taulborg v. Andresen, 119 Neb. 273, 228 N. W. 528, 67 A.L.R. 642.
Annotation: 67 A.L.R. 647.

[12] Taulborg v. Andresen, 119 Neb. 273, 228 N. W. 528, 67 A.L.R. 642.

[13] Sheldon v. James, 175 Cal. 474, 166 P. 8, 2 A.L.R. 1493.
Annotation: 67 A.L.R. 647.

[14] Taulborg v. Andresen, 119 Neb. 273, 228 N. W. 528, 67 A.L.R. 642.
Annotation: 67 A.L.R. 647.

[15] Annotation: 67 A.L.R. 647.

[16] Sheldon v. James, 175 Cal. 474, 166 P. 8, 2 A.L.R. 1493.

[17] Ibid.
Annotation: 67 A.L.R. 647.

[18] Sheldon v. James, 175 Cal. 474, 166 P. 8, 2 A.L.R. 1493.

[19] Taulborg v. Andresen, 119 Neb. 273, 228 N. W. 528, 67 A.L.R. 642.
Annotation: 67 A.L.R. 648.

[20] Taulborg v. Andresen, 119 Neb. 273, 228 N. W. 528, 67 A.L.R. 642.
Annotation: 67 A.L.R. 648.

[1] Sheldon v. James, 175 Cal. 474, 166 P. 8, 2 A.L.R. 1493.

[2] Ibid.

[3] Taulborg v. Andresen, 119 Neb. 273, 228 N. W. 528, 67 A.L.R. 642.

[4] Annotation: 67 A.L.R. 648.

[5] Annotation: 67 A.L.R. 648.

Failure to give a signal, as required by statute, constitutes negligence per se.[6]

§ 332. Application to Facts.—The fundamental rules stated in the preceding section govern the care of the driver or owner in backing in or out of the garage, driveway, or alley.[7] In fact, it has been said to be imprudent to back an automobile out of a garage across the sidewalk without taking extra precautions to avoid running down passers-by.[8] Especially where the view is obstructed is it necessary to take extra precautions.[9]

The general rules discussed in preceding sections apply also to backing into or out of a parking place,[10] to backing in order to turn around,[11] to backing of a car for the purpose of making delivery,[12] to backing a truck working on the road,[13] to backing away from a gasoline station,[14] and to backing at a cabstand.[15]

Where the car is backed at or near a street intersection[16] or near street cars,[17] the presence of traffic in one case and of the street cars in the other enters into the determination of whether proper care has been exercised.

11. Stopping

§ 333. Generally.—Negligence in stopping an automobile arises in many connections.[18]

The stalling of an automobile on the highway does not, in every instance, evidence negligence on the part of its operator.[19] The operator must exercise a reasonable degree of care to keep the car in proper condition so that it will not stall.[20] It is a want of such care to permit it to stall for want of a sufficient supply of gasoline.[1]

Negligence in stopping an automobile on a street car track for the purpose of taking on, or letting off, a person depends upon the circumstances.[2] There may be circumstances in which it is not negligence.[3]

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[6] Annotation: 67 A.L.R. 648.

[7] Annotation: 67 A.L.R. 649.

[8] Annotation: 67 A.L.R. 649.

[9] Annotation: 67 A.L.R. 650.

[10] Annotation: 67 A.L.R. 655.
A municipal ordinance making it unlawful to propel any vehicle in a backward direction if, in so doing, the free and uninterrupted passage of any vehicle or any street car or interurban car shall be impeded has no application in an action to recover damages for injury to a pedestrian by attempting to back an automobile into a parking space. Sheldon v. James, 175 Cal. 474, 166 P. 8, 2 A.L.R. 1493.

[11] Annotation: 67 A.L.R. 659.

[12] Annotation: 67 A.L.R. 660.

[13] Annotation: 67 A.L.R. 661.

[14] Annotation: 67 A.L.R. 661.

[15] Annotation: 67 A.L.R. 661.

[16] Annotation: 67 A.L.R. 653.

[17] Annotation: 67 A.L.R. 655.

[18] **The fact that one turned out of the road to stop his automobile** in order to assist persons supposed to be in need of assistance in a standing car does not excuse negligence in so doing which results in injury to one walking along the side of the road. Woodhead v. Wilkinson, 181 Cal. 599, 185 P. 851, 10 A.L.R. 291.
As to stopping in the way of traffic moving in the same direction, see supra, § 281.
As to parking, see infra, §§ 334 et seq.

[19] Keller v. Breneman, 153 Wash. 208, 279 P. 588, 67 A.L.R. 92.
The driver of an automobile which stalls in a public highway is not negligent in alighting from the car and attempting to adjust the mechanism without moving the car. Southall v. Smith, 151 La. 967, 92 So. 402, 27 A.L.R. 1194.

[20] Keller v. Breneman, 153 Wash. 208, 279 P. 588, 67 A.L.R. 92.

[1] Ibid.

[2] Fitch v. Bay State Street R. Co. 237 Mass. 65, 129 N. E. 423, 15 A.L.R. 234.
Annotation: 15 A.L.R. 236.

[3] Fitch v. Bay State Street R. Co. 237 Mass. 65, 129 N. E. 423, 15 A.L.R. 234.
It was held not negligence for the automobilist to stop in front of his home to discharge two invalid guests with a portion of the automobile on the street car track at a time when no car was in sight and when the traffic in the street made such position safer and more convenient for the discharge of the guests than a position outside the car tracks. Ibid.

12. Parking

§ 334. Generally.—The right to park an automobile in the street is generally recognized.

The term "parking," as applied to automobiles, includes not only the voluntary act of leaving a car on the street unattended, but also the stopping of a car on a highway, though occupied and attended, for a length of time inconsistent with a reasonable use of the street for the purpose of travel, but does not generally include stopping at the curb for the purpose of taking in, or letting out, persons, or for the purpose of loading or unloading goods.[4]

In parking, the operator must exercise ordinary care not to park in an improper place.[5] Here, as elsewhere, the fundamental rule of negligence law that to impose liability upon the negligent party, his negligence must be the proximate cause of the injury, applies.[6] To hold the owner of a runaway truck liable for injuries caused by it, the plaintiff must show that the owner was negligent and that his negligence was the proximate cause of the injury.[7]

§ 335. On Wrong Side of Street or Highway.—It is generally recognized as negligence to park on the wrong side of a much-traveled highway,[8] and in some cases this is held as a matter of law.[9] In other cases such parking is held merely to be evidence of negligence.[10]

The mere fact of stopping an automobile on the wrong side of a highway does not, under all conditions, constitute negligence.[11] Parking on the left side with headlights burning for the purpose of making a delivery [12] or making repairs to the engine—even if there was opportunity to turn off the road for that purpose[13]—is not negligence. In the ordinary case negligence in parking or stopping on the wrong side presents a jury question.[14]

The driver of an approaching car on his right-hand side of the road who sees in front of him the headlights of another car facing him has the right to assume that such car is in motion and will be operated in conformity with the law of the road.[15]

In order that liability may be based upon parking on the wrong side, the fundamental rule of negligence law—namely, that the negligence in so parking must be the proximate cause of the injury—applies.[16]

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[4] Wonewoc v. Taubert, 203 Wis. 73, 233 N. W. 755, 72 A.L.R. 224.

A few cases of stopping for purposes of delivery have been included in this subdivision.

It is not negligence per se to leave a motor truck unattended in a public street, although it is the duty of the driver to exercise the care of a person of ordinary prudence under the circumstances. American Express Co. v. Terry, 126 Md. 254, 94 A. 1026, Ann. Cas. 1917C, 650.

[5] Annotation: 73 A.L.R. 1074.

When a vehicle is stopped substantially in the middle of the highway with sufficient space on either side for other vehicles to pass in safety, a driver approaching from the rear may make use of the unoccupied portion of the roadway on either side of the standing vehicle, exercising such care as the circumstances require. Grein v. Gordon, 280 Pa. 576, 124 A. 737, 34 A.L.R. 1511.

[6] Milbury v. Turner Centre System, 274 Mass. 358, 174 N. E. 471, 73 A.L.R. 1070.

[7] Jackson v. Mills Baking Co. 221 Mich. 64, 190 N. W. 740, 26 A.L.R. 906.

[8] Annotation: 70 A.L.R. 1021.

[9] **Parking in such a position** that, although the front of the car is off the highway and the front lights are directed obliquely away from the road, the rear end of the truck extends well out on the paved surface of the highway constitutes negligence. Waynick v. Walrond, 155 Va. 400, 154 S. E. 522, 70 A.L.R. 1014.

[10] **Leaving a car parked in the center of a public highway** in the nighttime in such a position that it is not visible from approaching cars is prima facie evidence of negligence. Whitworth v. Riley, 132 Okla. 72, 269 P. 350, 59 A.L.R. 584.

[11] Annotation: 70 A.L.R. 1023.

[12] Annotation: 70 A.L.R. 1023.

[13] Schacht v. Quick, 178 Wis. 330, 190 N. W. 87, 25 A.L.R. 130.

[14] Annotation: 70 A.L.R. 1024.

[15] Whitworth v. Riley, 132 Okla. 72, 279 P. 350, 59 A.L.R. 584.
Annotation: 70 A.L.R. 1025.

[16] Waynick v. Walrond, 155 Va. 400, 154 S. E. 522, 70 A.L.R. 1014.
Annotation: 70 A.L.R. 1027.

The doctrine of last clear chance has been held inapplicable in the situation presented by the class of cases under consideration.[17]

§ 336. —**Wilful and Wanton Negligence.**—Whether it is wilful and wanton negligence to park on the wrong side of the road on a dark night in such a way that the lights do not clearly show the position of the car is usually a question of fact. In some cases, however, it has been held as a matter of law that the conduct of the defendant was not wilful and wanton.[18]

§ 337. **Stopping without Lights.**[19]—It is generally held to be negligence or evidence of negligence to leave an automobile on the highway after dark without displaying lights or giving warning of its presence in some other way.[20] The failure to display lights as required by statute is negligence per se.[1] The courts, however, have pointed out that an accidental break in machinery or a defect in the mechanism or parts peculiar to the car often gives the person operating it no choice about leaving a car standing in the road until a remedy for the mishap is found; that the rights of persons operating cars upon the public highway are coequal; and that all parties operating cars, in the exercise of ordinary care, should be on the lookout for other cars either moving or standing in the highway.[2]

§ 338. **Duty to Guard against Machine Moving.**—A person who leaves an automobile on a public street unattended is under the duty to exercise such care in doing so as a person of ordinary prudence would exercise under the circumstances. If, by reason of the failure to exercise such care, the machine, without any interference of wilful act of another, gets under way and inflicts injury, such person is liable.[3] One precaution that is frequently mentioned in the cases is the duty to see that the brakes are properly set.[4] On wet and slippery pavements extra precautions are required in setting the brakes.[5]

The question that has most frequently arisen in cases of injuries resulting from the starting of a parked car is the proof of negligence. The doctrine of res ipsa loquitur has been applied to such a case,[6] especially where the car was parked on a grade and, shortly after it was left, started down the grade.[7] The question of negligence in such a case is ordinarily a question for the jury.[8]

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[17] Whitworth v. Riley, 132 Okla. 72, 269 P. 350, 59 A.L.R. 584.
Annotation: 70 A.L.R. 1028.

[18] Waynick v. Walrond, 155 Va. 400, 154 S. E. 522, 70 A.L.R. 1014.
Submission to the jury of the question whether the defendant's negligence was wilful and wanton is not warranted in a case where such negligence consisted of parking a truck on the wrong side of the road on a dark night at such an angle that the rear end extended halfway across the roadway. Ibid.

[19] As to the applicability of light regulations to cars not in motion, see § 35.

[20] Annotation: 24 A.L.R. 510, s. 47 A.L.R. 706, 62 A.L.R. 972.
A father who is accustomed to leave his automobile standing at the curb unlighted in the night cannot escape liability for an injury caused by such act, by the fact that his son had last used the car on business of his own. Jaquith v. Worden, 73 Wash. 349, 132 P. 33, 48 L.R.A.(N.S.) 827.
The negligence of a truck driver in parking his truck on a drizzly, foggy night, without lights, on a highway wide enough to carry four trucks abreast, so that it extended diagonally to the center of the highway, and in placing himself at the rear of the truck while hanging an unlighted lantern thereon, and not the negligence of the driver of another truck in proceeding at a speed which did not permit him to stop within the distance covered by the range of his lights, was the proximate cause of the death of the driver of the first truck when the second truck collided with it. Singer v. Messina, 312 Pa. 129, 167 A. 583, 89 A.L.R. 1271.

[1] Murphy v. Hawthorne, 177 Or. 319, 244 P. 79, 44 A.L.R. 1397.
Annotation: 24 A.L.R. 510, s. 47 A.L.R. 706, 62 A.L.R. 972.

[2] Annotation: 24 A.L.R. 510, s. 47 A.L.R. 706, 62 A.L.R. 972.
The driver of an automobile who stopped his car, under an arc light and as far off the pavement on the right as he could go for the purpose of fixing his lights was held not guilty of actionable negligence for an injury caused by a collision between such standing car and another proceeding in the same direction. Annotation: 62 A.L.R. 973.

[3] Annotation: 66 A.L.R. 440.

[4] Annotation: 66 A.L.R. 440.

[5] Annotation: 66 A.L.R. 440.

[6] Annotation: 66 A.L.R. 441.
Generally as to evidence, see infra, §§ 607 et seq.

The intervention of a third person in attempting to stop the car does not always relieve the owner from liability, even though such person, in his attempts to stop the car, changes its course.[9] In fact, such owner may even be liable to the third person who is injured in his attempts to stop the car.[10]

Where the car is started by a third person, any negligence there may be on the part of the owner in leaving it unattended is regarded as not the proximate cause of the injury, and therefore, there is held to be no liability.[11]

§ 339. In Municipalities.—Parking in city streets is generally regulated by ordinance.[12] There are questions of construction in determining whether the ordinance is violated.[13]

Parking in violation of such ordinance is not invariably actionable negligence.[14] An ordinance forbidding parking within a certain distance of a fire hydrant has been held not to be for the protection of the traveling public, and therefore, parking in violation thereof is held not to be negligence as against other travelers on the highway.[15] Parking in violation of an ordinance within the prohibited distance from a crossing is generally held, however, to be negligence,[16] or evidence of negligence which requires submission to the jury,[17] according to the view which prevails in the jurisdiction as to the effect of violation of a statute or ordinance as negligence.[18]

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[7] Biller v. Meyer (C. C. A. 7th) 33 F. (2d) 440, 66 A.L.R. 436.

Annotation: 66 A.L.R. 441.

[8] Biller v. Meyer (C. C. A. 7th) 33 F. (2d) 440, 66 A.L.R. 436; American Exp. Co. v. Terry, 126 Md. 254, 94 A. 1026, Ann. Cas. 1917C, 650.

Annotation: 66 A.L.R. 443.

[9] Annotation: 66 A.L.R. 447.

As to injury to person on sidewalk, see § 189.

[10] American Exp. Co. v. Terry, 126 Md. 254, 94 A. 1026, Ann. Cas. 1917C, 650.

Annotation: 66 A.L.R. 447.

[11] Jackson v. Mills Baking Co. 221 Mich. 64, 190 N. W. 740, 26 A.L.R. 906; Maloney v. Kaplan, 233 N. Y. 426, 135 N. E. 838, 26 A.L.R. 909; Rhad v. Duquesne Light Co. 255 Pa. 409, L.R.A.1917D, 864, 100 A. 262.

Annotation: 26 A.L.R. 912.

The driver of a motor vehicle who had set its brakes, turned off the engine, and turned the front wheels to the curb, or otherwise stopped it securely, in the circumstances, is not liable for an injury caused by the acts of others in wilfully starting the car; at least if the circumstances are not such as to suggest the necessity of unusual care to guard against probable interference with the car. Maloney v. Kaplan, 233 N. Y. 426, 135 N. E. 838, 26 A.L.R. 909.

Where defendant's chauffeur drove up to the curb, stopped his car headed down a grade, put on the brake, stopped his engine, and went into a restaurant, and a boy released the brake and caused the car to start and injure the plaintiff, it was held that the proximate cause of the injury was the act of the boy in releasing the brake, and that the defendant was not liable, although the chauffeur failed to take the additional precaution of turning the wheels toward the curb. Rhad v. Duquesne Light Co. 255 Pa. 409, L.R.A.1917D, 864, 100 A. 262.

The driver of an electric delivery wagon is held not negligent in failing to remove the switch when he stopped the car in the highway, put on the brakes, and started to deliver parcels to an adjoining house, where he intended to remain only a moment, so as to become liable for an injury to a child by the starting of the car by children at play in the vicinity, where the children had not been in the habit of meddling with the car, the court holding that the proximate cause of the inquiry was the starting of the car by the children, and not the driver's failure to remove the switch. Jackson v. Mills-Fox Baking Co. — Mich. —, 190 N. W. 780, 26 A.L.R. 906.

[12] **Although no violation of any parking regulation was apparently involved,** the owner's act in leaving an automobile unattended on car tracks near the middle of the street while he went across the street into a garage, which act he conceded to be negligence, was held to be the proximate cause of an injury to a person who was working at the curb who was hit by the automobile when a street car ran into it, the court overruling the contention that the intervening, independent negligence of the motorman in running into the automobile broke the causal relation. There being no pretense of any contributory negligence, there was held to be no opportunity for applying the last clear chance doctrine against the codefendant street railway company, a car belonging to which hit an automobile that was left unattended in the street. Annotation: 73 A.L.R. 1076.

[13] **Temporarily stopping a truck in an alley** and placing a block behind a rear wheel while waiting for the opportunity to proceed a little farther in order to unload has been held not to violate an ordinance against standing or parking a vehicle in an alley except while actually loading or unloading, and accordingly, not to amount to contributory negligence so as to preclude recovery for negligence of another truck driver who tried to pass in the narrow space instead of stopping, the place of parking of the plaintiff's truck being not the proximate cause of the accident. Annotation: 73 A.L.R. 1076.

[14] Annotation: 73 A.L.R. 1075.

Along with absence of lights, parking a car all night in a city street at a place where parking was forbidden by ordinance was held negligence so as to entitle one who drove into the parked car to recover for its owner's negligence. Annotation: 73 A.L.R. 1076.

Parking at a prohibited place without lights has been held negligence.[19]

§ 340. In Highways outside Municipalities.—Parking on a highway or on the traveled portion thereof is or is not negligence, according to the facts. A finding of negligence is generally held warranted where the car is parked at night without lights and in such a position that other travelers regularly using the highway are likely to run into it.[20] In some cases parking so as to occupy more than half the highway when it would have been possible to move the greater part of the car off the highway is held negligence as a matter of law.[1] Parking on a curve is generally sufficient evidence of negligence to raise a question of fact.[2] On the other hand, an automobilist who places his car off the side of the road with ample passing space in the highway, with lights turned on, and a person on guard to signal approaching cars while he works in front of his car in repairing the tire is held free from negligence as a matter of law.[3]

Parking on highways outside of municipalities is generally regulated by statute. Usually, parking on the traveled or hard-surfaced part of the highway is forbidden. Some except from the prohibition against parking on the traveled portion cases in which the vehicle is disabled or cases in which it is necessary to make repairs.[4] Even in case the vehicle is disabled so that it can-

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[15] Annotation: 73 A.L.R. 1076.

[16] Annotation: 73 A.L.R. 1075.

[17] Milbury v. Turner Central System, 274 Mass. 358, 174 N. E. 471, 73 A.L.R. 1070.

A finding that the negligence of a truck owner and operator in leaving it standing at a street intersection directly in the path taken by pedestrians in violation of an ordinance making that unlawful was the sole cause of the death of a small child who was obliged to go around it in trying to cross the street and was hit by an automobile in motion, the driver of which was not negligent, was held warranted. Annotation: 73 A.L.R. 1076.

The refusal of the person in charge of an automobile which was parked across a sidewalk (such person at the time sitting in it) to move it in order to enable a pedestrian to pass has been held sufficient ground upon which negligence might be imputed to such person and, accordingly also, to the owner, as a predicate to liability for injury to the pedestrian who was injured by a fall after having been compelled to walk around the car toward the curb. Annotation: 73 A.L.R. 1076.

[18] See supra, § 163.

[19] Annotation: 73 A.L.R. 1076.

[20] Annotation: 73 A.L.R. 1077.

It is recognized that the leaving of a car upon the highway for the making of absolutely necessary repairs may in certain instances be negligence, as, for example, where it is so left as unnecessarily to obstruct traffic and where no precautions are taken to signal approaching cars. Long v. Steffen, 194 Wis. 179, 215 N. W. 892, 61 A.L.R. 1155.

The parking of an unlighted truck for a few minutes at late dusk at the side of a country highway which was straight and level for at least half a mile in both directions, with its right wheels about 2 feet off the pavement, the softness of the shoulder and the weight of the load making it undesirable to drive it further to the side, while negligence, is not recklessness. Hart v. Stence, 219 Iowa, 55, 257 N. W. 434, 97 A.L.R. 535.

Leaving a truck standing on a public highway in the path of travel, after dark, in a rainstorm, is the proximate cause of injury through collision with it by one driving an automobile at 12 miles per hour, when he could see only 20 feet ahead, who was unable to stop or turn aside after he discovered the obstruction in time to avoid the collision. Rozycki v. Yantic Grain & Products Co. 99 Conn. 711, 122 A. 717, 37 A.L.R. 582.

[1] Keller v. Breneman, 153 Wash. 208, 279 P. 588, 67 A.L.R. 92.

[2] Annotation: 73 A.L.R. 1079.

[3] Long v. Steffen, 194 Wis. 179, 215 N. W. 892, 61 A.L.R. 1155.

[4] **An exception, under such a statute, of the case where repairs are absolutely necessary** applies to the repairing of a punctured tire. Long v. Steffen, 194 Wis. 179, 215 N. W. 892, 61 A.L.R. 1155.

The question whether an emergency existed which justified leaving a truck on the traveled portion of the highway about a mile and a half from a village when its engine became hot in order to refill the radiator from a wayside ditch, or whether it could have safely been driven to the village, was held for the jury; and accordingly, the refusal to direct a verdict for a not move under its own power, if it can otherwise be removed from the traveled portion, it is the duty of the driver so to remove it.[5]

The effect of the violation of such a statute as negligence depends upon the doctrine which prevails in the particular state upon this question.[6] That it is negligence per se is the view of some jurisdictions.[7] In some instances the opportunity or lack of opportunity of parking off the traveled portion of the highway is given weight on the question of negligence.[8]

13. OPERATION ON CURVES AND HILLS

§ 341. Generally.—In rounding a curve[9] or approaching the summit of a hill,[10] where the view is shortened, it is the driver's duty to keep on the right-hand side of the road. The view is taken, however, that this duty is not an inflexible one in the absence of statute.[11]

The duty to keep to the right at curves and on hills has been imposed by statute; and frequently, the familiar lines marking the center of the road are placed there for the purpose of keeping traffic on its right-hand side. A violation of the statute in this regard has the same effect as the violation of a statute generally.[12] It has been held to be negligence to drive on the left-hand side in violation of statute.[13]

§ 342. Speed.—Generally speaking, the speed at which a car may be driven around a curve in the exercise of ordinary care is less than may be required in other places.[14] Some statutes limit the speed in going around a corner or a curve where the operator's view is obstructed and provide that a speed in excess of that fixed shall be prima facie evidence of negligence.[15] Other statutes require the driver to have his vehicle under control, without specifying the effect of violation of the statute.[16] Negligence in this regard, however, is usually held to be a question for the jury.[17]

14. TOWING CARS

§ 343. Generally.—The towing of an automobile through a street by means

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defendant who so left a truck was held proper in a case upholding a recovery by a driver who ran into the truck supposing it to be in motion. Annotation: 73 A.L.R. 1079.

[5] Keller v. Breneman, 153 Wash. 208, 279 P. 588, 67 A.L.R. 92.

In Keller v. Breneman, 153 Wash. 208, 279 P. 588, 67 A.L.R. 92, the truck was on a grade so that when it stalled, it could have drifted back downgrade upon the shoulder, which was wide enough to take it off the traveled portion for its greater part.

[6] See supra, § 163.

[7] Keller v. Breneman, 153 Wash. 208, 279 P. 588, 67 A.L.R. 92.

[8] Annotation: 73 A.L.R. 1078.

[9] Bragdon v. Kellogg, 118 Me. 42, 105 A. 433, 6 A.L.R. 669; Bloom v. Bailey, 292 Pa. 348, 141 A. 150, 57 A.L.R. 585.

Annotation: 57 A.L.R. 589.

A clear case of negligence is held to be established where the driver did not keep on his side upon approaching a dangerous turn at a bridge, but cut across and, after passing the bridge, continued on his left-hand side for some distance until the collision occurred. Annotation: 57 A.L.R. 591.

Likewise, it is held sufficient evidence of negligence that the car was being driven on the left-hand side of the road at a "pretty lively" pace. Annotation: 57 A.L.R. 591.

Evidence that an automobile collision occurred at night at a curve because of the swerving of the car driven by the plaintiff's decedent to the wrong side of the road is insufficient to take to the jury the question of the negligence of the occupants of the other car in an action to hold them liable for damages for the death. Bloom v. Bailey, 292 Pa. 348, 141 A. 150, 57 A.L.R. 585.

[10] Bloom v. Bailey, 292 Pa. 348, 141 A. 150, 57 A.L.R. 585.

Annotation: 57 A.L.R. 595.

[11] Annotation: 57 A.L.R. 589.

[12] See supra, § 163.

[13] Annotation: 57 A.L.R. 592.

[14] Annotation: 57 A.L.R. 592.

[15] Annotation: 57 A.L.R. 593.

[16] Annotation: 57 A.L.R. 594.

[17] Annotation: 57 A.L.R. 595.

The fact that a car came around a curve without warning and at a greater rate of speed than permitted by the statute is a sufficient showing of negligence. Annotation: 57 A.L.R. 594.

of a rope does not constitute negligence per se.[18] Hence, the mere fact that a person is injured by being struck by the towed car does not make out a case of negligence.[19] The driver of the automobile which is doing the towing and the person in charge of the towed car owe a duty to pedestrians and other vehicles to exercise reasonable or ordinary care.[20] On the existence of negligence the sufficiency of warning is an important element.[1] A prima facie case of negligence is made by showing that the driver of the automobile doing the towing crosses a sidewalk in turning into a garage after dark without warning pedestrians of the fact that his car is towing another car.[2]

The question whether due care has been exercised in a particular case is generally a question for the jury.[3] Whether sufficient warning is given is likewise usually for the jury.[4]

The driver of a towing car owes to the persons who are riding in the towed car the duty of ordinary care in managing his car.[5] Excessive speed or an improper hitching of the tow rope may constitute negligence which will render him liable to such persons.[6]

VI. PERSONS LIABLE

A. In General

§ 344. Generally[7]—Where the owner of an automobile, by his negligence in its operation, causes injury to another, it is clear that he is liable therefor. Similarly, where the driver of an automobile, though not the owner, negligently causes injuries to another, he likewise is liable for such injuries.[8]

A person learning to drive a car under the tutelage of the dealer is liable for injuries due to his negligence.[9] He is not relieved from liability for such negligence because of reliance upon the promise of his instructor to render assistance in avoiding danger.[10] One who has purchased a car from the dealer with the usual guaranty has, however, been held not liable for the latter's negligence in driving it at the purchaser's request to test it.[11]

§ 345. Joint Liability of Tort-feasors.—The rule that where two or more tort-feasors by concurrent acts of negligence which, though disconnected, in combination inflict an injury, all are jointly liable,[12] is applied in cases involving the joint liability of owners or operators of two or more automobiles for injuries to a third person for damage to his property.[13] If the concurrent negligence of the drivers is the proximate cause of the damage immediately inflicted upon a third person by one of the automobiles, both drivers or their employers are liable jointly and severally.[14] It is, of course, essential to the joint liability that both operators are negligent.[15] But the parties may be sued jointly, although the degree of care which each owed the person injured was different.[16] They may be sued jointly, notwithstanding there may exist a difference in the degree of liability or the quantum of evidence necessary to establish such liability.[17] So too, the fact that one was wanton and reckless and the other simply manifested want of ordinary caution does not prevent joint liability.[18]

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[18] Richter v. Dahlman & I. Co. 179 Wis. 7, 190 N. W. 841, 30 A.L.R. 747.
Annotation: 30 A.L.R. 750.

[19] Annotation: 30 A.L.R. 750.

[20] Annotation: 30 A.L.R. 750.

[1] Annotation: 30 A.L.R. 750.
The question as to whether warning is necessary, and as to the sufficiency thereof is based upon the further fact as to the condition of light, size, and color of the rope, etc. Annotation: 30 A.L.R. 750.

[2] Annotation: 30 A.L.R. 751.

[3] Richter v. Dahlman & I. Co. 179 Wis. 7, 190 N. W. 841.
Annotation: 30 A.L.R. 750.

[4] Richter v. Dahlman & I. Co. 179 Wis. 7, 190 N. W. 841.
Annotation: 30 A.L.R. 751.
The owner of a car is liable for negligence in towing a disabled car down a slippery grade backward when the brakes of the towed car are out of order, as a result of which it skids into a third car standing at a curb. Annotation: 30 A.L.R. 750.

[5] Annotation: 30 A.L.R. 754.

[6] Annotation: 30 A.L.R. 754.

[7] As to the liability of a husband or wife for injuries to the other, see HUSBAND AND WIFE [Also 13 R. C. L. p. 1445, §§ 495 et seq.].
As to the liability of a parent for injuries to a child, see PARENT AND CHILD [Also 20 R. C. L. p. 631, § 36].
As to damages for prenatal injuries, see TORTS.
As to liability for act of third person in starting parked car, see § 338, supra.
As to the liability of garage keepers and repairmen, see GARAGES, PARKING STATIONS, AND LIVERIES.

[8] The text statements are fundamental and are assumed in all the cases dealing in automobile negligence law.

[9] Goff v. Hubbard, 217 Ky. 729, 290 S. W. 696, 50 A.L.R. 1382.
Annotation: 20 A.L.R. 194, s. 50 A.L.R. 1391.

[10] Goff v. Hubbard, 217 Ky. 729, 290 S. W. 696, 50 A.L.R. 1382.

[11] Annotation: 20 A.L.R. 194, s. 50 A.L.R. 1391.

§ 346. Liability of Common Owners or Operators.—Ownership of an interest in an automobile does not render one liable for injury caused by the negligence of the co-owner when using the car solely for a purpose of his own.[19] But if, at the time of the negligent act, the automobile was under the joint control of the owners—as, for example, where it is driven by a chauffeur employed by both—both owners are liable.[20] A partner who uses a truck belonging to the firm in transporting coal to his own home for his own use is engaged in the business of the partnership, which is liable for any injury or damage to others due to his negligence, or even recklessness, in operating the truck.[1]

A husband and wife owning an automobile as community property are liable for negligent injuries occasioned by the machine when operated by their daughter while the husband is riding therein.[2]

One engaged in a joint enterprise with the driver of an automobile is chargeable with the driver's negligence in operating the automobile and may be held liable to third persons injured by the driver's negligence, regardless of who owns the automobile.[3]

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[12] See Proximate Cause [Also 22 R. C. L. p. 128].

[13] McDonald v. Robinson, 207 Iowa, 1293, 224 N. W. 820, 62 A.L.R. 1419; Reader v. Ottis, 147 Minn. 335, 180 N. W. 117, 16 A.L.R. 463; Carlton v. Boudar, 118 Va. 521, 88 S. E. 174, 4 A.L.R. 1480.

Annotation: 16 A.L.R. 465, s. 62 A.L.R. 1425.

Two or more persons who are unlawfully and negligently racing automobiles on a public highway and who thereby injure another are liable in damages for such injuries. Reader v. Ottis, 147 Minn. 335, 180 N. W. 117, 16 A.L.R. 463.

A sharp turn made by automobiles driving at a high rate of speed in order to avoid a collision is such a case of joint negligence as to render the drivers liable for injury to a third person who was struck and injured while crossing the street. Annotation: 16 A.L.R. 467, s. 62 A.L.R. 1427.

[14] Reader v. Ottis, 147 Minn. 335, 180 N. W. 117, 16 A.L.R. 463.

Annotation: 62 A.L.R. 1191.

As to the liability of one whose negligence caused another automobile to strike or injure a third person, see infra, § 352.

[15] Annotation: 16 A.L.R. 465, s. 62 A.L.R. 1425.

[16] Carlton v. Boudar, 118 Va. 521, 88 S. E. 174, 4 A.L.R. 1480.

Annotation: 16 A.L.R. 465, s. 62 A.L.R. 1425.

[17] Annotation: 16 A.L.R. 465, s. 62 A.L.R. 1425.

[18] Annotation: 16 A.L.R. 465, s. 62 A.L.R. 1425.

[19] Hamilton v. Vioue, 90 Wash. 618, 156 P. 853, L.R.A.1916E, 1300.

[20] Goodman v. Wilson, 129 Tenn. 464, 166 S. W. 752, 51 L.R.A.(N.S.) 1116.

Annotation: 51 L.R.A.(N.S.) 1116.

Where two joint owners of an automobile contribute equally to the expense of its upkeep and the wages of the chauffeur and have equal rights to the use of the car except when a preference is given to one owner as to its use in going to and from business, one such owner is liable for an injury caused to a traveler on the highway by the chauffeur's negligent operation of the car in obeying the orders of such other owner to take the car to his office to convey him home, although the former had given no orders in connection with the journey. Goodman v. Wilson, 129 Tenn. 464, 166 S. W. 752, 51 L.R.A.(N.S.) 1116.

[1] Dixon v. Haynes, 146 Wash. 163, 262 P. 119, 55 A.L.R. 1218.

[2] Switzer v. Sherwood, 80 Wash. 19, 141 P. 181, Ann. Cas. 1917A, 216.

§ 347. Liability of Dealer for Injuries from Operation.[4]—A dealer who employs one to instruct a purchaser or a prospective purchaser is liable for any negligence of the instructor in the control of the car.[5] Such negligence for which liability exists may consist of the failure of the instructor to take control of the car the operation of which he had intrusted to the purchaser; if, in the exercise of ordinary care he could have avoided the accident, his failure to do so is negligence.[6] Where the negligence of a purchaser whom an automobile dealer is teaching to drive a car as part of the service in effecting a sale injures a pedestrian on the highway, it is imputable to the dealer.[7] Whether or not a dealer has exercised ordinary care in the interference by him with the management of the car by the driver when the danger became apparent is ordinarily a question for the jury.[8] It is essential to the liability of the dealer that the driver is his agent, and not the agent of the purchaser. The line between the cases in which he is the agent of one and those in which he is the agent of the other is often very shadowy.[9] It is also essential to the liability of the dealer that the employee is acting within the scope of his employment and in furtherance thereof.[10] It is within the scope of his employment to accede to the suggestion of the customer to permit an inexperienced member of his family to drive the car so as to render the employer liable for injuries caused to a pedestrian by the driver losing control of the car and colliding with the pedestrian where the agent sat beside and directed the driver and had his hand on the steering wheel when the accident happened.[11]

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[3] Annotation: 62 A.L.R. 442, s. 85 A.L.R. 631.

While two traveling salesmen are engaged in the joint enterprise of transporting themselves by automobile over the territory canvassed by both for different merchants, one of the salesmen owning and operating the automobile and the other paying sums about equal to the cost of the gasoline and oil consumed, the latter, if possessing joint control over the automobile, may be liable for the negligence of the other in operating it, both being occupants at the time. Judge v. Wallen, 98 Neb. 154, 152 N. W. 318, L.R.A.1915E, 436.

All who join in an enterprise to take a pleasure ride in an automobile on a highway are liable in case the one having control of the machine is guilty of reckless driving. State v. Davis, 88 S. C. 229, 70 S. E. 811, 34 L.R.A.(N.S.) 295.

As to imputing negligence of a driver engaged in a joint enterprise with an occupant to such occupant so as to prevent recovery by the latter against third persons, see infra, § 494.

[4] As to the liability of a purchaser of a car operating it while learning under the tutelage of the dealer, see supra, § 344.

[5] Opecello v. Meads, 152 Md. 29, 135 A. 488, 50 A.L.R. 1385.

Annotation: 16 B. R. C. 849.

An automobile dealer is liable for the death of a passenger invited to ride in its car by its wholesale salesman, which results from the negligent operation of the car by a prospective customer of a local agent whom the salesman, although he knew him to be incompetent, permitted to drive for practice on a part of the salesman's trip. Kerr v. Haug Motors [1930] 39 Manitoba L. R. 238, 16 B. R. C. 838.

[6] Ibid.

[7] Ibid.

[8] Annotation: 20 A.L.R. 194, s. 50 A.L.R. 1391.

[9] **It has been held that a chauffeur** sent by an automobile dealer with an inexperienced customer to take a car which the customer had purchased through the crowded part of the town, and turn it over to him when the business streets were passed might, while en route, be found to be acting for the dealer, so as to render him liable for injuries caused by negligent driving, even though by direction of the purchaser, they stopped at various places to do errands for the latter. Dalrymple v. Covey Motor Car Co. 66 Or. 533, 135 P. 91, 48 L.R.A.(N.S.) 424.

In Janik v. Ford Motor Co. 180 Mich. 557, 147 N. W. 510, 52 L.R.A.(N.S.) 294, Ann. Cas. 1916A, 669, however, it was held that an automobile manufacturer who, after selling a car, delegated one of his employees, at the purchaser's request, to drive the car to the city limits, from which place the purchaser, who was an experienced automobilist, was to drive it to the destination, was not answerable for an injury by the driver to a person on the street where the purchaser was in the car at the time of the accident, although he had given no directions except as to the route as to which he wished to travel.

In Hiroux v. Baum, 137 Wis. 197, 118 N. W. 533, 19 L.R.A.(N.S.) 332, a finding was held justified that the son of the defendant was the latter's servant, and not the servant of the one who sold the car to the defendant, where there was evidence that the car was purchased with the understanding that the son should learn to operate it, that the seller had agreed to teach the defendant's son to operate the car, and that the son, for the purpose of learning to run it, was driving it, accompanied by the seller, at the time the plaintiff was injured.

[10] Annotation: 20 A.L.R. 194, s. 50 A.L.R. 1391.

§ 348. Liability for Negligence during Demonstration of Car by One Who Has Undertaken to Sell It.[12]—The responsibility for negligence during the demonstration of a car by one who has undertaken to sell it for the owner depends upon the relation which exists between the owner and the person thus undertaking to sell the car. If that relation is not one of principal and agent, but one of independent contractor, the owner of the car is not liable for negligence when it is being thus demonstrated.[13] And it is generally held that where the car is left with one for sale, especially if it is left on commission, the person undertaking to sell it is an independent contractor.[14]

§ 349. Dealer's Liability for Injuries from Defects in Car Sold.—A dealer in automobiles of standard make is not required to dismantle the automobile to determine whether it is properly built in order to absolve himself from responsibility for damages resulting from defects therein not visible on the usual customary and careful inspection.[15] No liability rests upon a dealer in secondhand automobiles to a person who is injured by the operation of a car sold by him, in the hands of one to whom it is sold, from the mere fact that the car is defective.[16] There must be knowledge of the defect, either actual or constructive.[17]

The view is taken, however, that the law imputes to the seller of a secondhand automobile such knowledge with respect to its condition as he could have obtained in the exercise of ordinary care.[18] The duty of the seller of a secondhand automobile to exercise care with respect to its equipment so that it may be kept under control and not become a menace to life and limb is the same as that of the manufacturer of a new automobile, especially where the car is represented to be equipped with standard equipment.[19] If the automobile is capable of being made safe, it is, according to this theory, the seller's duty to make it safe.[20]

According to another view, it is the seller's duty to communicate information as to the defect to the purchaser. Failure to do so may impose liability.[1]

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[11] Hoffman v. Roehl, 61 Mont. 290, 203 P. 349, 20 A.L.R. 189.

One conducting a school for instruction in automobile driving for pay has been held liable for injuries done to a traveler on a highway through the incompetence of a pupil whom one of his teachers intrusted with the management of a car. Easton v. United Trade School Contracting Co. 173 Cal. 199, 159 P. 597, L.R.A. 1917A, 394.

[12] As to the person liable where a garageman who has been employed to make repairs is testing a car, see GARAGES, PARKING STATIONS, AND LIVERIES.

[13] Bell v. State, 153 Md. 333, 138 A. 227, 58 A.L.R. 1051.

Annotation: 58 A.L.R. 1057.

[14] Bell v. State, 153 Md. 333, 138 A. 227, 58 A.L.R. 1051.

Annotation: 58 A.L.R. 1057.

A garage keeper who undertakes to sell an automobile for its owner at a fixed price, the machine to be left with him during the day for that purpose and with the implied authority to demonstrate the machine in any manner he sees fit, is an independent contractor in taking the machine to make a demonstration, so that the owner is not liable for an injury caused by his negligent operation of the car. Bell v. State, 153 Md. 333, 138 A. 227, 58 A.L.R. 1051.

[15] Annotation: 99 A.L.R. 243.

[16] Annotation: 99 A.L.R. 240.

[17] Annotation: 99 A.L.R. 240.

[18] Flies v. Fox Bros. Buick Co. 196 Wis. 196, 218 N. W. 855, 60 A.L.R. 357.

Annotation: 63 A.L.R. 398.

[19] Flies v. Fox Bros. Buick Co. 196 Wis. 196, 218 N. W. 855, 60 A.L.R. 357.

[20] Ibid.

[1] Bergstresser v. Van Hoy, 142 Kan. 88, 45 P. (2d) 855, 99 A.L.R. 236.

A petition in an action seeking to recover damages from the dealer for selling the defective automobile which fails to allege that the dealer concealed the defective condition or failed to inform the purchaser thereof states no cause of action. Ibid.

Upon giving this information, his duty is discharged unless, from facts known or which he should know, there is a probability that the buyer will use the automobile without remedying the defects.[2] Turning a dangerously defective automobile over to a buyer under such circumstances is equivalent to turning it over to a driver known to be unfit to use it.[3]

Liability may also be based upon representations, contrary to the facts, that the car is equipped with standard equipment.[4] The failure of the purchaser to inspect it and discover the defective brakes is not an intervening cause of an injury due to such brakes so as to relieve the seller of liability because of such defect.[5]

§ 350. Manufacturer's Liability for Injuries from Defects in Car Sold.—A manufacturer of an automobile may be held liable to a purchaser for defects therein which result in injuries to such purchaser, notwithstanding there is no privity of contract.[6] The automobile is regarded as a thing of danger, or one which may become dangerous, within the meaning of the rule that there is no liability where there is no privity of contract unless the article is dangerous.[7] In such a case the manufacturer owes to the public a duty, irrespective of any contractual relationship, to use reasonable care in the manufacture of an automobile and in applying reasonable tests to detect defects and deficiencies therein.[8]

Representations by the manufacturer may be relied upon by the purchaser from a middleman where the representations relate to a part a defect in which is not readily discoverable.[9]

A failure to exercise care in inspecting parts bought for use in constructing the car renders the manufacturer liable for injury.[10] The failure to maintain a reasonable inspection by which defects in a part, such as a wheel, would have been discovered is negligence.[11]

It must be shown, however, that the defect was due to the failure of the manufacturer to exercise care; the mere fact that a defect developed which might have been due to other causes is not sufficient to impose liability on the manufacturer.[12]

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[2] Ibid.
Annotation: 99 A.L.R. 240.

[3] Bergstresser v. Van Hoy, 142 Kan. 88, 45 P. (2d) 855, 99 A.L.R. 236.
Annotation: 99 A.L.R. 240.

[4] Flies v. Fox Bros. Buick Co. 196 Wis. 196, 218 N. W. 855, 60 A.L.R. 357.
A dealer in secondhand automobiles who reconditions and sells a wrecked car, representing that it has standard equipment, is liable for injuries caused to a pedestrian by its brakes being so defective that it could not be controlled on the public street. Ibid.

[5] Flies v. Fox Bros. Buick Co. 196 Wis. 196, 218 N. W. 855, 60 A.L.R. 357.
Annotation: 99 A.L.R. 240.

[6] Johnson v. Cadillac Motor Car Co. (C. C. A. 2d) 261 F. 878, 8 A.L.R. 1023, reversing same case (C. C. A. 2d) 221 F. 801, L.R.A.1915E, 287, Ann. Cas. 1917E, 581; Heckel v. Ford Motor Co. 101 N. J. L. 385, 128 A. 242, 39 A.L.R. 989; MacPherson v. Buick Motor Co. 217 N. Y. 382, 111 N. E. 1050, L.R.A.1916F, 696, Ann. Cas. 1916C, 440; Baxter v. Ford Motor Co. 168 Wash. 456, 12 P. (2d) 409, 15 P. (2d) 1118, 88 A.L.R. 521.
Annotation: 17 A.L.R. 701, s. 39 A.L.R. 998, 63 A.L.R. 347, and 88 A.L.R. 533; 63 A.L.R. 398; Ann. Cas. 1913B, 689, Ann. Cas. 1917E, 584.

[7] Johnson v. Cadillac Motor Car Co. (C. C. A. 2d) 261 F. 878, 8 A.L.R. 1023, reversing (C. C. A. 2d) 221 F. 801, L.R.A.1915E, 287, Ann. Cas. 1917E, 581; Heckel v. Ford Motor Co. 101 N. J. L. 385, 128 A. 242, 39 A.L.R. 989; MacPherson v. Buick Motor Co. 217 N. Y. 382, 111 N. E. 1050, L.R.A. 1916F, 696, Ann. Cas. 1916C, 440.
Annotation: 17 A.L.R. 701, s. 39 A.L.R. 998, 63 A.L.R. 347, and 88 A.L.R. 533.

[8] Heckel v. Ford Motor Co. 101 N. J. L. 385, 128 A. 242, 39 A.L.R. 989.

[9] Baxter v. Ford Motor Co. 168 Wash. 456, 12 P. (2d) 409, 15 P. (2d) 1118, 88 A.L.R. 522 (glass warranted shatterproof).

[10] Johnson v. Cadillac Motor Car Co. (C. C. A. 2d) 261 F. 878, 8 A.L.R. 1023, reversing (C. C. A. 2d) 221 F. 801, L.R.A.1915E, 287, Ann. Cas. 1917E, 581.
Annotation: 17 A.L.R. 701, s. 39 A.L.R. 998, 63 A.L.R. 347, and 88 A.L.R. 533.

[11] MacPherson v. Buick Motor Co. 217 N. Y. 382, 111 N. E. 1050, L.R.A.1916F, 696, Ann. Cas. 1916C, 440.

[12] Annotation: 17 A.L.R. 701, s. 39 A.L.R. 998, 63 A.L.R. 347, and 88 A.L.R. 533.

Liability has also been imposed upon the manufacturer of automobiles which are unsafe and dangerous where he has concealed such condition from a purchaser or has represented the automobile to be safe.[13] In such a case the manufacturer may be liable to a third person injured by such defect.[14] Actual notice of such defect or faulty construction is not necessary.[15] Where the defect is so plain that notice could not have escaped the attention of the manufacturer, there is a sufficient showing.[16] If a purchaser to whom the representations are made or from whom the defects are concealed has knowledge of the defects before a third party is injured in using the car, the manufacturer is not thereafter liable.[17]

§ 350a. **Liability of Manufacturer of Tractor.**—A manufacturer of a tractor who gives the purchaser ample instructions as to the method of procedure if the machine becomes mired is not liable to the purchaser's employee, who is injured by failing to follow the directions, and employing a dangerous method of procedure to release the machine when it becomes mired, because it did not give the employee notice of the danger of such procedure.[17a] The manufacturer is not, as matter of law, required to anticipate that a person would attempt to operate it without previous knowledge, either from experience or from the instructions provided.[17b]

§ 351. **Liability of Guest.**—As a general rule, one riding in a vehicle as a guest, without any control over the driver, is not liable for injury to a third person due to the negligence of the driver.[18] The owner of the automobile may be a guest within the meaning of this rule.[19] The fact that the guest made a request that the driver should do a certain errand of the guest does not necessarily make the case one of joint enterprise or indicate that the guest had either management or control of the car so as to make him responsible for the negligence of the driver.[20] If, however, the guest undertakes to keep a lookout and fails or has even a slight share in the management of the car, he may be held liable for the negligence of the driver.[1] There is a difference of opinion as to whether the husband may be the guest of his wife within the meaning of this rule. According to one view, he may be.[2] On the other hand, it has been denied that the rule can be extended so as to afford an avenue for the husband's escape from liability on account of the negligent act of his wife or minor child with whom he is riding in an automobile. He is presumed to exercise some control over them under the circumstances and is therefore liable for their negligence.[3]

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[13] Olds Motor Works v. Shaffer, 145 Ky. 616, 140 S. W. 1047, 37 L.R.A.(N.S.) 560, Ann. Cas. 1913B, 689.
Annotation: Ann. Cas. 1913B, 694.

[14] Olds Motor Works v. Shaffer, 145 Ky. 616, 140 S. W. 1047, 37 L.R.A.(N.S.) 560, Ann. Cas. 1913B, 689.
Where the manufacturer of a defective automobile represented to the purchaser that it was properly constructed, very slight evidence of care on the part of the purchaser will entitle a third person, injured by reason of the defect, to recover from the manufacturer. Ibid.

[15] Olds Motor Works v. Shaffer, 145 Ky. 616, 140 S. W. 1047, 37 L.R.A.(N.S.) 560, Ann. Cas. 1913B, 689.

[16] Ibid.

[17] Ibid.

[17a] Foster v. Ford Motor Co. 139 Wash. 341, 246 P. 945, 48 A.L.R. 934.
Annotation: 48 A.L.R. 939.

[17b] Foster v. Ford Motor Co. 139 Wash. 341, 246 P. 945, 48 A.L.R. 934.

[18] Minor v. Mapes, 102 Ark. 351, 144 S. W. 219, 39 L.R.A.(N.S.) 214; Crawford v. McElhinney, 171 Iowa, 606, 154 N. W. 310, Ann. Cas. 1917E, 221; Anthony v. Kiefner, 96 Kan. 194, 150 P. 524, L.R.A.1915F, 876, Ann. Cas. 1916E, 264; Wilkinson v. Myatt-Dicks Motor Co. 136 La. 977, 68 So. 96, L.R.A.1915E, 439; Hartley v. Miller, 165 Mich. 115, 130 N. W. 336, 33 L.R.A.(N.S.) 81; Reiter v. Grober, 173 Wis. 493, 181 N. W. 739, 18 A.L.R. 362.
Annotation: 18 A.L.R. 365.
To render one riding in an automobile liable for the negligence of the chauffeur, either the relation of master and servant or that of principal and agent must exist, or the parties must be engaged in a joint enterprise so that responsibility exists for the acts of each other. St. Louis & S. F. R. Co. v. Bell, 58 Okla. 84, 159 P. 336, L.R.A. 1917A, 543.

[19] Hartley v. Miller, 165 Mich. 115, 130 N. W. 336, 33 L.R.A.(N.S.) 81.
Annotation: 18 A.L.R. 365.

[20] Anthony v. Kiefner, 96 Kan. 194, 150 P. 524, L.R.A.1915F, 876, Ann. Cas. 1916E, 264.
Annotation: 18 A.L.R. 365.

[1] Annotation: 18 A.L.R. 365.

[2] Crawford v. McElhinney, 171 Iowa, 606, 154 N. W. 310, Ann. Cas. 1917E, 221.
Annotation: 18 A.L.R. 365.

§ 352. Responsibility of Owner or Driver of One Car for Injuries Immediately Inflicted by Another Car.—The driver or owner of an automobile so negligently operated as to place others in a position where they are struck and injured by an automobile operated by a third person may be held liable therefor where it can be said that such negligence was the proximate cause of the resulting injuries.[4] Nor is the responsibility of a negligent driver or owner of an automobile for damage immediately inflicted by another car avoided by proof that the driver of the other car also was negligent.[5] If both are negligent and their concurring negligense is the proximate cause, they are jointly and severally liable.[6] Thus, responsibility for injuries to the person or property of another may be imposed upon the owner or driver of an automobile which is operated in such a negligent manner as to cause the injured person or his property to come or be thrown into the path of another car,[7] or to cause a second car to swerve from its course,[8] leave the highway,[9] or come to a sudden stop,[10] thereby causing injury to others or their property. It applies where the defendant's car negligently pushes a second car against the person or property of another[11] or where his car, which he has

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[3] Minor v. Mapes, 102 Ark. 351, 144 S. W. 219, 39 L.R.A.(N.S.) 214.
Annotation: 18 A.L.R. 365.

[4] Judd v. Rudolph, 207 Iowa, 113, 222 N. W. 416, 62 A.L.R. 1174; Holmberg v. Villaume, 158 Minn. 442, 197 N. W. 849; Reader v. Ottis, 147 Minn. 335, 180 N. W. 117, 16 A.L.R. 463; Jaquith v. Worden, 73 Wash. 349, 132 P. 33, 48 L.R.A.(N.S.) 827.
Annotation: 62 A.L.R. 1181.

[5] Judd v. Rudolph, 207 Iowa, 113, 222 N. W. 416, 62 A.L.R. 1174.
Annotation: 62 A.L.R. 1182.

[6] See supra, § 345.

[7] Judd v. Rudolph, 207 Iowa, 113, 222 N. W. 416, 62 A.L.R. 1174.
Annotation: 62 A.L.R. 1182, 1183.

Where two automobiles were racing along a road at excessive speed, and, in order to get out of the way of the first automobile, which passed to the right of a horse-drawn vehicle which was proceeding in the same direction near the middle of the road, the injured persons, becoming confused at the proximity of their danger, sprang to the left, and were struck by the second car, which was attempting to pass the first car, it was held that the plaintiffs could recover damages from the driver of either car. Annotation: 62 A.L.R. 1183.

In Judd v. Rudolph, 207 Iowa, 113, 222 N. W. 416, 62 A.L.R. 1174, it is held that if the driver of the first automobile was negligent, and thereby placed the plaintiff and his automobile in such a position that they were struck by a following automobile, as well as by the first one, then the driver of the first automobile is liable for the injuries inflicted by both collisions.

[8] Annotation: 62 A.L.R. 1185–1188.

Where two automobiles approached an intersection negligently and at a high speed, and, to avoid a collision, one driver diverged sharply from his course and struck a pedestrian, the drivers of both cars were held liable for the pedestrian's injury. Annotation: 62 A.L.R. 1187.

Where a truck backed up to the curb was driven crosswise of a narrow street without signal or warning, in violation of a city ordinance, and the driver of another automobile proceeding up the street swerved to one side to avoid the truck and negligently hit a third car parked at the curb, the owner of the truck was held equally liable with the second driver for the damage resulting to the parked car. Annotation: 62 A.L.R. 1188.

[9] In Reader v. Ottis, 147 Minn. 335, 180 N. W. 117, 16 A.L.R. 463, the court held both automobile drivers who were unlawfully and negligently racing their respective automobiles on a public highway in concert liable to a person riding in one of the cars who was injured by the overturning of the car in attempting to take a turn.

[10] Annotation: 62 A.L.R. 1190.

It is not material that the defendant's car never came into physical contact with the plaintiff or his car if it is once established that the defendant was negligent in such a manner that the driver of the other car was placed in a position of peril. Annotation: 62 A.L.R. 1190.

[11] Annotation: 62 A.L.R. 1188–1190.

Where a driver tried to cut in ahead of another automobile the driver of which could have avoided a collision by slightly turning his car and lessening its speed, and the resulting collision threw one of the cars against a bicyclist, who was killed, it was asserted that the driver of either car could have been held liable for the death, and a verdict of the jury against both of the defendants was declared to be one parked in a negligent manner, is struck and hurled against another.[12] There is no liability, however, on the part of the negligent owner or driver if the negligence complained of on his part is not a proximate cause of the damage immediately inflicted by a second car.[13]

B. Owner where Car Driven by Another

1. In General

§ 353. Generally.[14]—At common law, liability for the negligent use of an automobile by one other than the owner cannot be predicated against the owner merely because of such ownership.[15] The owner of a car, in the absence of a statute changing the common-law rule, is not liable for the negligence of one who stands in the relation of independent contractor in the operation of the car.[16] Whether the driver is an employee or an independent contractor is determined by the general principles applicable to that phase of the law.[17] Obviously the owner of a car, in general, is not responsible for its negligent operation by a trespasser. Even the statutes which make an owner liable for injury inflicted by other persons operating his car stipulate generally that to create such liability the car must be taken with the owner's express or implied consent. The automobile is not, according to the great weight of authority, an inherently dangerous agency[18] so as to make the owner liable.[19]

§ 354. Presence of Owner in Car.—The mere presence of the owner in an automobile while it is being driven in a negligent manner by another does not necessarily make him liable for an injury caused thereby if he would not otherwise have been liable.[1] Assuming that the owner does not interfere in any way with the management of the car,[2] this rule holds whether the car is being driven by a member of his family[3] or by a stranger to whom he has

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which could not be interfered with by an appellate court. Annotation: 62 A.L.R. 1190.

[12] Annotation: 62 A.L.R. 1190.

Where the owner of an automobile left it parked at night, without a light, on a highway, and the driver of a second car struck it while driving at a fast rate of speed and while blinded by a street car's headlight, in consequence of which collision he was caused to run upon the sidewalk and strike a pedestrian, the owners of both cars were held liable for the pedestrian's injuries. Jaquith v. Worden, 73 Wash. 349, 132 P. 33, 48 L.R.A.(N.S.) 827.

[13] Annotation: 62 A.L.R. 1181, 1184, 1188.

[14] As to car driven by dealers and demonstrators, see supra, §§ 347 et seq.

[15] Hays v. Hogan, 273 Mo. 1, 200 S. W. 286, L.R.A.1918C, 715, Ann. Cas. 1918E, 1127; Potts v. Pardee, 220 N. Y. 431, 116 N. E. 78, 8 A.L.R. 785; Reilly v. Connable, 214 N. Y. 586, 108 N. E. 853, L.R.A.1916A, 954, Ann. Cas. 1916A, 656; Ouellette v. Superior Motor & Mach. Works, 157 Wis. 531, 147 N. W. 1014, 52 L.R.A.(N.S.) 299.

Annotation: 36 A.L.R. 1140, s. 68 A.L.R. 1009, and 100 A.L.R. 921.

[16] Segler v. Callister, 167 Cal. 377, 139 P. 819, 51 L.R.A.(N.S.) 772.

Babbitt, Motor Vehicle Law, 4th ed. p. 845, § 1238.

[17] See INDEPENDENT CONTRACTORS [Also 14 R. C. L. p. 65].

[18] See supra, §§ 11, 12.

[19] Danforth v. Fisher, 75 N. H. 111, 71 A. 535, 21 L.R.A.(N.S.) 93. But see Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629, 16 A.L.R. 255.

See infra, § 356.

[1] Zeeb v. Bahnmaier, 103 Kan. 599, 176 P. 326, 2 A.L.R. 883

Annotation: 2 A.L.R. 888, s. 80 A.L.R. 285.

[2] Reiter v. Grober, 173 Wis. 493, 181 N. W. 739, 18 A.L.R. 362.

A superintendent of a fire department who permits his car to be driven at excessive speed by a fireman assigned to duty as his driver, after reasonable opportunity to protest, may be found to have approved of the unlawful speed so as to be liable for injuries thereby inflicted upon a traveler on the highway. Dowler v. Johnson, 225 N. Y. 39, 121 N. E. 487, 3 A.L.R. 146.

[3] Crawford v. McElhinney, 171 Iowa, 606, 154 N. W. 310, Ann. Cas. 1917E, 221 (wife driving car owned jointly); Zeeb v. Bahnmaier, 103 Kan. 599, 176 P. 326, 2 A.L.R. 883; Halverson v. Blosser, 101 Kan. 683, 168 P. 863, L.R.A.1918B, 498 (son driving parent's car); Rodgers v. Saxton, 305 Pa. 479, 158 A. 166, 80 A.L.R. 280 (husband driving wife's car); Reiter v. Grober, 173 Wis. 493, 181 N. W. 739, 18 A.L.R. 362 (son driving parent's car).

Annotation: 2 A.L.R. 888, s. 80 A.L.R. 286.

A wife's presence in an automobile owned by her and driven by her husband with her consent does not exclude the theory that the husband was her bailee and loaned or hired the car.[4] A husband driving his wife's automobile, even with the wife present, may be presumed, in the absence of evidence to the contrary, to be in control of the car and solely responsible for its operation.[5] Except as statutory liability may be imposed upon an owner for the negligence of those permitted to use his car[6] or the doctrine of dangerous instrumentality may be applied to automobiles,[7] an automobile owner is charged with the negligence of the driver only when he has the right to exercise control over and direct the driver to such an extent that the doctrine of respondeat superior may be invoked.[8] According to the great weight of authority, the owner, present in his own automobile while it is being driven by one other than his servant, cannot be held liable on the theory that the automobile is a dangerous machine.[9] The owner's presence in the car at the time of an accident is, however, an important element where recovery is sought on the theory that the operator was acting as his servant or agent or that the owner had control over the operation of the car;[10] an inference may readily be drawn, from the fact of the owner's presence, that the automobile was being driven by his agent or that he had some control over it.[11] The strength of the inference varies with the circumstances—probably the strongest is drawn against the owner in a case where his wife or child is driving with him when an injury occurs.[12] In a number of cases, under the facts proved, where the car in which the owner was riding was being driven by a member of his family, the owner was held liable for the negligent operation of the car.[13] Where the common-law rule making the husband liable for the torts committed by the wife is in force, a husband may be held liable for an injury inflicted while his wife was driving his automobile, in which he was riding.[14] Moreover, the owner may be held liable where there is evidence sufficient to warrant a finding of negligence on his part.[15]

In jurisdictions where the family purpose doctrine obtains, an owner may be held responsible for the negligence of a member of his family who is driving the car in which the owner is riding.[16] He may also be held liable for the

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that she was riding as his guest. Rodgers v. Saxton, 305 Pa. 479, 158 A. 166, 80 A.L.R. 280.

[4] Hartley v. Miller, 165 Mich. 115, 130 N. W. 336, 33 L.R.A.(N.S.) 81.

Annotation: 2 A.L.R. 890, s. 80 A.L.R. 288.

[5] Rodgers v. Saxton, 305 Pa. 479, 158 A. 166, 80 A.L.R. 280.

[6] See infra, §§ 397 et seq.

[7] See § 12.

[8] Annotation: 2 A.L.R. 888, s. 80 A.L.R. 286.

[9] Hartley v. Miller, 165 Mich. 115, 130 N. W. 336, 33 L.R.A.(N.S.) 81.

[10] Annotation: 2 A.L.R. 888, s. 80 A.L.R. 286.

[11] Annotation: 2 A.L.R. 888, s. 80 A.L.R. 286.

[12] Annotation: 2 A.L.R. 888, s. 80 A.L.R. 286.

[13] Cowart v. Lewis, 151 Miss. 221, 117 So. 531, 61 A.L.R. 1229.

Annotation: 2 A.L.R. 888, s. 80 A.L.R. 286.

In Cowart v. Lewis, 151 Miss. 221, 117 So. 531, 61 A.L.R. 1229, a husband who, at the time of an injury to a passenger in an automobile owned jointly by himself and wife, was riding in the front seat beside his wife, who was driving in a negligent manner, and heard remonstrances of other occupants of the car, was held liable for injuries to the passenger occasioned by his wife's negligent operation of the automobile.

[14] Minor v. Mapes, 102 Ark. 351, 144 S. W. 219, 39 L.R.A.(N.S.) 214.

[15] Ibid.

[16] See infra, §§ 365 et seq.

In Switzer v. Sherwood, 80 Wash. 19, 141 P. 181, Ann. Cas. 1917A, 216, where the automobile which caused the injury was occupied by a husband and wife, driven by the wife, owned by them as a community, and used for their pleasure and that of their family and also in connection with their business, a claim that the act causing the injury was the wife's individual tort, or, at most, the tort of the husband and wife, and that it was error to allow judgment against the community, was disallowed, the court relying upon the authorities holding an owner of an automobile, purchased for family use, liable for injuries sustained through its negligent operation by members of the family.

driver's negligence if he is engaged with the driver in the prosecution of a joint enterprise.[17]

2. Intrusting to Incompetent or Unlicensed Driver

§ 355. Generally.—An owner who lends his automobile to another, knowing that the latter is an incompetent, reckless, or careless driver, is liable for such person's negligence; the owner's liability in such cases is based upon his own negligence in intrusting the automobile to such a person.[18] Intrusting the car to a minor child known to be a reckless and incompetent driver,[19] or to one forbidden to operate a car,[20] or to an unlicensed driver,[1] constitutes an act of negligence for which the owner is liable.

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[17] See supra, § 345.

As to joint adventures generally, see Joint Adventures [Also 15 R. C. L. pp. 500 et seq.].

[18] Gardiner v. Solomon, 200 Ala. 115, 75 So. 621, L.R.A.1917F, 380; Parker v. Wilson, 179 Ala. 361, 60 So. 150, 43 L.R.A.(N.S.) 87; Priestly v. Skourup, 142 Kan. 127, 45 P. (2d) 852, 100 A.L.R. 916; Elliott v. Harding, 107 Ohio St. 501, 140 N. E. 338, 36 A.L.R. 1128; Crowell v. Duncan, 145 Va. 489, 134 S. E. 576, 50 A.L.R. 1425 (loan to one addicted to use of intoxicants); Mitchell v. Churches, 119 Wash. 547, 206 P. 6, 36 A.L.R. 1132.

Annotation: 36 A.L.R. 1148, s. 68 A.L.R. 1013, and 100 A.L.R. 923; L.R.A.1915D, 691, s. L.R.A.1916E, 1295, and L.R.A.1917F, 384.

While automobiles are not regarded as inherently dangerous instrumentalities and the owner of an automobile is not responsible for its negligent use except upon the theory of the doctrine of respondeat superior, yet there is an exception if he intrusts it to one, though not an agent or servant, who is so incompetent in handling an automobile as to convert it into a dangerous instrumentality, and the incompetency is known to the owner when permitting the use of the vehicle by such person. Gardiner v. Solomon, 200 Ala. 115, 75 So. 621, L.R.A.1917F, 380.

The automobile has become so perfected that it may not be classed as a "dangerous instrumentality," when intelligently managed. It will not shy, balk, back up, or run away when properly directed, but may do all of these when managed by an inexperienced, incompetent, or reckless driver. When in the control of such a one it becomes an exceedingly destructive agency, as the daily toll of lives and the many injuries to persons chronicled by the newspapers attest. If the owner of such agency consents to turn it over to the control of an incompetent or reckless chauffeur, he is not deprived of any legal right when he is held liable for its negligent operation while in such control, and a greater degree of safety to the general public is likely to follow. Stapleton v. Independent Brewing Co. 198 Mich. 170, 164 N. W. 520, L.R.A. 1918A, 916.

[19] Gardiner v. Solomon, 200 Ala. 115, 75 So. 621, L.R.A. 1917F, 380.

Annotation: 36 A.L.R. 1150, s. 68 A.L.R. 1014, and 100 A.L.R. 926.

In the case of a mere permissive use, the liability of the owner would rest not alone upon the fact of ownership, but upon the combined negligence of the owner and the driver,—negligence of the one in intrusting the machine to an incompetent driver, and negligence of the other in its operation. Parker v. Wilson, 179 Ala. 361, 60 So. 150, 43 L.R.A.(N.S.) 87.

[20] Hopkins v. Droppers, 184 Wis. 400, 198 N. W. 738, 36 A.L.R. 1156.

Annotation: 36 A.L.R. 1164, s. 49 A.L.R. 1523.

Upon subsequent appeal in the Hopkins Case, supra, however, it was held, that the father was not, in order to avoid liability for injuries caused by the son's negligent use of the machine, bound to do more than forbid him to use it in violation of the statute, where there was nothing to show that the son was unruly, wilful, or repeatedly disobedient. Hopkins v. Droppers, 191 Wis. 334, 210 N. W. 684, 49 L.R.A. 1519.

Negligence on the part of an automobile driver is shown where there is evidence that he was incompetent and was operating a car with four wheel brakes, to which he was not accustomed, for practice, and that after having driven a short distance and while traveling about 40 miles an hour, he turned the wheels to avoid an object, and jammed on the brakes, which resulted in the car overturning. Kerr v. Haug Motors [1930] 39 Manitoba L. R. 238, 16 B. R. C. 838. Annotation: 16 B. R. C. 849.

The owner of an automobile who permits it to be operated by one not possessing the age qualifications required by municipal ordinance is not liable for injuries inflicted by the car upon a boy who dashes in front of it from the sidewalk so suddenly that no one could have avoided striking him. Elmendorf v. Clark, 143 La. 971, 79 So. 557, L.R.A.1918F, 802.

[1] Walker v. Klopp, 99 Neb. 794, 157 N. W. 962, L.R.A.1916E, 1292.

Annotation: 36 A.L.R. 1152, s. 68 A.L.R. 1015, and 100 A.L.R. 926.

In Walker v. Klopp, 99 Neb. 794, 157 N. W. 962, L.R.A.1916E, 1292, a statute providing that it shall be unlawful for any person under sixteen years of age, or for any intoxicated person, to operate a motor vehicle, and declaring that any owner, dealer, or manufacturer of motor vehicles who permitted a person under sixteen, or an intoxicated person, to operate a motor vehicle shall be guilty of a misdemeanor, was held to impose a public duty to refrain from permitting the persons designated from operating motor vehicles; and an owner who permitted his son, under sixteen years of age, to operate his automobile was held guilty of negligence and liable for an injury inflicted by his car, the other elements of negligence being present.

One permitting an unlicensed person to

3. Liability where Car Loaned

§ 356. Generally.—In the absence of a change of rule by statute, the owner of an automobile, who intrusts it to another who is competent to operate it, is not, according to the great weight of authority, responsible for the negligence of the borrower in the use thereof in his own business and affairs.[2] This is true where the car is let for hire.[3] These cases adhere to the general doctrine that the automobile is not a dangerous instrumentality.[4] It is not necessary for the owner to test the competency and skill of the customer before intrusting him with it.[5]

In at least one jurisdiction the view is taken that an automobile operated on the public highways is a dangerous instrumentality and that the owner thereof is responsible for the manner in which it is used by any person to whom it is intrusted.[6]

§ 357. Furnishing Driver of Leased Automobile.—The driver furnished with a leased automobile is generally held to be the servant of the owner of the machine, where the lessee has authority only to give directions as to where the car shall be driven.[7] The owner is therefore liable for injuries inflicted upon occupants of the car through the driver's negligence.[8] The owner is also liable to third persons injured through the driver's negligence.[9] Some such cases present a question for the jury as to whether the driver is the servant of the owner or of the lessee.[10]

While it has been held that the owner of an automobile who lends his car and driver to a friend is not liable for injury sustained through the driver's negligence, such decisions turn on the question of the measure of duty owed rather than on any question of imputed negligence.[10a]

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drive in a congested district a truck committed to his care is chargeable with the driver's negligence and cannot recover damages for injuries to which such negligence contributes. Zandras v. Moffett, 286 Pa. 477, 133 A. 817, 47 A.L.R. 699.

[2] Smith v. Callahan, 34 Del. 129, 144 A. 46, 64 A.L.R. 830; Neubrand v. Kraft, 169 Iowa, 444, 151 N. W. 455, L.R.A.1915D, 691; Halverson v. Blosser, 101 Kan. 683, 168 P. 863, L.R.A.1918B, 498; Hartley v. Miller, 165 Mich. 115, 130 N. W. 336, 33 L.R.A.(N.S.) 81; Blair v. Broadwater, 121 Va. 301, 93 S. E. 632, L.R.A.1918A, 1011.

Annotation: 36 A.L.R. 1138, s. 68 A.L.R. 1009, and 100 A.L.R. 921; 33 L.R.A.(N.S.) 81; L.R.A.1915D, 691; Ann. Cas. 1916A, 668.

An automobile with a broken muffler or without a muffler is not such an inherently dangerous agency as to make the owner liable for injuries sustained through negligent driving while the automobile was being used by persons to whom the owner had loaned it for their own purposes. Halverson v. Blosser, 101 Kan. 683, 168 P. 863, L.R.A.1918B, 498.

[3] Fisher v. Fletcher, 191 Ind. 529, 133 N. E. 834, 22 A.L.R. 1392; Neubrand v. Kraft, 169 Iowa, 444, 151 N. W. 455, L.R.A.1915D, 691; Eklof v. Waterston, 132 Or. 479, 285 P. 201, 68 A.L.R. 1003.

Annotation: 36 A.L.R. 1153, s. 68 A.L.R. 1016, and 100 A.L.R. 927.

[4] Gardiner v. Solomon, 200 Ala. 115, 75 So. 621, L.R.A.1917F, 380; Hartley v. Miller, 165 Mich. 115, 130 N. W. 336, 33 L.R.A. (N.S.) 81; Elliott v. Harding, 107 Ohio St. 501, 140 N. E. 338, 36 A.L.R. 1128; Blair v. Broadwater, 121 Va. 301, 93 S. E. 632, L.R.A. 1918A, 1011.

See generally, supra, §§ 11, 12.

[5] Neubrand v. Kraft, 169 Iowa, 444, 151 N. W. 455, L.R.A.1915D, 691.

[6] Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629, 16 A.L.R. 255.

[7] Forbes v. Reinman, 112 Ark. 417, 166 S. W. 563, 51 L.R.A.(N.S.) 1164; Shepard v. Jacobs, 204 Mass. 110, 90 N. E. 392, 26 L.R.A.(N.S.) 442, 134 Am. St. Rep. 648; Meyers v. Tri-State Auto. Co. 121 Minn. 68, 140 N. W. 184, 44 L.R.A.(N.S.) 113; Gerretson v. Rambler Garage Co. 149 Wis. 528, 136 N. W. 186, 40 L.R.A.(N.S.) 457.

Annotation: 40 L.R.A.(N.S.) 457, s. 44 L.R.A.(N.S.) 113, and 51 L.R.A.(N.S.) 1164. See also §§ 384 et seq.

[8] Forbes v. Reinman, 112 Ark. 417, 166 S. W. 563, 51 L.R.A.(N.S.) 1164; Meyers v. Tri-State Auto. Co. 121 Minn. 68, 140 N. W. 184, 44 L.R.A.(N.S.) 113; Gerretson v. Rambler Garage Co. 149 Wis. 528, 136 N. W. 186, 40 L.R.A.(N.S.) 457.

Annotation: 40 L.R.A.(N.S.) 457, s. 44 L.R.A.(N.S.) 113, and 51 L.R.A.(N.S.) 1164.

[9] Shepard v. Jacobs, 204 Mass. 110, 90 N. E. 392, 26 L.R.A.(N.S.) 442, 134 Am. St. Rep. 648.

Annotation: 40 L.R.A.(N.S.) 457, s. 44 L.R.A.(N.S.) 113, and 51 L.R.A.(N.S.) 1164.

[10] Minor v. Stevens, 65 Wash. 423, 118 P. 313, 42 L.R.A.(N.S.) 1178.

Annotation: 40 L.R.A.(N.S.) 457, s. 44 L.R.A.(N.S.) 115, and 51 L.R.A.(N.S.) 1164.

[10a] Perkins v. Galloway, 194 Ala. 265, 69 So. 875, L.R.A.1916E, 1190; Beard v. Klus-

§ 358. **Lending Defective Automobile.**—In intrusting automobiles in the hands of third persons for operation, the owner must take certain precautions to see that the cars are not defective. The keeper of a public garage who lends automobiles for hire must use ordinary care to see that the car loaned is not in such a condition as to become dangerous.[11] In other words, there is a duty to inspect and make such simple and available tests as to its condition as the intended use would suggest to sensible and right-minded persons.[12] The garage keeper must exercise ordinary care to see that the steering gear is in reasonably safe condition. If he fails to exercise such care and loans an automobile with steering gear in a defective condition which would have been discovered in the exercise of ordinary care, he is liable for injuries proximately resulting to third parties from such defect.[13]

Toward the bailee a bailor for hire is generally held to a high degree of care to make an examination of the automobile before letting it.[14]

A gratuitous bailor of an automobile is generally held to a lesser degree of care in seeing that the car is in condition for operation; he is not liable for injuries due to defects of which he is not aware, and is bound to disclose only defects of which he is aware and which might make the loan perilous to the bailee.[15] He is not bound to warn the bailee of defects which are open and patent to such bailee or of which he has in fact adequate knowledge and information.[16]

One invited by a gratuitous bailee of an automobile to ride in it stands in no better position with respect to the owner's liability for defects in it than does the bailee.[17]

4. ACTS OF MEMBERS OF FAMILY

a. IN GENERAL

§ 359. **Generally.**—In the absence of a statute imposing liability upon an owner of an automobile for the negligence of members of his family in the operation of the automobile,[18] the mere fact of a family relationship between the owner of an automobile and the person driving it on the occasion in question does not impose a liability upon the owner for the negligence of the driver.[19] This is so whether the car was being operated by the owner's child[20] or wife,[1] or by some more remote member of his family whom he has permitted to use his car.[2] Some statutes make an owner liable for the permissive use of his car by another and create a conclusive presumption of consent or

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meier, 158 Ky. 153, 164 S. W. 319, Ann. Cas. 1915D, 342, 50 L.R.A.(N.S.) 1100.

[11] Collette v. Page, 44 R. I. 26, 114 A. 136, 18 A.L.R. 74.

[12] Saunders System Birmingham Co. v. Adams, 217 Ala. 621, 117 So. 72, 61 A.L.R 1333.

[13] Collette v. Page, 44 R. I. 26, 114 A. 136, 18 A.L.R. 74.

[14] Annotation: 12 A.L.R. 788, s. 61 A.L.R. 1337.

See BAILMENTS [Also 3 R. C. L. p. 69].

[15] Johnson v. H. M. Bullard Co. 95 Conn. 251, 111 A. 70, 12 A.L.R. 766.

Annotation: 12 A.L.R. 793, s. 61 A.L.R. 1338.

Knowledge by the owner of an auto truck that it was temporarily equipped by the vendor with a second-hand body is not sufficient to charge him with knowledge that the stringers by which it was attached to the chassis were so defective as to render it dangerous for use by a gratuitous baliee, and require notice to him of the defect. Johnson v. H. M. Bullard Co. 95 Conn. 251, 111 A. 70, 12 A.L.R. 766.

[16] Johnson v. H. M. Bullard Co. 95 Conn. 251, 111 A. 70, 12 A.L.R. 766.

[17] Ibid.

[18] See infra, §§ 397 et seq.

[19] Annotation: 41 L.R.A.(N.S.) 775, s. 50 L.R.A.(N.S.) 59, L.R.A.1916F, 223, L.R.A. 1917F, 365, and L.R.A.1918F, 297.

[20] See infra, § 360.

[1] See infra, § 362.

[2] Annotation: 41 L.R.A.(N.S.) 775, s. 50 L.R.A.(N.S.) 59, L.R.A.1916F, 223, L.R.A. 1917F, 365, and L.R.A.1918F, 297.

Babbitt, Motor Vehicle Law, 4th ed. p. 942, § 1341.

permission where the car is driven by a member of the owner's family.[3] Aside from such statutes, however, the owner's liability for the negligent operation of his automobile by a member of his family must depend either upon the theory that the one driving the car was acting as the owner's agent or servant[4] or was otherwise subject to his control, or upon the theory of personal negligence on the part of the owner in intrusting the operation of the car to one incompetent to drive.[5] The family purpose doctrine which renders the owner of a car, who keeps it for family use, liable for injuries due to the negligence of a member of the family while operating the car although unaccompanied by any other member of the family recognizes the necessity of the existence of a relationship of agency or of master and servant in order to hold the owner liable for the acts of members of his family.[6]

§ 360. Child of Owner.—Except as the common law has been changed by statute, a parent is not liable for the tort even of a minor child merely because of the relationship of parent and child.[7] Liability cannot, therefore, be imposed upon the owner of an automobile for injuries resulting from the negligent operation of the automobile by the owner's child merely by reason of the defendant's ownership of the automobile and the relationship of parent and child between the owner and driver.[8] An automobile is not, according to the great weight of authority, a dangerous agency[9] so as to render a parent liable for intrusting it to his child, regardless of the agency of the child, if the child is a competent driver.[10] A parent's liability for the tort of a child in the negligent management of the parent's automobile, apart from any statutory modification,[11] depends upon whether at the time of the injury complained of the child was operating the automobile as the agent or servant of the parent and was then engaged upon the parent's business.[12] Liabil-

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[3] See infra, §§ 397 et seq.

[4] Annotation: 41 L.R.A.(N.S.) 775, s. 50 L.R.A.(N.S.) 59, L.R.A.1916F, 223, L.R.A. 1917F, 365, and L.R.A.1918F, 297.

[5] See supra, § 355.

[6] See infra, §§ 365 et seq.

[7] See Parent and Child [Also 20 R. C. L. p. 627, § 33].

As to liability of infant for his own tort, see Infants [Also 14 R. C. L. p. 259, §§ 36–39].

[8] Gardiner v. Solomon, 200 Ala. 115, 75 So. 621, L.R.A.1917F, 380; Parker v. Wilson, 179 Ala. 361, 60 So. 150, 43 L.R.A.(N.S.) 87; Smith v. Callahan, 34 Del. 129, 144 A. 46, 64 A.L.R. 830; Gordon v. Rose, 54 Idaho, 502, 33 P. (2d) 351, 93 A.L.R. 984; Arkin v. Page, 287 Ill. 420, 123 N. E. 30, 5 A.L.R. 216; Sultzback v. Smith, 174 Iowa, 704, 156 N. W. 673, L.R.A.1916F, 228; Zeeb v. Bahnmaier, 103 Kan. 599, 176 P. 326, 2 A.L.R. 883; Doran v. Thomsen, 76 N. J. L. 754, 71 A. 296, 19 L.R.A.(N.S.) 335, 131 Am. St. Rep. 677; Elliott v. Harding, 107 Ohio St. 501, 140 N. E. 338, 36 A.L.R. 1128; McNeal v. McKain, 33 Okla. 449, 126 P. 742, 41 L.R.A.(N.S.) 775; King v. Smythe, 140 Tenn. 217, 204 S. W. 296, L.R.A.1918F, 293; McFarlane v. Winters, 47 Utah, 598, 155 P. 437, L.R.A.1916D, 618.

Annotation: 41 L.R.A.(N.S.) 775, s. 50 L.R.A.(N.S.) 59, L.R.A.1916F, 223, L.R.A. 1917F, 365, and L.R.A.1918F, 297, 7 B. R. C. 39.

[9] See supra, §§ 11, 12.

[10] Gardiner v. Solomon, 200 Ala. 115, 75 So. 621, L.R.A.1917F, 380; Parker v. Wilson, 179 Ala. 361, 60 So. 150, 43 L.R.A.(N.S.) 87; Smith v. Callahan, 34 Del. 129, 144 A. 46, 64 A.L.R. 830; Arkin v. Page, 287 Ill. 420, 123 N. E. 30, 5 A.L.R. 216; Bradley v. Schmidt, 223 Ky. 784, 4 S. W. 703, 57 A.L.R. 1100; King v. Smythe, 140 Tenn. 217, 204 S. W. 296, L.R.A.1918F, 293; Blair v. Broadwater, 121 Va. 301, 93 S. E. 632, L.R.A.1918A, 1011.

[11] As to statutes imposing liability upon owner for negligence in use of car by member of owner's family, see infra, §§ 397 et seq.

[12] Woods v. Clements, 113 Miss. 720, 74 So. 422, L.R.A.1917E, 357; Elliott v. Harding, 107 Ohio St. 501, 140 N. E. 338, 36 A.L.R. 1128; Stumpf v. Montgomery, 101 Okla. 257, 226 P. 65, 32 A.L.R. 1490; King v. Smythe, 140 Tenn. 217, 204 S. W. 296, L.R.A.1918F, 293; Blair v. Broadwater, 121 Va. 301, 93 S. E. 632, L.R.A.1918A, 1011.

Annotation: 41 L.R.A.(N.S.) 775, s. 50 L.R.A.(N.S.) 59, L.R.A.1916F, 223, L.R.A. 1917F, 365, and L.R.A.1918F, 297.

An adult daughter in taking a car in which her father has a partnership interest for business purposes, with his implied consent, for a pleasure trip on which her mother accompanies her, is not the servant of her father so as to render him liable for an injury inflicted by her negligence upon a traveler on the highway. Woods v. Clements, 113 Miss. 720, 74 So. 422, L.R.A. 1917E, 357.

Before the negligence of a child will be imputed to its father, it is necessary to

ity of a parent for the acts of his child rests upon the same basic facts as the liability of a master for the acts of his servant in the operation of the master's automobile.[13] A child may, of course, occupy the position of agent or servant of his parent while driving the parent's automobile, so as to subject the parent to liability for his acts,[14] but the mere fact of relationship of parent and child does not make the child the servant of the parent in driving an automobile owned by the parent.[15] However, the seeming injustice of allowing one who has purchased an automobile for the use of his family to escape responsibility for injury or damage resulting from its operation by members of his family who, in most instances, were financially irresponsible has led many courts, at least in the early development of automobile law, to stretch the principles of the law of agency and of master and servant to include the so-called family purpose doctrine under which one who purchases and maintains an automobile for the use and pleasure of his family is chargeable with the negligence of members of the family while using the automobile for their own pleasure. All courts which have adopted this doctrine recognize that fundamentally there must exist, either in fact or by process of judicial reasoning, a relationship of principal and agent or master and servant before there can be any liability.[16] Where adopted, it extends the principle of respondeat superior to create liability upon an automobile owner in situations which, but for its adoption, would not have existed. The tendency of the more recent decisions is to reject the doctrine; it has been definitely rejected by the courts of many states.[17] In jurisdictions which reject the family purpose doctrine, the mere ownership of an automobile purchased by a parent for the use and pleasure of himself and family does not render the parent liable in damages to a third person who may be injured by reason of the negligence of a minor child while operating the automobile for his own purpose and pleasure, notwithstanding the car is being used with the permission of the parent.[18] Even in many cases which assert recognition of the family purpose doctrine, liability is not imposed upon the parent where the automobile is used by the child alone, for his own pleasure.[19] Clearly, a parent cannot, apart from statute, be held liable where a child takes the parent's car for a purpose

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prove that the father was the owner of the car and that the relation of master and servant existed between the child and the parent, which proof raises a presumption that at the time of the accident the driver was acting for the parent and within the scope of his authority. Stumpf v. Montgomery, 101 Okla. 257, 226 P. 65, 32 A.L.R. 1490.

[13] Stumpf v. Montgomery, 101 Okla. 257, 226 P. 65, 32 A.L.R. 1490.

As to master's liability for act of servant, see infra, §§ 373 et seq.

[14] See infra, § 361.

[15] Doran v. Thomsen, 76 N. J. L. 754, 71 A. 296, 19 L.R.A.(N.S.) 335, 131 Am. St. Rep. 677; Boes v. Howell, 24 N. M. 142, 173 P. 966, L.R.A.1918F, 288.

The operation by an eighteen-year-old boy of his father's automobile for his own pleasure, without the father's knowledge but with his implied general permission, does not make him the father's agent so as to render the latter liable for the son's negligent operation of the car. Parker v. Wilson, 179 Ala. 361, 60 So. 150, 43 L.R.A. (N.S.) 87.

[16] Trice v. Bridgewater, 125 Tex. 75, 81 S. W. (2d) 63, 100 A.L.R. 1014.

[17] See infra, § 365.

[18] Gardiner v. Solomon, 200 Ala. 115, 75 So. 621, L.R.A.1917F, 380; Spence v. Fisher, 184 Cal. 209, 193 P. 255, 14 A.L.R. 1083; Smith v. Callahan, 34 Del. 129, 144 A. 46, 64 A.L.R. 830; Pratt v. Clothier, 119 Me. 203, 110 A. 353, 10 A.L.R. 1434; Myers v. Shipley, 140 Md. 380, 116 A. 645, 20 A.L.R. 1460; McGowan v. Longwood, 242 Mass. 337, 136 N. E. 72, 23 A.L.R. 617; Woods v. Clements, 113 Miss. 720, 74 So. 422, L.R.A.1917E, 357; Hays v. Hogan, 273 Mo. 1, 200 S. W. 286, L.R.A.1918C, 715, Ann. Cas. 1918E, 1127; Doran v. Thomsen, 76 N. J. L. 754, 71 A. 296, 19 L.R.A.(N.S.) 335, 131 Am. St. Rep. 677; Van Blaricom v. Dodgson, 220 N. Y. 111, 115 N. E. 443, L.R.A.1917F, 363; Trice v. Bridgewater, 125 Tex. 75, 81 S. W. (2d) 63, 100 A.L.R. 1014; Blair v. Broadwater, 121 Va. 301, 93 S. E. 632, L.R.A.1918A, 1011; Hopkins v. Droppers, 184 Wis. 400, 198 N. W. 738, 36 A.L.R. 1156.

Annotation: 41 L.R.A.(N.S.) 775, s. 50 L.R.A.(N.S.) 59, L.R.A.1916F, 223, L.R.A. 1917F, 365, and L.R.A.1918F, 297.

[19] See infra, § 368.

of his own, without the parent's knowledge or consent,[20] or against his command.[1] This is so even under the family purpose doctrine.[2] Nor is an owner of an automobile liable for an injury inflicted by his adult son, who is in business for himself, while operating the car for his own purpose with the owner's consent as implied from the relationship of the parties and previous permitted use.[3]

§ 361. —Child as Agent of Parent.—Although the relationship of parent and child does not suffice to make the child the servant of the parent within the meaning of the rule of respondeat superior, or to impose upon the parent liability for torts committed without his knowledge or authority,[4] as to third persons, a child whether a minor or an adult may become, by particular arrangement, the agent or servant of its parent, so as to charge the parent with liability for the child's negligent operation of the parent's automobile.[5] This relationship may arise from an implied agreement[6] or from previous conduct.[7] It is not necessary that there be an express contract of employment or an express agreement for compensation,[8] for instance, the child need not be a hired chauffeur.[9] In any case, if there are facts which reasonably justify an inference of a real agency or a master and servant relationship between parent and child in the use of the parent's automobile at the time in question, the parent may be held liable to the same extent that any other owner is liable for the tortious act of his agent or servant in the operation of an automobile.[10] In order, however, to hold the parent liable on the theory of responsibility under the doctrine of respondeat superior, the child must have been acting within the scope of his employment.[11] Even conceding the existence of an agency or master and servant relationship, the parent cannot be held responsible for an act of the child while engaged in some private matter of his own,[12] unless the parent, with full knowledge of the facts,[13] ratifies the act of the child.[14] The question of liability, if any, in cases where there may be an issue of fact as to the nature of the mission in which the child may be engaged (other than his or her personal ends and pleasure) is to be determined upon the facts of each particular case.[15]

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[20] Sultzbach v. Smith, 174 Iowa, 704, 156 N. W. 673, L.R.A.1916F, 228; Myers v. Shipley, 140 Md. 380, 116 A. 645, 20 A.L.R. 1460.
Annotation: 12 A.L.R. 816.

[1] Sultzbach v. Smith, 174 Iowa, 704, 156 N. W. 673, L.R.A.1916F, 228; Hays v. Hogan, 273 Mo. 1, 200 S. W. 286, L.R.A.1918C, 715, Ann. Cas. 1918E, 1127.

[2] See infra, § 368.

[3] Gardiner v. Solomon, 200 Ala. 115, 75 So. 621, L.R.A.1917F, 380.

[4] See supra, § 360.

[5] Parker v. Wilson, 179 Ala. 361, 60 So. 150, 43 L.R.A.(N.S.) 87; Griffin v. Russell, 144 Ga. 275, 87 S. E. 10, L.R.A.1916F, 216, Ann. Cas. 1917D, 994.
Annotation: 41 L.R.A.(N.S.) 775, s. 50 L.R.A.(N.S.) 59, L.R.A.1916F, 223, L.R.A. 1917F, 365, and L.R.A.1918F, 297, 7 B. R. C. 39.

[6] Woods v. Clements, 113 Miss. 720, 74 So. 422, L.R.A.1917E, 357.

[7] Annotation: L.R.A.1916F, 223.

[8] Parker v. Wilson, 179 Ala. 361, 60 So. 150, 43 L.R.A.(N.S.) 87; Woods v. Clements, 113 Miss. 720, 74 So. 422, L.R.A.1917E, 357; Doran v. Thomsen, 76 N. J. L. 754, 71 A. 296, 19 L.R.A.(N.S.) 335, 131 Am. St. Rep. 677.
Annotation: 41 L.R.A.(N.S.) 775, s. 50 L.R.A.(N.S.) 59, L.R.A.1916F, 223, L.R.A. 1917F, 365, and L.R.A.1918F, 297.

[9] Annotation: L.R.A.1916F, 223.

[10] Hiroux v. Baum, 137 Wis. 197, 118 N. W. 533, 19 L.R.A.(N.S.) 332.

An automobile purchased with the understanding that the son of the purchaser should be taught to operate it may be found to be in possession of the son as agent of the purchaser while the instructions are being given. Ibid.

[11] Annotation: 41 L.R.A.(N.S.) 775, s. 50 L.R.A.(N.S.) 59, L.R.A.1916F, 223, L.R.A. 1917F, 365, and L.R.A.1918F, 297.

[12] Doran v. Thomsen, 76 N. J. L. 754, 71 A. 296, 19 L.R.A.(N.S.) 335, 131 Am. St. Rep. 677.

[13] Myers v. Shipley, 140 Md. 380, 116 A. 645, 20 A.L.R. 1460.

[14] The mere fact, however, that a father renders aid to one injured by his son's operation of his automobile does not show ratification of the son's act so as to render the father liable for the injury. Parker v. Wilson, 179 Ala. 361, 60 So. 150, 43 L.R.A. (N.S.) 87.

In any case, of course, in an action against the owner of an automobile to recover damages for an injury inflicted in the operation of the automobile by the owner's child, the plaintiff is not entitled to recover unless the injuries were the proximate result of the negligence of the driver.[15a]

Where a member of the family is driving the car for the transportation of the owner or in direct furtherance of the owner's business, the owner may be charged with the negligence of the driver as his agent or servant. In such case the family purpose doctrine is inappropriately referred to.[16] In many cases a child, when acting as the chauffeur of an automobile purchased by its parent for the use of the family, has been considered to be acting as agent for the parent when operating the car for the convenience or pleasure of members of the family.[17] Many of the decisions to this effect may, however, be ascribed to an application of the so-called family purpose doctrine which is invoked by some courts to impose upon a parent who furnishes a car for the use of his family liability for negligence of members of his family when using it for their own purposes. Courts which adopt this doctrine read into the situation a relationship of master and servant or principal and agent, the master or principal being the head of the family, the servants or agents being the family members, and the business attended to by the servants or agents in behalf of the master or principal being the entertainment, pleasure, or convenience of themselves.[18]

§ 362. Wife or Husband of Owner.—At common law a husband is liable for the torts of his wife committed during coverture,[19] and where this common-law rule prevails, a husband can be held liable for the negligence of his wife in operating his automobile.[20] In practically all jurisdictions, however, this common-law rule holding the husband liable for his wife's torts is abrogated, either by force of the married women's property acts or by statutes expressly abrogating the tort liability of the husband,[1] and accordingly a husband is not, merely by virtue of the marital relationship, liable for injuries caused by his wife's negligent operation of an automobile.[2] In the absence of a statute imposing liability for the use of an automobile by members of the owner's family,[3] a husband can be held liable for the negligent operation of his automobile by his wife only upon the theory of personal negligence in intrusting the car to her, knowing that she is incompetent to drive,[4] or upon the theory that the wife, in driving his automobile, was at the time of the injury acting as her husband's agent[5] or that he otherwise exercised control over her operation of the car. The husband is not, according to the great weight of authority, liable on the theory of intrusting a dangerous instrumentality to another.[6]

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[15] Trice v. Bridgewater, 125 Tex. 75, 81 S. W. (2d) 63, 100 A.L.R. 1014.

[15a] Stumpf v. Montgomery, 101 Okla. 257, 226 P. 65, 32 A.L.R. 1440.

[16] Trice v. Bridgewater, 125 Tex. 75, 81 S. W. (2d) 63, 100 A.L.R. 1014.

[17] Annotation: 41 L.R.A.(N.S.) 775, s. 50 L.R.A.(N.S.) 59, L.R.A.1916F, 223, L.R.A. 1917F, 365, and L.R.A.1918F, 297.

If the owner of a car directly or indirectly causes his child to drive the car for the benefit of members of his family, such driver may become the agent of the owner. Van Blaricom v. Dodgson, 220 N. Y. 111, 115 N. E. 443, L.R.A.1917F, 363.

[18] See infra, §§ 365 et seq.

[19] See HUSBAND AND WIFE [Also 13 R. C. L. p. 1229, § 264].

[20] See Minor v. Mapes, 102 Ark. 351, 144 S. W. 219, 39 L.R.A.(N.S.) 214, holding the husband liable for his wife's negligence in the operation of her own automobile. The common-law rule has since been abrogated by statute in Arkansas. Bourland v. Baker, 141 Ark. 280, 216 S. W. 707, 20 A.L.R. 525.

[1] See HUSBAND AND WIFE [Also 13 R. C. L. p. 1233, §§ 269–271].

[2] Bourland v. Baker, 141 Ark. 280, 216 S. W. 707, 20 A.L.R. 525; Landry v. Richmond, 45 R. I. 504, 124 A. 263, 32 A.L.R. 1500.

[3] See infra, §§ 397 et seq.

[4] See supra, § 355.

[5] Hutchins v. Haffner, 63 Colo. 365, 167 P. 966, L.R.A.1918A, 1008; Landry v. Rich-

In jurisdictions which have adopted the family purpose doctrine, the agency theory has been so extended as to hold an owner of an automobile purchased and maintained for the pleasure of his family liable for injuries inflicted by the machine while it was being used by his wife with his permission.[7] However, in jurisdictions which have rejected the family purpose doctrine, a man is not liable for an injury caused by the negligent operation by his wife of an automobile maintained for her use or for the general use of his family when she, a competent driver, is using it for her own purposes.[8] Conversely, the fact that a husband negligently operates a car owned by his wife does not, in the absence of a statutory change in the common-law rules,[9] impose a liability upon the wife,[10] unless she exercised some measure of control over his driving or it can be said that he was acting as her agent or servant in operating the car.[11] Nor does the mere fact of her presence in the car, or her failure to object to her husband's manner of driving, render her liable for his act.[12] Her presence does not preclude the theory that the husband was her bailee and she was riding as his guest.[13]

§ 363. Liability to Invited Guest of Member of Family.—It follows from the general rules which govern the liability of an owner for the negligence of a member of his family in operating his automobile[14] that a relationship of parent and child is not sufficient to render a parent liable for injury to a child's guest resulting from the child's negligent operation of the parent's automobile.[15] A parent may, however, be held liable for injury to a child's guest through the child's negligence in the operation of the parent's automobile on the ground that the parent was negligent in loaning the car to a person known to be incompetent.[16] In at least one jurisdiction the parent has been held liable on the theory of intrusting a dangerous instrumentality to the child,[17] although other courts have uniformly denied application of the dangerous instrumentality theory to the operation of automobiles.[18] Generally speaking, the liability of a parent for injury to a child's guest, resulting from the child's negligent operation of the car, is dependent on whether the child was acting as the parent's agent or servant in operating the parent's automobile and had authority to invite others to ride. Liability has been imposed in a number of cases,[19] especially in those jurisdictions which recog-

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mond, 45 R. I. 504, 124 A. 263, 32 A.L.R. 1500.

Annotation: L.R.A.1916F, 227, s. L.R.A. 1918F, 300.

[6] Landry v. Richmond, 45 R. I. 504, 124 A. 263, 32 A.L.R. 1500.

[7] See infra, §§ 365 et seq.

[8] Crawford v. McElhinney, 171 Iowa, 606, 154 N. W. 310, Ann. Cas. 1917E, 221; Landry v. Richmond, 45 R. I. 504, 124 A. 263, 32 A.L.R. 1500.

Annotation: L.R.A.1916F, 226.

[9] Wolf v. Sulik, 93 Conn. 431, 106 A. 443, 4 A.L.R. 356.

Generally, as to statutory liability of owners, see infra, §§ 397 et seq.

[10] Potts v. Pardee, 220 N. Y. 431, 116 N. E. 78, 8 A.L.R. 785 (wife's car operated by husband's chauffeur).

Annotation: 12 A.L.R. 1466.

[11] Generally, as to liability of wife for tort of husband while acting as her agent, see HUSBAND AND WIFE [Also 13 R. C. L. p. 1227, § 262].

[12] Annotation: 12 A.L.R. 1463.

Generally, as to the effect of the owner's presence in the car on his liability for the acts of the driver, see supra, § 354.

[13] Rodgers v. Saxton, 305 Pa. 479, 158 A. 166, 80 A.L.R. 280.

[14] See supra, §§ 359–362.

[15] Annotation: 2 A.L.R. 900, s. 88 A.L.R. 590.

[16] Annotation: 88 A.L.R. 592.

[17] Annotation: 88 A.L.R. 594.

[18] See § 11.

[19] Annotation: 2 A.L.R. 900, s. 88 A.L.R. 590.

A father who knew of his son's custom to have his friends with him while operating the father's car is not relieved from liability for a violation of the law as to the permissible number,—four persons were riding in the front seat of the car operatnize the family purpose doctrine.[1] However, where a driver of an automobile is held liable only for gross negligence to invitees,[2] a parent is liable to one riding at the invitation of his child only if the child was guilty of gross negligence.[3] If, under the facts of the case, it cannot be said that there is either an actual agency relationship or, in jurisdictions which recognize the family purpose doctrine, an agency relationship within the meaning of that doctrine, there is no liability,[4] assuming the absence of personal negligence on the part of the parent and of a statute imposing liability for the use of a car by a member of the owner's family.

§ 364. **Acts of Third Person Whom Member of Family Permits to Drive.**—In order to charge the owner of an automobile with liability for the act of a third person whom a member of his family permits to operate the car, it is necessary to establish that the owner would have been liable for the personal negligence of the member of the family; in other words, there must be an agency relation with reference to the latter's operation of the automobile, within the rules above stated. If such a relationship exists, the owner's liability is then determined by the principles which, in the ordinary master and servant cases, determine the liability of the master for the acts of a third person whom the servant has permitted to drive.[5] Thus, the constructive identity doctrine which holds a master who has intrusted the operation of his automobile to a servant liable for the act of a third person whom the servant permits to operate the car[6] has been applied where an owner of a car is sought to be charged with the negligence of a third person operating the owner's car with the permission of the owner's child. In other words, the owner of an automobile, who permits his son to take it, is liable for injuries caused by the negligent driving of a third person whom the son permits to operate the car, while remaining in it himself, if the owner would have been liable had the son himself been driving at the time of the accident.[7] Similarly, the owner of an automobile has been held liable for injuries resulting from the negligent operation of the car by a third person whom the owner's wife had directed or permitted to drive in her presence.[8]

b. "Family Purpose" Doctrine

§ 365. **Generally.**[9]—The so-called "family purpose doctrine" is one of comparatively recent origin and rapid growth.[10] This doctrine holds the owner

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ed by the son,—because the father had warned the son against violating the law in that regard. McDowell v. Hurner, 142 Or. 617, 20 P. (2d) 395, 88 A.L.R. 578.

[1] Johnson v. Evans, 141 Minn. 356, 170 N. W. 220, 2 A.L.R. 891.

[2] See supra, § 231.

[3] Flynn v. Lewis, 231 Mass. 550, 121 N. E. 493, 2 A.L.R. 896.

[4] Annotation: 2 A.L.R. 900, s. 88 A.L.R. 590.

[5] Annotation: 54 A.L.R. 851, s. 98 A.L.R. 1043.

See infra, §§ 382, 383.

Where an incompetent person is permitted to drive the owner may be held liable for that person's negligence. Annotation: 98 A.L.R. 1051.

[6] See infra, § 383.

[7] Thixton v. Palmer, 210 Ky. 838, 276 S. W. 971, 44 A.L.R. 1379.

Annotation: 44 A.L.R. 1389.

In Kayser v. Van Nest, 125 Minn. 277, 146 N. W. 1091, 51 L.R.A.(N.S.) 971, where the defendant's daughter permitted another to drive the parent's car, and through such person's negligence the accident occurred, it was held that the mere fact that the car was driven at the time of the accident by one not authorized by the owner to do so, but who was permitted to do so by the one who had charge of the car, did not necessarily absolve the owner from liability for the injury caused.

[8] Ulman v. Lindeman, 44 N. D. 36, 176 N. W. 25, 10 A.L.R. 1440.

[9] **This subdivision does not include** the question of an owner's liability, so far as it involves the application of the generally accepted principles for the determination of the relationship of master and servant or principal and agent, but covers merely the question of liability under the so-called "family purpose" doctrine.

[10] Annotation: 64 A.L.R. 845, s. 88 A.L.R.

of an automobile which was purchased and maintained for the pleasure of his or her family liable for injuries inflicted by the machine while it was being used by members of the family for their own pleasure, on the theory that the car was being used for the purpose or business for which it was kept, and that the person operating it was, therefore, acting as the owner's agent or servant in using it.[11] It is said to be one of the indispensable requisites of the family purpose doctrine that the person on whom it is sought to fasten liability under that principle owns, maintains, or provides an automobile for the general use, pleasure, and convenience of the family.[12] A direct conflict exists among the courts concerning the doctrine under consideration. It is, however, usually connected with the factual setting of the cases, so that it has seemed better to show the holdings of the various courts under the subdivisions as herein subsequently appears.

Some courts have squarely rejected it, while others have as unqualifiedly approved and adopted it. The doctrine undoubtedly involves a novel application of the rule of respondeat superior and may, perhaps, be regarded as straining that rule unduly. There are, however, undoubted practical considerations in favor of the doctrine, since it puts the financial responsibility of the owner behind the car while it is being used by a member of the family, who is likely to be financially irresponsible, in the pursuit and furtherance of the purpose for which the car is kept, and since it relieves the injured person from the difficult task of meeting the owner's claim that upon the occasion in question, the car was not being used for his pleasure or business. The doctrine extends, of course, its protection not only to pedestrians, but to other automobilists who may be injured in person or property by the negligence of a member of the family of the owner of the car in question.[13]

§ 366. Effect of Statute.—It may be observed that the practical results accomplished by the family purpose doctrine, without the aid of a statute, are secured in some states by statutes which in effect hold the owner responsible for all injuries negligently inflicted while the car is being used by another

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602, and 100 A.L.R. 1021; 41 L.R.A.(N.S.) 775, s. 50 L.R.A.(N.S.) 59, L.R.A.1916F, 223, L.R.A.1917F, 365, and L.R.A.1918F, 297.

[11] Annotation: 64 A.L.R. 845, s. 88 A.L.R. 602, and 100 A.L.R. 1021; 41 L.R.A.(N.S.) 775, s. 50 L.R.A.(N.S.) 59, L.R.A.1916F, 223, L.R.A.1917F, 365, and L.R.A.1918F, 297.

In McDowell v. Hurner, 142 Or. 617, 13 P. (2d) 600, 20 P. (2d) 395, 88 A.L.R. 578, the family purpose doctrine, which renders the owner of a car who keeps it for family use liable for injuries due to the negligence of a member of the family while operating the car, though unaccompanied by any other member of the family, was reaffirmed.

The family purpose doctrine originated in the desire of the courts, as a matter of justice or supposed necessity, to charge one who had purchased a car for the use of his family with responsibility for injury or damage resulting from its negligent operation by a member of his family. It was quite generally recognized that liability could not be based on the doctrine of master and servant or principal and agent as it had previously been applied. Owing, however, to the multitude of cases and the seeming injustice in allowing one so to purchase a car, turn it over to a member of his family, and thus make possible injury or damage to an innocent person, the principles of the law of master and servant and principal and agent were stretched by the courts in some jurisdictions, beyond their former limits, to include the so-called "family purpose doctrine," whereunder liability is imposed where none before existed. Annotation: 88 A.L.R. 602.

The family purpose doctrine is inappropriately referred to where a real relationship of agency is discernible, as where a member of the family is driving the car for the transportation of the owner or in direct furtherance of the owner's business, and is properly applicable only where a member of the owner's household is using it for his own purposes. Trice v. Bridgewater, 125 Tex. 75, 81 S. W. (2d) 63, 100 A.L.R. 1014.

[12] Annotation: 64 A.L.R. 845, s. 88 A.L.R. 602, and 100 A.L.R. 1021.

The mere fact that a car is purchased for business purposes does not prevent its coming within the "family purpose" doctrine where it is used for family pleasure. Watson v. Burley, 105 W. Va. 416, 143 S. E. 95, 64 A.L.R. 839.

[13] Annotation: 64 A.L.R. 846, s. 88 A.L.R. 602, and 100 A.L.R. 1021.

with the owner's consent, express or implied.[14] Such statutes, however, go further than the doctrine and cover cases beyond their reach—as, for example, where the car is not kept for family use, but is loaned upon a particular occasion.[15]

§ 367. Child Driving with Other Members of Family.—In a large number of cases in which it appears that an automobile is kept for the pleasure and convenience of the owner's family, it has been held that he is liable, under the family purpose doctrine, for an injury caused by it while it is being occupied and used with his express or implied permission by members of his family, who are being driven by one of his children; at least, these cases emphasize the point that the car is kept for, and habitually used by, the members of the family.[16]

§ 368. Car Used by Child Alone.—The family purpose doctrine is most clearly presented in cases where it is sought to hold the owner of a car kept for family use liable for an injury caused by it while one of his children was using it for his own purpose, and there is a decided conflict among the cases involving this question, the jurisdictions being practically evenly divided, though to a slight extent numerically favoring the nonliability view.[17]

One line of authority supports the view that where a car kept for family purposes causes an injury while being used by a child of the owner alone for his own pleasure, the owner is not liable under the so-called "family purpose" doctrine.[18]

[14] Stapleton v. Independent Brewing Co. 198 Mich. 170, 164 N. W. 520, L.R.A.1918A, 916.

Annotation: 64 A.L.R. 847, s. 88 A.L.R. 602, and 100 A.L.R. 1022.

In Gordon v. Rose, 54 Idaho, 502, 33 P. (2d) 351, 93 A.L.R. 984, it was held that a statute providing that every owner of a motor vehicle who caused, or knowingly permitted, a minor under the age of sixteen years to drive it upon a highway, should be jointly and severally liable with such minor for its negligent operation was indicative of the legislative intention that the owner of a motor vehicle should be liable for its negligent operation by a member of his family over sixteen only if the latter was his agent in fact.

[15] Annotation: 64 A.L.R. 847, s. 88 A.L.R. 602, and 100 A.L.R. 1022.

[16] Griffin v. Russell, 144 Ga. 275, 87 S. E. 10, L.R.A.1916F, 216, Ann. Cas. 1917D, 994; Stowe v. Morris, 147 Ky. 386, 144 S. W. 52, 39 L.R.A.(N.S.) 224; Boes v. Howell, 24 N. M. 142, 173 P. 966, L.R.A.1918F, 288; McNeal v. McKain, 33 Okla. 449, 126 P. 742, 41 L.R.A.(N.S.) 775.

Annotation: 64 A.L.R. 848, s. 88 A.L.R. 602, and 100 A.L.R. 1023.

[17] Annotation: 64 A.L.R. 851, s. 88 A.L.R. 603, and 100 A.L.R. 1023.

In Felcyn v. Gamble, 185 Minn. 357, 241 N. W. 37, 79 A.L.R. 1159, though declining to hold the "family purpose" doctrine applicable to a son's operation of a motor boat, the court recognized the doctrine, formerly announced in that jurisdiction, that where the head of the family makes it his business to provide recreation and pleasure for the family and its several members and to that end furnishes an automobile, he is responsible for its negligent use by any one of the family having his permission to drive it, stating that public policy requires that the doctrine be applied to automobiles in the interest of justice.

[18] Norton v. Hall, 149 Ark. 428, 232 S. W. 934, 19 A.L.R. 384; Spence v. Fisher, 184 Cal. 209, 193 P. 255, 14 A.L.R. 1083; Smith v. Callahan, 34 Del. 129, 144 A. 46, 64 A.L.R. 830; Pratt v. Cloutier, 119 Me. 203, 110 A. 353, 10 A.L.R. 1434; Myers v. Shipley, 140 Md. 380, 116 A. 645, 20 A.L.R. 1460; McGowan v. Longwood, 242 Mass. 337, 136 N. E. 72, 23 A.L.R. 617; Hays v. Hogan, 273 Mo. 1, 200 S. W. 286, L.R.A. 1918C, 715, Ann. Cas. 1918E, 1127; Doran v. Thomsen, 76 N. J. L. 754, 71 A. 296, 19 L.R.A.(N.S.) 335, 131 Am. St. Rep. 677; Van Blaricom v. Dodgson, 220 N. Y. 111, 115 N. E. 443, L.R.A.1917F, 363; Stumpf v. Montgomery, 101 Okla. 257, 226 P. 65, 32 A.L.R. 1490; Behseleck v. Andrus, 60 S. D. 204, 244 N. W. 268, 88 A.L.R. 596; Blair v. Broadwater, 121 Va. 301, 93 S. E. 632, L.R.A.1918A, 1011.

Annotation: 64 A.L.R. 851, s. 88 A.L.R. 604, and 100 A.L.R. 1024.

In Trice v. Bridgewater, 125 Tex. 75, 81 S. W. (2d) 63, 100 A.L.R. 1014, it was held that the mere ownership of an automobile purchased by a father for the use and pleasure of himself and family did not render him liable in damages to a third person who was injured by reason of the negligence of the defendant's minor son while operating the car on the highway in pursuit of the son's own purpose and pleasure, notwithstanding he was using the car with the permission of his father. The court definitely rejected the family purpose doctrine, in so far at least as it applies in a case where a minor son is using the family car for his own purposes, holding the doctrine unsound under such circumstances.

The other line of authorities holds that where the owner's car is being used by one of his children alone at the time an injury is caused by it, the owner is liable, since the child is using the machine for the purpose for which the owner kept it.[19]

On the other hand, the doctrine has no application where the car is taken surreptitiously or in violation of orders. Thus, although a father may purchase an automobile for the general use of his family, he nevertheless retains the right to deny its use to any member when he sees fit; and when he does so, he cannot be held liable where the member surreptitiously takes the car after permission to use it has been refused and negligently operates it to the injury of another.[20]

Frequently, situations arise involving the application of the family purpose doctrine to cases where a child is driving to or from school. In such case the doctrine has generally been applied in those jurisdictions in which it is recognized, and to the extent recognized.[1] The owner of an automobile is not relieved from liability under the family purpose doctrine by the mere fact that the negligent use of the car was made by an adult child.[2] An adult child who resides at the parental home and is employed by, and partly dependent on, his father may properly be classed as a member of his father's family.[3] It will be noted in this connection that several of the jurisdictions which support the family purpose doctrine either do not recognize it in cases where the car is being driven by a child for his or her own purpose, or are very strict in limiting its application in such instances.[4]

§ 369. Car Used by Spouse of Owner.—The family purpose doctrine has in some cases been applied where a car kept for family purposes was being used by the owner's spouse at the time an injury resulted from its operation. In this situation, however, as in the others, the courts are also divided on the question of the liability of the owner.[5] In many cases the owner of an auto-

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In Gordon v. Rose, 54 Idaho, 502, 33 P. (2d) 351, 93 A.L.R. 984, it was held that the owner of an automobile kept for family use could not be held liable for an injury caused by the negligence of a member of the family while using it for his own purposes.

[19] Griffin v. Russell, 144 Ga. 275, 87 S. E. 10, L.R.A.1916F, 216, Ann. Cas. 1917D, 994; Johnson v. Evans, 141 Minn. 356, 170 N. W. 220, 2 A.L.R. 891; Kayser v. Van Nest, 125 Minn. 277, 146 N. W. 1091, 51 L.R.A. (N.S.) 970; Harmon v. Haas, 61 N. D. 772, 241 N. W. 70, 80 A.L.R. 1131; King v. Smythe, 140 Tenn. 217, 204 S. W. 296, L.R.A. 1918F, 293; Switzer v. Sherwood, 80 Wash. 19, 141 P. 181, Ann. Cas. 1917A, 216; Birch v. Abercrombie, 74 Wash. 486, 133 P. 1020, 50 L.R.A.(N.S.) 59; Watson v. Burley, 105 W. Va. 416, 143 S. E. 95, 64 A.L.R. 839.

Annotation: 64 A.L.R. 861, s. 88 A.L.R. 608, and 100 A.L.R. 1025.

In Arkin v. Page, 287 Ill. 420, 123 N. E. 30, 5 A.L.R. 216, where the defendant's car, kept for family purposes, was being used by his son for his own pleasure when an injury was caused by it, the court rejected the family purpose doctrine.

In Bradley v. Schmidt, 223 Ky. 784, 4 S. W. (2d) 703, 57 A.L.R. 1100, it was sought unsuccessfully to impose liability on a father under the family purpose doctrine for an injury caused by his car while being driven under the direction of his son while in the exclusive pursuit of his own purposes, it appearing that the son was twenty-four years of age and, although he resided with his father, paid his board and was self-supporting.

In Ritter v. Hicks, 102 W. Va. 541, 135 S. E. 601, 50 A.L.R. 1505, the court refused to hold the owner of a car liable under the family purpose doctrine for an injury resulting from its negligent operation by his son, who was employed by his father to sell cars, where the son was using the car for his own pleasure after business hours with his father's tacit consent, it not being shown that the son was a member of the family or that the car was provided by the father for family use.

[20] Dow v. Legg, 120 Neb. 271, 231 N. W. 747, 74 A.L.R. 5.

Annotation: 64 A.L.R. 870, s. 88 A.L.R. 612, and 100 A.L.R. 1026.

[1] Annotation: 64 A.L.R. 871, s. 88 A.L.R. 612, and 100 A.L.R. 1026.

[2] Harmon v. Haas, 61 N. D. 772, 241 N. W. 70, 80 A.L.R. 1131; Watson v. Burley, 105 W. Va. 416, 143 S. E. 95, 64 A.L.R. 839 (son).

[3] Watson v. Burley, 105 W. Va. 416, 143 S. E. 95, 64 A.L.R. 839.

[4] Annotation: 64 A.L.R. 851, s. 88 A.L.R. 603, and 100 A.L.R. 1023.

[5] Annotation: 64 A.L.R. 873, s. 88 A.L.R. 613, and 100 A.L.R. 1027.

mobile, in the absence of statutory provisions to the contrary, is not regarded as liable for the negligent operation of such automobile by his or her spouse.[6] The cases are, however, just as numerous, if not more so, which hold the owner liable for the negligent operation of an automobile by his or her spouse.[7] Thus, a husband has been held liable for an injury caused by the negligence of his wife in operating an automobile kept by him for the comfort and pleasure of the family, and which he permits her to use for that purpose.[8] And the owner of an automobile kept for family use has been held liable for its negligent operation by one whom his wife authorized to run it while she was riding in it.[9]

§ 370. Car Used by Owner's Relative.—As a general rule, the family purpose doctrine does not apply to situations where relatives of the owner of a car other than his or her immediate family, such as spouse or children, are using the car.[10] Thus, liability has been denied where the car was being used by a brother,[11] sister,[12] nephew,[13] cousin,[14] stepdaughter,[15] son-in-law,[16] or brother-in-law.[17] Circumstances may arise, however, where any one of such relatives may be considered a member of the family and render the owner liable where the family purpose doctrine is recognized.

§ 371. Car Owned by Other than Head of Family.—In most of the states where the family purpose doctrine is recognized and the question has arisen, the doctrine has been held applicable to situations where an automobile is owned by one other than the head of the family, as where it is owned by a daughter, son, or mother.[18]

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[6] Landry v. Richmond, 45 R. I. 504, 124 A. 263, 32 A.L.R. 1500.

Annotation: 64 A.L.R. 873, s. 88 A.L.R. 613, and 100 A.L.R. 1027.

In Landry v. Richmond, 45 R. I. 504, 124 A. 263, 32 A.L.R. 1500, the court stated that it felt compelled to follow the rule that a husband who furnishes an automobile for the pleasure of his family and permits his wife to drive whenever she desires is not responsible for her negligent use of the car when driving exclusively for her own purposes, and held that where the defendant kept an automobile for the exclusive use of his wife, who had permission to use it at all times and who was a competent driver, he was not liable for injuries resulting from its negligent operation by her where she was using it for her own purposes, it being provided by statute that the husband should not be liable, by reason of the marital relation, for torts committed by his wife unless he participated therein or coerced her thereto.

[7] Hutchins v. Haffner, 63 Colo. 365, 167 P. 966, L.R.A.1918A, 1008; Wolf v. Sulik, 93 Conn. 431, 106 A. 443, 4 A.L.R. 356; Crawford v. McElhinney, 171 Iowa, 606, 154 N. W. 310, Ann. Cas. 1917E, 221; Plasch v. Fass, 144 Minn. 44, 174 N. W. 438, 10 A.L.R. 1446; Ulman v. Lindeman, 44 N. D. 36, 176 N. W. 25, 10 A.L.R. 1440.

Annotation: 64 A.L.R. 876, s. 88 A.L.R. 614, and 100 A.L.R. 1027.

In Hutchins v. Haffner, 63 Colo. 365, 167 P. 966, L.R.A.1918A, 1008, the court said: "The decisions bearing upon the liability of an owner of an automobile kept for family use, for the negligence of a member of his family in driving the machine with his consent, cannot be reconciled. A majority of this court have chosen to adopt the doctrine that a husband is liable for an injury inflicted by his automobile, which he purchased for family use, while it was being operated by his wife solely for her own pleasure, under his general permission to use the machine whenever and wherever she pleased, upon the theory that the wife was the husband's agent in carrying out one of the purposes for which the car was purchased and owned."

In Crawford v. McElhinney, 171 Iowa, 606, 154 N. W. 310, Ann. Cas. 1917E, 221, where an injury resulted while the defendant's wife was operating his machine, which was occupied by the defendant and his guests, the fact that the car was purchased for his pleasure and that of his wife was one element entering into the decision that the question of her agency was for the jury. In this case a judgment against both the husband and wife was affirmed.

[8] Plasch v. Fass, 144 Minn. 44, 174 N. W. 438, 10 A.L.R. 1446.

[9] Ulman v. Lindeman, 44 N. D. 36, 176 N. W. 25, 10 A.L.R. 1440.

[10] Schneider v. Schneider, 160 Md. 18, 152 A. 498, 72 A.L.R. 449; Smith v. Burns, 71 Or. 133, 135 P. 200, 142 P. 352, L.R.A. 1915A, 1130, Ann. Cas. 1916A, 666.

Annotation: 64 A.L.R. 877, s. 88 A.L.R. 615, and 100 A.L.R. 1028.

[11] Schneider v. Schneider, 160 Md. 18, 152 A. 498, 72 A.L.R. 449.

Annotation: 88 A.L.R. 616.

[12] Annotation: 88 A.L.R. 615.

[13] Annotation: 64 A.L.R. 878, s. 88 A.L.R. 615, and 100 A.L.R. 1029.

[14] Annotation: 64 A.L.R. 878.

[15] Annotation: 100 A.L.R. 1028.

[16] Annotation: 88 A.L.R. 615.

[17] Annotation: 64 A.L.R. 877.

[18] Annotation: 64 A.L.R. 878, s. 88 A.L.R. 615, and 100 A.L.R. 1029.

§ 372. Car Driven by Servant or Employee.—As a general rule, the family purpose doctrine does not apply where a servant or employee of the owner of an automobile drives the automobile.[19] It is, however, possible to extend the doctrine to an employer with whom an employee makes his home, there being no ties of blood between them. But, in order to do so, it is essential to show that the employer was under obligation to support the employee; that the car causing the injury was maintained by the employer; that the employee had general authority to use it for his own convenience; and that he used it for the purpose for which it was maintained at the time his actionable negligence arose.[20]

Most of the cases involving liability for injuries inflicted by an owner's car while members of his family are being driven by his chauffeur are based on the doctrine of master and servant, apart from the family purpose doctrine. A few cases, however, mention the family use of the car as one element, at least, leading up to the decision.[1]

5. Master's Liability for Act of Servant

§ 373. Generally.—Aside from a statutory liability imposed upon the owner of an automobile who permits another to operate it [2] or from recognition of an automobile as a dangerous instrumentality rendering the owner who intrusts it to another liable for negligent operation by the latter,[3] the question whether the owner of an automobile is liable for the acts or omissions of his servant or agent while operating the automobile depends entirely upon whether, at the time of the act or omission complained of, the servant or agent was acting within the scope of his employment.[4] The relationship between an owner and chauffeur or driver of an automobile is not different from that existing between master and servant generally,[5] and it is to be determined by applying the general rules of law governing the relation of master and servant [6] to the particular facts of the case.[7] In the absence of a statutory change in the common-law rule,[8] it generally is essential to a recovery against the owner of an automobile for injuries caused by it while being driven by an employee that at the time the accident occurred the person in charge of the automobile was using it in the

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In Schneider v. Schneider, 160 Md. 18, 152 A. 498, 72 A.L.R. 449, it was held that the owner of a car generally used by his family was not liable for the negligent operation of such car by his brother while driving the car at the owner's request for the purpose of taking the brothers' parents on a visit to friends, the court declaring that the mere fact that it may afford an owner pleasure and satisfaction to have members of his family transported in his car entirely on their own affairs does not render their expedition his business, so that he will be liable for the results of negligence in its operation.

[19] Annotation: 64 A.L.R. 878, s. 88 A.L.R. 616, and 100 A.L.R. 1030.

[20] Annotation: 100 A.L.R. 1030.

[1] Annotation: 64 A.L.R. 880, s. 88 A.L.R. 616, and 100 A.L.R. 1030.

[2] See infra, §§ 397 et seq.

[3] Anderson v. Southern Cotton Oil Co. 73 Fla. 432, 74 So. 975, L.R.A.1917E, 715; Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629, 16 A.L.R. 255.

For a general discussion of the doctrine of dangerous instrumentality as applied to automobiles, see supra, §§ 11, 12.

[4] Danforth v. Fisher, 75 N. H. 111, 71 A. 535, 21 L.R.A.(N.S.) 93, 139 Am. St. Rep. 670; White Oak Coal Co. v. Rivoux, 88 Ohio St. 18, 102 N. E. 302, 46 L.R.A.(N.S.) 1091, Ann. Cas. 1914C, 1082; Lotz v. Hanlon, 217 Pa. 339, 66 A. 525, 10 L.R.A.(N.S.) 202, 118 Am. St. Rep. 922, 10 Ann. Cas. 731.

Halparin v. Bulling, 50 Can. S. C. 471, 20 D. L. R. 598, Ann. Cas. 1915D, 474.

Annotation: 22 A.L.R. 1397, s. 45 A.L.R. 478, 68 A.L.R. 1052, and 80 A.L.R. 726, 1 L.R.A.(N.S.) 235; 10 Ann. Cas. 732; 12 Ann. 972; Ann. Cas. 1914C, 1087; Ann. Cas. 1915D, 476; Ann. Cas. 1916A, 659; Ann. Cas. 1917D, 1001, 1008; Ann. Cas. 1918D, 241, 1134.

As to the liability of joint owners of an automobile for the torts of a common servant, see supra, § 346.

[5] Annotation: Ann. Cas. 1916A, 659.

[6] See Agency, Vol. 2, p. 1; Master and Servant [Also 18 R. C. L. p. 480].

[7] Elliott v. Harding, 107 Ohio St. 501, 140 N. E. 338, 36 A.L.R. 1128; Ulman v. Lindeman, 44 N. D. 36, 176 N. W. 25, 10 A.L.R. 1440; Mitchell v. Churches, 119 Wash. 547, 206 P. 6, 36 A.L.R. 1132.

Annotation: 36 A.L.R. 1137.

[8] See infra, §§ 397 et seq.

course of his employment and on his employer's business.[9] The general test of the master's liability is whether there was authority expressed or implied for doing the act in question. If it is done within the course of and scope of his employment, the master will be liable for the act, although a master is not liable for every wrong which the servant may commit during the continuance of the employment; liability can occur only when that which is done is within the real or apparent scope of the master's business,[10] or where the master subsequently ratifies the servant's unauthorized act.[11] If, however, it appears that the plaintiff or his decedent was injured by reason of the negligent operation of the defendant's automobile by an employee of the defendant acting within the scope of his authority or employment, the defendant is liable if the employee was negligent.[12] His acts in operating an automobile within the lines of his employment are the acts of a servant, for which his employer is responsible.[13] The mere fact that an employee, during the period of his employment, negligently injures another while operating the employer's automobile does not make the latter liable,[14] unless it further appears that the employee was acting at the time on the master's business.[15] An owner is not liable for an injury caused by the negligence of a servant or agent while operating the employer's automobile for his own pleasure or business.[16] According to the great weight of authority, the owner cannot be held liable for the employee's negligence on the theory that the automobile is a dangerous instrumentality within the rule making the owner of such an instrumentality liable for the consequences of its use by any person.[17] However, the view is taken in at least one jurisdiction that the possibility of injuries from the operation of an automobile are so great that an owner who allows his servant to use the machine on his personal business is liable for negligence of the servant while so engaged.[18] Moreover, proof that the car which caused an injury belonged to the defendant may raise a presumption that the driver was his servant and that he was at the time of the accident acting within the scope of his authority.[19]

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[9] Forbes v. Reinman, 112 Ark. 417, 166 S. W. 563, 51 L.R.A.(N.S.) 1164; Halverson v. Blosser, 101 Kan. 683, 168 P. 863, L.R.A. 1918B, 498; Fleischner v. Durgin, 207 Mass. 435, 93 N. E. 801, 33 L.R.A.(N.S.) 79, 20 Ann. Cas. 1291; Kayser v. Van Nest, 125 Minn. 277, 146 N. W. 1091, 51 L.R.A.(N.S.) 970; Danforth v. Fisher, 75 N. H. 111, 71 A. 535, 21 L.R.A.(N.S.) 93, 139 Am. St. Rep. 670; White Oak Coal Co. v. Rivoux, 88 Ohio St. 18, 102 N. E. 302, 46 L.R.A.(N.S.) 1091, Ann. Cas. 1914C, 1082; Lotz v. Hanlon, 217 Pa. 339, 66 A. 525, 10 L.R.A.(N.S.) 202, 118 Am. St. Rep. 922, 10 Ann. Cas. 731.

Annotation: Ann. Cas. 1917D, 1001.

Under the English common law, the master is not liable for the negligence of his servant while the latter is engaged in some act beyond the scope of his employment for his own purpose, although he may be using the instrumentalities furnished by the master to perform his duties as servant. Halparin v. Bulling, 50 Can. S. C. 471, 20 D. L. R. 598, Ann. Cas. 1915D, 474.

Where the owner of an automobile directs his chauffeur to put the machine in dead storage, with instructions not to use it without permission, the chauffeur has no implied authority to violate orders and, without the owner's knowledge or consent, take the car out for the purpose of testing it. Therefore, such use being unauthorized, the owner is not liable for an accident resulting therefrom. Rose v. Balfe, 223 N. Y. 481, 119 N. E. 842, Ann. Cas. 1918D, 238.

[10] Crawford v. McElhinney, 171 Iowa, 606, 154 N. W. 310, Ann. Cas. 1917E, 221; Halverson v. Blosser, 101 Kan. 683, 168 P. 863, L.R.A.1918B, 498; Wyatt v. Hodson, 210 Ky. 47, 275 S. W. 15, citing R. C. L.; Marullo v. St. Pasteur, 144 La. 926, 81 So. 403, citing R. C. L.; Janik v. Ford Motor Co. 180 Mich. 557, 147 N. W. 510, 52 L.R.A.(N.S.) 294, Ann. Cas. 1916A, 669; Provo v. Conrad, 130 Minn. 412, 153 N. W. 753, citing R. C. L.; Kayser v. Van Nest, 125 Minn. 277, 146 N. W. 1091, 51 L.R.A.(N.S.) 970; Geiss v. Twin City Taxicab Co. 120 Minn. 368, 139 N. W. 611, 45 L.R.A.(N.S.) 382; Slater v. Advance Thresher Co. 97 Minn. 305, 107 N. W. 133, 5 L.R.A.(N.S.) 598; Paiewonsky v. Joffe, 101 N. J. L. 521, 129 A. 142, 40 A.L.R. 1335; Rose v. Balfe, 223 N. Y. 481, 119 N. E. 842, Ann. Cas. 1918D, 238; Potts v. Pardee, 220 N. Y. 431, 116 N. E. 78, 8 A.L.R. 785; Ulman v. Lindeman, 44 N. D. 36, 176 N. W. 25, 10 A.L.R. 1440; Stumpf v. Montgomery, 101 Okla. 257, 226 P. 65, 32 A.L.R. 1490; Moon v. Matthews, 227 Pa. 488, 76 A. 219, 29 L.R.A.(N.S.) 856, 136 Am. St. Rep. 902; Lotz v. Hanlon, 217 Pa. 339, 66 A. 525, 10 L.R.A.(N.S.) 202, 118 Am. St. Rep. 922, 10 Ann. Cas. 731; Jones v. Hoge, 47 Wash. 663, 92 P. 433, 14 L.R.A.(N.S.) 216, 125 Am. St. Rep. 915; Steffen v. McNaughton, 142 Wis. 49, 124 N. W. 1016, 26 L.R.A.(N.S.) 382, 19 Ann. Cas. 1227.

Ricketts v. Tilling [1915] 1 K. B. 644, 6 B. R. C. 683; Halparin v. Bulling, 50 Can. S. C. 471, 20 D. L. R. 598, Ann. Cas. 1915D, 474.

Annotation: 14 A.L.R. 1089; 45 A.L.R. 479; 26 L.R.A.(N.S.) 382; Ann. Cas. 1916A, 659; Ann. Cas. 1917D, 1001; Ann. Cas. 1917E, 228; Ann. Cas. 1918D, 241.

[11] Babbitt, Motor Vehicle Law, 4th ed. p. 825, § 1204.

Ratification of an act of a servant may be equivalent to command by the master, and co-operation of the master may be inferred from acquiescence, where there was power to restrain. Dowler v. Johnson, 225 N. Y. 39, 121 N. E. 487, 3 A.L.R. 146.

See generally Master and Servant [Also 18 R. C. L. p. 793, §§ 253 et seq.]. See also Agency, Vol. 2, p. 165, §§ 208 et seq.

[12] Albert v. Munch, 141 La. 686, 75 So. 513, L.R.A.1918A, 240.

Mattei v. Gilles, 16 Ont. L. Rep. 558, 12 Ann. Cas. 970.

Annotation: 10 Ann. Cas. 732; 12 Ann. Cas. 972; Ann. Cas. 1914C, 1087; Ann. Cas. 1915D, 476; Ann. Cas. 1916A, 659; Ann. Cas. 1917D, 1001, 1008; Ann. Cas. 1918D, 241, 1134.

The master is liable for the act of a servant in charge of his vehicle when the latter is acting in the main with the master's express or implied authority, upon his business, and in the course of the employment, for the purpose of doing the work for which he is engaged. Fleischner v. Durgin, 207 Mass. 435, 93 N. E. 801, 33 L.R.A.(N.S.) 79, 20 Ann. Cas. 1291.

[13] Johnson v. Coey, 237 Ill. 88, 86 N. E. 678, 21 L.R.A.(N.S.) 81; Fleischner v. Durgin, 207 Mass. 435, 93 N. E. 801, 33 L.R.A. (N.S.) 79, 20 Ann. Cas. 1291; Hartley v. Miller, 165 Mich. 115, 130 N. W. 336, 33 L.R.A.(N.S.) 81; Danforth v. Fisher, 75 N. H. 111, 71 A. 535, 21 L.R.A.(N.S.) 93, 139 Am. St. Rep. 670; Lotz v. Hanlon, 217 Pa.

The owner's liability for his servant's operation of an unregistered car depends upon the law of the jurisdiction regarding the operation of unregistered motor vehicles.[20]

§ 374. When Relationship Exists Generally.—The general rules which govern the relationship of master and servant and which determined when one may be charged under the doctrine of respondeat superior for the negligence of another [1] are to be applied in determining whether the person driving the automobile causing the injury complained of was the agent or servant of the person sought to be charged for the injury, and was acting within the scope of his authority at the time of the injury. As in other cases, the doctrine of respondeat superior, as applied to the operation of automobiles, rests upon the power and control which the person sought to be charged as master has over the alleged employee.[2] The master is the one who can order not only that the work be done, but how it shall be done,—in other words, the one who has con-

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339, 66 A. 525, 10 L.R.A.(N.S.) 202, 118 Am. St. Rep. 922, 10 Ann. Cas. 731.

Annotation: 1 L.R.A.(N.S.) 235; 4 L.R.A.(N.S.) 1131; 10 Ann. Cas. 732.

The act of the driver may be within the course of his employment, though forbidden by the master or outside his line of duty. Luckett v. Reighard, 248 Pa. 24, 93 A. 773, Ann. Cas. 1916A, 662.

[14] Annotation: Ann. Cas. 1916A, 657.

[15] Healey v. Cockrill, 133 Ark. 327, 202 S. W. 229, L.R.A.1918D, 115; Slater v. Advance Thresher Co. 97 Minn. 305, 107 N. W. 133, 5 L.R.A.(N.S.) 598; Louisville & N. R. Co. v. Marlin, 135 Tenn. 435, 186 S. W. 595, L.R.A.1917A, 417.

[16] See infra, §§ 375 et seq.

[17] Symington v. Sipes, 121 Md. 313, 88 A. 134, 47 L.R.A.(N.S.) 662; Slater v. Advance Thresher Co. 97 Minn. 305, 107 N. W. 133, 5 L.R.A.(N.S.) 598; Danforth v. Fisher, 75 N. H. 111, 71 A. 535, 21 L.R.A.(N.S.) 93, 139 Am. St. Rep. 670; King v. Smythe, 140 Tenn. 217, 204 S. W. 296, L.R.A.1918F, 293; Goodman v. Wilson, 129 Tenn. 464, 166 S. W. 752, 51 L.R.A.(N.S.) 1116; Birch v. Abercrombie, 74 Wash. 486, 133 P. 1020, 50 L.R.A.(N.S.) 59; Jones v. Hoge, 47 Wash. 663, 92 P. 433, 14 L.R.A.(N.S.) 216, 125 Am. St. Rep. 915; Steffen v. McNaughton, 142 Wis. 49, 124 N. E. 1016, 26 L.R.A.(N.S.) 382, 19 Ann. Cas. 1227.

Annotation: 16 A.L.R. 273; Ann. Cas. 1916A, 659.

The owner of an automobile who keeps it at a public garage is not, upon the ground that it is a dangerous agency, liable for personal injuries sustained by a person run over by it in consequence of the negligence of the chauffeur, who had taken the machine without the knowledge or permission of the owner and was using the same on an errand personal to himself, even though he was not a competent and careful operator. Jones v. Hoge, 47 Wash. 663, 92 P. 433, 14 L.R.A.(N.S.) 216, 125 Am. St. Rep. 915.

[18] Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629, 16 A.L.R. 255.

[19] See infra, § 612.

[20] See generally supra, §§ 138 et seq.

[1] See MASTER AND SERVANT [Also 18 R. C. L. p. 480].

[2] Annotation: 42 A.L.R. 1417.

The superintendent of a fire department is not liable, on the theory of respondeat superior, for the negligence of a fireman driving his automobile under his assignment of duty. Dowler v. Johnson, 225 N. Y. 39, 121 N. E. 487, 3 A.L.R. 146.

trol of the work.[3] The manner, method, and means by which compensation is paid may constitute a material factor in determining whether the relation exists.[4] Neither the fact that the driver of an automobile, at the time of negligently injuring another, has a fixed weekly wage, nor the fact that he is an employee and has no other employment, is decisive of the relationship of master and servant whereby his negligent act is legally imputable to his master, since a person may be an agent or servant as to one part of an undertaking and an independent contractor as to other parts.[5] Assuming that a relationship of employer and employee exists between the driver of the automobile causing the injury and the person sought to be held responsible, the question whether the driver, at the time of an accident, was acting within the scope of his employment generally involves an inquiry into the contract of employment and the relation of his acts at the time of the accident to the service he actually performed pursuant to his employment.[6] The expression, "in the course of employment," means, in contemplation of law, "while engaged in the service of the master;" it is not synonymous with the phrase, "during the period covered by his employment."[7] The mere fact that the employee at the time of inflicting the injury may have taken the car out for the purpose of testing it does not necessarily show that he was acting in the course of his employment, so as to render the employer liable, although the facts of the particular case may be such as to render him so liable.[8] However any use of a car which is reasonably incidental to the performance of the duties with which the employee is charged is deemed to be within the scope of his employment.[9] The mere fact that the employee may have disobeyed certain of the master's commands does not necessarily show that he is acting outside the scope of his employment, so as to relieve the master from liability for injury done by the negligent handling of the car.[10]

§ 375. Employee Using Employer's Car for Own Pleasure or Benefit.—Apart from the liability created by statute,[11] it is a well-established general rule that the owner of an automobile is not liable for injury or damage resulting from the negligent operation of his car by his employee while the latter is using it for his own pleasure or business.[12] This rule applies not only to cases in which the agent or servant uses his employer's car for his own purposes without the owner's permission or consent,[13] but, according to the great weight of authority, to cases in which the employer has consented to or acquiesced in the employee's use of the car for his own pleasure or business.[14] In other words, an employer is not, by reason of his relation of master or principal, liable for injuries inflicted by his employee when operating the master's automobile for the personal pleasure of the servant when not on regular duty, whether he is using the car with or without the consent of the master.[15] An employer may, however, be held liable for permitting an employee, who is an incompetent driver, to use the car for his own purposes,[16] or for permitting an employee to use a defective and dangerous automobile for an errand of his own,[17] or he may be made liable by a statute which imposes liability upon the owner for the negligence of those whom he permits to use his automobile.[18] In one jurisdiction the view is taken that an owner who allows his servant to use his machine on personal business is liable for the negligence of the servant so engaged.[19] Generally, in order to hold the principal or master liable for the act of his agent or servant, the relation of master and servant or principal and agent must exist at the time, and the act must be within the scope of the servant's authority.[20] Under the general rule governing the owner's liability for an injury inflicted by his automobile while it is being used by a servant for his own pleasure or business, an employer is not liable for the negligence of his employee in the operation of the employer's automobile while using the car to do a personal errand.[1] Nor is a corporation or a partnership owning a motor vehicle liable for injury or damage caused while the vehicle is being operated by an official of the company, or a member of the partnership, for his own purposes.[2]

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[3] Babbitt, Motor Vehicle Law, 4th ed. p. 830, § 1212.

[4] Minor v. Stevens, 65 Wash. 423, 118 P. 313, 42 L.R.A.(N.S.) 1178.

Annotation: 44 L.R.A.(N.S.) 115.

An employee who is entitled, as part of his compensation, to the use of his employer's automobile for his own pleasure is, while so using the car, a mere bailee, and his negligence is not imputable to the owner so as to prevent the latter's holding another liable for negligently injuring the machine. Lloyd v. Northern P. R. Co. 107 Wash. 57, 181 P. 29, 6 A.L.R. 307.

[5] Khoury v. Edison Electric Illuminating Co. 265 Mass. 236, 164 N. E. 77, 60 A.L.R. 1159.

[6] Steffen v. McNaughton, 142 Wis. 49, 124 N. W. 1016, 26 L.R.A.(N.S.) 382, 19 Ann. Cas. 1227.

Annotation: 26 L.R.A.(N.S.) 382; 19 Ann. Cas. 1229.

[7] Hickson v. W. W. Walker Co. 110 Conn. 604, 149 A. 400, 68 A.L.R. 1044; Slater v. Advance Thresher Co. 97 Minn. 305, 107 N. W. 133, 5 L.R.A.(N.S.) 598.

[8] Annotation: 22 A.L.R. 1428, s. 45 A.L.R. 496, 80 A.L.R. 733.

In Rose v. Balfe, 223 N. Y. 481, 119 N. E. 842, Ann. Cas. 1918D, 238, there was held to be no evidence justifying a recovery against the defendant, where there was evidence that he kept two cars, and some time before, had ordered the car which caused the injury for which a recovery was sought to be placed in "dead storage" and not to be used; that his chauffeur, after having taken the defendant home at night, was given no further orders and was free until the next morning; that without the knowledge or consent of the defendant, and in direct violation of his orders, he took the car out, as he testified, to "adjust the car for his own benefit," although he had no orders to repair the cars, and when they were out of order he reported it to the defendant and took them to the shop for repairs; and that while he was using the car, an accident occurred.

[9] Annotation: Ann. Cas. 1917D, 1002.

[10] Moon v. Matthews, 227 Pa. 488, 76 A. 219, 29 L.R.A.(N.S.) 856, 136 Am. St. Rep. 906.

An employer is liable for injuries due to negligent acts or omissions of his servant in the course of his employment, without regard to his motives, though such acts or omissions were unauthorized or even forbidden by him, and though they were outside the servant's line of duty. Luckett v. Reighard, 248 Pa. 24, 93 A. 773, Ann. Cas. 1916A, 662.

[11] See infra, §§ 397 et seq.

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[12] Annotation: 22 A.L.R. 1397, s. 45 A.L.R. 478, 68 A.L.R. 1052, and 80 A.L.R. 726; 1 L.R.A.(N.S.) 235; 9 L.R.A.(N.S.) 1033; 14 L.R.A.(N.S.) 216; 21 L.R.A.(N.S.) 93; 26 L.R.A.(N.S.) 352; 33 L.R.A.(N.S.) 79; 37 L.R.A.(N.S.) 834; 47 L.R.A.(N.S.) 662, s. L.R.A.1916A, 957; 10 Ann. Cas. 732; 12 Ann. Cas. 972; Ann. Cas. 1914C, 1087; Ann. Cas. 1915D, 476; Ann. Cas. 1916A, 659; Ann. Cas. 1917D, 1001, 1008; Ann. Cas. 1918D, 241, 1134.

The owner is not liable, upon the ground that an automobile is a dangerous agency, for personal injuries sustained by a person run over by such owner's car in consequence of the negligence of the chauffeur who had taken the machine without the knowledge or permission of the owner and was using the same on an errand personal to himself, even though he was not a competent and careful operator. Jones v. Hoge, 47 Wash. 663, 92 P. 433, 14 L.R.A.(N.S.) 216, 125 Am. St. Rep. 915.

Mere employment of a chauffeur known to be a reckless driver does not render the owner of an automobile liable for injuries which he may cause to others while he is operating the machine for his own pleasure, contrary to the express orders of the owner. Danforth v. Fisher, 75 N. H. 111, 71 A. 535, 21 L.R.A.(N.S.) 93, 139 Am. St. Rep. 670.

[13] Healey v. Corkrill, 133 Ark. 327, 202 S. W. 229, L.R.A.1918D, 115; Hickson v. W. W. Walker Co. 110 Conn. 604, 149 A. 400, 68 A.L.R. 1044; Arkin v. Page, 287 Ill. 420, 123 N. E. 30, 5 A.L.R. 216; Fisher v. Fletcher, 191 Ind. 529, 133 N. E. 834, 22 A.L.R. 1392; Symington v. Sipes, 121 Md. 313, 88 A. 134, 47 L.R.A.(N.S.) 662; Fleischner v. Durgin, 207 Mass. 435, 93 N. E. 801, 33 L.R.A.(N.S.) 79, 20 Ann. Cas. 1291; Riley v. Roach, 168 Mich. 294, 134 N. W. 14, 37 L.R.A.(N.S.) 834; Kohlman v. Hyland, 54 N. D. 710, 210 N. W. 643, 50 A.L.R. 1437 (later appeal in 56 N. D. 772, 219 N. W. 228); White Oak Coal Co. v. Rivoux, 88 Ohio St. 18, 102 N. E. 302, 46 L.R.A.(N.S.) 1091, Ann. Cas. 1914C, 1082; Stumpf v. Montgomery, 101 Okla. 257, 226 P. 65, 32 A.L.R. 1490; Lotz v. Hanlon, 217 Pa. 339, 66 A. 525, 10 L.R.A.(N.S.) 202, 118 Am. St. Rep. 922, 10 Ann. Cas. 731; Jones v. Hoge, 47 Wash. 663, 92 P. 433, 14 L.R.A.(N.S.) 216, 125 Am. St. Rep. 915; Ritter v. Hicks, 102 W. Va. 541, 135 S. E. 601, 50 A.L.R. 1505; Steffen v. McNaughton, 142 Wis. 49, 124 N. W. 1016, 26 L.R.A.(N.S.) 382, 19 Ann. Cas. 1227.

Battistoni v. Thomas [1932] (Can.) S. C. R. 144, [1932] 1 D. L. R. 577, 80 A.L.R. 722; Halparin v. Bulling, 50 Can. S. C. 471, 20 D. L. R. 598, Ann. Cas. 1915D, 474.

Annotation: 22 A.L.R. 1397, s. 45 A.L.R. 477, 68 A.L.R. 1051, and 80 A.L.R. 725.

[14] Fisher v. Fletcher, 191 Ind. 529, 133 N. E. 834, 22 A.L.R. 1392; Fletcher v. Meredith, 148 Md. 580, 129 A. 795, 45 A.L.R. 474; Reilly v. Connable, 214 N. Y. 586, 108 N. E. 853, L.R.A.1916A, 954, Ann. Cas. 1916A, 656.

Annotation: 22 A.L.R. 1400, s. 45 A.L.R. 480, 68 A.L.R. 1053, and 80 A.L.R. 727.

The owner of an automobile, who permitted his chauffeur, as a part of his wages, to use the car for his own purposes while he was off duty, is not liable for an injury resulting from its negligent operation while it was being so used; even though the owner knew that the chauffeur was in the habit of becoming intoxicated and had been guilty of negligently operating the car while in that condition, he was not liable for an injury resulting from the negligent operation of the car by the chauffeur for his own purposes when he was intoxicated. Fisher v. Fletcher, 191 Ind. 529, 133 N. E. 834, 22 A.L.R. 1392.

By the weight of authority, an automobile is not such a dangerous instrumentality that an owner who permits his servant to use it on the servant's personal business is liable for an accident caused by the servant's negligence. Symington v. Sipes, 121 Md. 313, 88 A. 134, 47 L.R.A.(N.S.) 662; Slater v. Advance Thresher Co. 97 Minn. 305, 107 N. W. 133, 5 L.R.A.(N.S.) 598. Annotation: 16 A.L.R. 273, 274; Ann. Cas. 1916A, 659.

[15] Fisher v. Fletcher, 191 Ind. 529, 133 N. E. 834, 22 A.L.R. 1392.

A fortiori, the owner of a car cannot be held liable for injuries inflicted by it while it was being used by the wife of the employee. Annotation: 22 A.L.R. 1437, s. 45 A.L.R. 498, and 68 A.L.R. 1061.

[16] See supra, § 355.

[17] Annotation: 22 A.L.R. 1402, s. 45 A.L.R. 481.

§ 376. **—Departure or Deviation from Direct Line of Duties.**—While, as stated in the preceding section, the owner of an automobile is not liable for injuries or damages caused by the negligent operation of his automobile while it is being used by an employee for his own business or pleasure,[3] the servant must have abandoned and turned aside completely from the master's business, to engage in some purpose wholly his own, before the master ceases to be liable for his act; it is not every deviation from the direct line of his duties on the part of an employee that constitutes a turning aside from, and an abandonment of, his master's business. A slight deviation by the servant in charge of a motor vehicle, for his own purposes, when he is on business for his master, does not affect the liability of the master for an injury resulting from the negligent operation of the automobile by the servant.[4] This rule that a slight deviation will not take the servant out of the master's business so as to relieve the latter from liability for injuries and damage caused during such deviation has been applied in a great variety of situations.[5] The fact that the employer may, to serve some purpose of his own, deviate a few blocks out of his way [6] or choose a different way back, even though it is not the most direct route, does not, as a matter of law, constitute an abandonment of the master's work.[7] But if the driver, without authority, makes a marked deviation or goes a considerable distance off from his customary route on an excursion of his own, for no purpose of his employer, the master may be absolved from liability for his negligence while on such excursion.[8] In other words, while a mere disregard of instructions or deviation from the line of his duty by a servant does not relieve his master of responsibility, if the servant, for purposes of his own, departs so far from the line of his duty that for the time being his acts constitute an abandonment of his service, the master is not liable.[9]

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[18] See infra, §§ 397 et seq.

[19] Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629, 16 A.L.R. 255.

Where, with the acquiescence of his employer, an employee uses the employer's automobile for his own purposes, and while doing so injures one in the street, the jury should be permitted to determine, under appropriate instructions, whether the employer is liable. Anderson v. Southern Cotton Oil Co. 73 Fla. 432, 74 So. 975, L.R.A. 1917E, 715.

[20] See supra, § 373.

[1] Gardner v. Farnum, 230 Mass. 193, 119 N. E. 666, L.R.A.1918E, 997 (chauffeur, in his master's absence, driving car to a near-by town to obtain liquor for himself); Reilly v. Connable, 214 N. Y. 586, 108 N. E. 853, L.R.A.1916A, 954, Ann. Cas. 1916A, 656 (chauffeur using car, with the master's acquiescence, to do marketing for himself).

Annotation: 22 A.L.R. 1423, s. 45 A.L.R. 493, 68 A.L.R. 1058, and 80 A.L.R. 732.

The master is not liable if the servant has abandoned his obligations, and is doing something not in compliance with the express or implied authority given, and is not acting in pursuance of the general purpose of his occupation, or in connection with the doing of the master's work. Fleischner v. Durgin, 207 Mass. 435, 93 N. E. 801, 33 L.R.A.(N.S.) 79, 20 Ann. Cas. 1291.

[2] Annotation: 22 A.L.R. 1402, s. 45 A.L.R. 481, and 68 A.L.R. 1054.

In Ackerson v. Erwin M. Jennings Co. 107 Conn. 393, 140 A. 760, 56 A.L.R. 1127, it appeared that the plaintiff's intestate was killed on the return trip from a dinner given by the defendant's branch manager to his employees. At the time of the accident the car was being driven by a fellow employee at the direction and with the consent of the branch manager. It was held that if the jury concluded that the expedition was a personal entertainment by the branch manager of the employees of the company as his guests, in return for a present which had been made to him, and that such references as were made to the conduct of the business of the company were merely incidental and such as would naturally be discussed in a meeting of its employees, the occasion would not have been within the apparent scope of the branch manager's authority as representing the defendant, and the defendant would not be liable.

A company was held not liable for an injury inflicted by an automobile owned by it, while such automobile was being used by the company's manager, who had taken it at the close of business hours for the purpose of taking himself and his children home, and for a drive, since he was not engaged in the company's business. Annotation: 22 A.L.R. 1402.

[3] See supra, § 375.

[4] Healey v. Corkrill, 133 Ark. 327, 202 S. W. 229, L.R.A.1918D, 115; Guthrie v. Holmes, 272 Mo. 215, 198 S. W. 854, Ann. Cas. 1918D, 1123.

Annotation: 22 A.L.R. 1404, s. 45 A.L.R. 482, 68 A.L.R. 1055, and 80 A.L.R. 727.

§ 377. —Commencement and Termination of Departure or Deviation; Resumption of Employer's Responsibility.—Little difficulty has been experienced in determining when the departure from the employer's business commences. The moment the employee starts on the trip designed to promote his own pleasure or benefit, or turns aside in an opposite direction and on an errand of his own, he is deemed to have left his employment, thereby relieving his employer from responsibility for negligence.[10] However, the question as to when the employee who has departed from the employer's service temporarily, for a purpose of his own, is deemed to have returned to the employer's service so as to restore the latter's liability presents considerable difficulty in varying

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Under this rule the employer has been held responsible for wrongs done to third persons by his driver during incidental departures from the scope of the authority conferred by the employment, and upon comparatively insignificant deviations from direct routes of travel, but within the general penumbra of the duty for which he is engaged. Fleischner v. Durgin, 207 Mass. 435, 93 N. E. 801, 33 L.R.A.(N.S.) 79, 20 Ann. Cas. 1291.

Thus, the fact that the driver deviated slightly from the direct route on account of heavy traffic on that route, or because the engine was not working well, will not relieve the employer from an injury resulting from the negligent operation of the machine. Annotation: 22 A.L.R. 1405; Ann. Cas. 1917D, 1008.

[5] Annotation: 45 A.L.R. 484, s. 68 A.L.R. 1055, and 80 A.L.R. 727.

[6] Annotation: 45 A.L.R. 484, s. 68 A.L.R. 1055, and 80 A.L.R. 727.

The court, in Healey v. Corkrill, 133 Ark. 327, 202 S. W. 229, L.R.A.1918D, 115, said: "Much is said in the adjudged cases about the doctrine of slight deviations or 'detours' made by the servant in performing his master's business, and the rule seems to be settled by the weight of authority that, where the servant is pursuing the general course necessary to accomplish the purposes involved in his master's business, the responsibility of the master is not lessened by the fact that the servant, for purposes of his own, deviates from the route to be pursued or the particular method to be observed in performing the service. The fact that the servant acts also for himself while performing service for his employer, and in doing so diverts from the usual route or method of performing the service, will not exonerate the employer from responsibility for misconduct of the servant."

[7] Annotation: 22 A.L.R. 1405, s. 45 A.L.R. 483, 68 A.L.R. 1055, and 80 A.L.R. 727.

Where the driver of a delivery truck offered to give a woman who was waiting for a street car a lift to her home, in which direction he was proceeding, and ran down a pedestrian while taking the woman to her home, it was held that the deviation was not so great as to compel the determination that the servant was not on the master's business. Annotation: 45 A.L.R. 483.

[8] Healey v. Corkrill, 133 Ark. 327, 202 S. W. 229, L.R.A.1918D, 115; Fleischner v. Durgin, 207 Mass. 435, 93 N. E. 801, 33 L.R.A.(N.S.) 79, 20 Ann. Cas. 1291.

Annotation: 45 A.L.R. 485, s. 68 A.L.R. 1055, and 80 A.L.R. 727.

The owner of an automobile, who has directed the chauffeur to bring his car from the garage in the rear of his lot to the front of his residence for his use, is not liable, where the chauffeur, in order to purchase cigarettes for himself, drives the car six and one-half blocks off the route which he should take to obey the orders, for injuries inflicted by him in the operation of the car between the place of purchase and the owner's residence. Healey v. Corkrill, 133 Ark. 327, 202 S. W. 229, L.R.A. 1918D, 115.

[9] Eakin v. Anderson, 169 Ky. 1, 183 S. W. 217, Ann. Cas. 1917D, 1003.

[10] Annotation: 22 A.L.R. 1409, s. 45 A.L.R. 486, and 68 A.L.R. 1056.

situations,[11] although it may be stated generally that whether or not a driver of a motor vehicle who had departed from his master's business had returned and resumed his master's business at the time of the accident is primarily dependent upon whether the dominant purpose of the driver is to perform the master's business.[12] There is a difference of opinion on the question as to whether an employee who has turned aside from his master's business to accomplish some purpose of his own, and who, after accomplishing his purpose, is returning to resume his duties, is, while so returning, engaged in the business of his master and within the scope of his employment so as to render the master liable for an accident happening while he is so returning.[13] Some cases hold that when the employee in charge of his employer's car has completed the purpose for which he turned aside and is returning to resume his duties, he is, while so returning, engaged in the business of his master, and the master is liable for any injury caused by the servant's negligence while the latter is so returning.[14] Other cases hold that the mere fact that an employee using the car for his own business or pleasure is returning to the master's garage, or to his employment, when the injury occurs, does not alone constitute such a resumption of his master's business as will render the master liable for the injury.[15]

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[11] Annotation: 22 A.L.R. 1408, s. 45 A.L.R. 486, 68 A.L.R. 1056.

[12] Annotation: 45 A.L.R. 486.

[13] Annotation: 45 A.L.R. 487, s. 68 A.L.R. 1056, and 80 A.L.R. 728.

[14] Fisher v. Fletcher, 191 Ind. 529, 133 N. E. 834, 22 A.L.R. 1392; Riley v. Standard Oil Co. 231 N. Y. 301, 132 N. E. 97, 22 A.L.R. 1382.

Annotation: 22 A.L.R. 1409, s. 45 A.L.R. 487, 68 A.L.R. 1056, and 80 A.L.R. 728.

This rule has been held to be applicable only to cases where the original taking by the chauffeur is rightful and there is a deviation from the line of duty; where the original taking of the automobile by the servant is wrongful and without knowledge or consent of the owner, on a wholly unlawful excursion, no part of which in any way can be said to be in the business of the owner, no question arises as to whether the servant has resumed the business of his master and is acting within the scope of his employment, but the servant is without the scope of his employment, and the master is not liable for his negligence. Annotation: 45 A.L.R. 487.

In Riley v. Standard Oil Co. 231 N. Y. 301, 132 N. E. 97, 22 A.L.R. 1382, a chauffeur in charge of a truck sent to a freight yard for goods, who, after obtaining them, went four blocks in the opposite direction on an errand of his own, was held to have returned to the master's service so as to render him liable for an injury inflicted on a child by the negligent operation of the truck, when, having accomplished his errand, he drove towards his employer's plant, although he had not yet reached the point at the entrance of the freight yard at which he departed from such service.

[15] Fletcher v. Meredith, 148 Md. 580, 129 A. 795, 45 A.L.R. 474; Fleischner v. Durgin, 207 Mass. 435, 93 N. E. 801, 33 L.R.A.(N.S.) 79, 20 Ann. Cas. 1291; Danforth v. Fisher, 75 N. H. 111, 71 A. 535, 21 L.R.A.(N.S.) 93, 139 Am. St. Rep. 670.

Annotation: 22 A.L.R. 1414, s. 45 A.L.R. 486, 68 A.L.R. 1056, and 80 A.L.R. 728.

Where the employee, after going on an errand of his own requiring a journey six or seven times as long as was required by his employment, into a crowded part of the city, inflicts an injury while returning toward his original destination, a repair shop to which he had been directed to take the car, the owner is not liable. Fleischner v. Durgin, 207 Mass. 435, 93 N. E. 801, 33 L.R.A.(N.S.) 79, 20 Ann. Cas. 1291.

This view has been applied with the result of relieving the master from liability where the injury happened while the servant was on the way back from a funeral, to attend which the master had permitted him to use the truck on the condition that on his way out he would make a delivery of goods for the master, which the servant had done. Fletcher v. Meredith, 148 Md. 580, 129 A. 795, 45 A.L.R. 474.

Where a chauffeur was permitted to drive the car to another town to get something for his brother, the owner was held liable for an accident occurring on the return trip, on the theory that at the time, the chauffeur was carrying out the owner's implied instructions to return the car to the garage when he had completed that particular errand. Annotation: 45 A.L.R. 487.

An owner of an automobile, who employs a chauffeur to take the car from the garage to a repair shop, is not liable for an injury inflicted upon a stranger by the negligent operation of the car while the chauffeur was on an errand of his own, requiring a journey six or seven times as long as was required by his employment, into a crowded part of the city, although at the time of the injury he was returning toward his original destination. Fleischner v. Durgin, 207 Mass. 435, 93 N. E. 801, 33 L.R.A.(N.S.) 79, 20 Ann. Cas. 1291.

In Battistoni v. Thomas [1932] (Can.) S. C. R. 144, [1932] 1 D. L. R. 577, 80 A.L.R. 722, the defendant's son, who was employed by his father as a truck driver, was held

Some courts have drawn a distinction between cases in which a servant, while on a trip for the master, deviates from the prescribed route for a purpose of his own, and the cases in which the servant, without the knowledge or consent of the master, takes the latter's car for his own personal use; in the former case the servant may be deemed to have returned to the master's service as soon as he completed his private business and started back, but this does not apply where the trip undertaken was not in any sense in the master's business.[16]

Whether a servant who has departed from the line of his duty to perform an errand of his own, or for his own pleasure, has resumed his master's business presents, at any rate, a question for the jury.[17]

§ 378. —**Car Furnished Employee for Business Uses.**—An employer who furnishes an employee with an automobile for his use in expediting the employer's business is not liable for injuries resulting from the employee's negligence in the use of the machine for his own purposes, not connected with the master's business, as such use of the automobile is not within the scope of the agent's employment.[18] The mere fact that the employee fails to return by the shortest route is of no great importance; in the absence of specific directions from the employer, the choice of routes is open to the employee, and if he pursues an ordinary, customary, and usual route, that does not amount to a departure from his employment, even though it is not the shortest possible route.[19] The same general principles apply where one employs a driver and furnishes him with an automobile to carry passengers for hire; the owner may be held responsible for the negligence of the employee where he deviates slightly from the proper route or makes a short detour from the employer's business,

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not to have been acting in the course of his employment at the time of the accident, but to have been "on a frolic of his own," where his father had instructed him on Christmas Day to drive the truck to a certain place beyond the down-town section of the city, and to return home in time for dinner with the family, but, instead of returning home after making the delivery, the employee changed his clothes, drove the truck downtown, and, after eating dinner, picked up a friend at a hotel and drove to the home of another friend, and an accident occurred while he was driving back to the hotel with the intention of taking the friend home and then returning to his father's home.

[16] Eakin v. Anderson, 169 Ky. 1, 183 S. W. 217, Ann. Cas. 1917D, 1003.

[17] Annotation: 45 A.L.R. 489, s. 68 A.L.R. 1056, and 80 A.L.R. 728.

In Edwards v. Earnest, 206 Ala. 1, 89 So. 729, 22 A.L.R. 1387, it is held that the jury must determine whether or not one in charge of an automobile, who, after performing an errand upon which he was sent by his master, continued away from the latter's place of business on an errand of his own, and, after turning back, negligently injured a pedestrian before reaching the master's place of business, was within the scope of his employment so as to render the master liable for the injury.

[18] Slater v. Advance Thresher Co. 97 Minn. 305, 107 N. W. 133, 5 L.R.A.(N.S.) 598.

Annotation: 22 A.L.R. 1419, s. 45 A.L.R. 490, 68 A.L.R. 1056, and 80 A.L.R. 729, 730.

The test of the owner's liability for the negligence of his employee in driving an automobile furnished to the employee for business uses is the nature of its use at the time of the accident, that is, whether or not it is being used in the transaction of the business of the owner of the automobile; the driver of the car must be acting for the owner, and not for himself personally, at the time of the accident. Annotation: 80 A.L.R. 730, 731.

A construction company which furnished its superintendent with an automobile for use in the business, and instructed him to keep it in a garage at his residence when not so used, is not liable for damage caused by its negligent operation by the superintendent, where he took the car in the evening to go to the theater, and later drove to a country club, and, while returning home therefrom, ran into another car. Annotation: 22 A.L.R. 1419.

An employer who permits one employed to make deliveries on a motorcycle and allows him to keep the motorcycle at his home and ride it to and from work is not liable where the employee, after he had finished his work for the day, drove home, and, after dinner, started to drive to a service station to have the tires changed, and on the way to such station, had an accident, where it appears without contradiction that he had been ordered by his employer to have repairs made at a place other than that for which he had started. Annotation: 80 A.L.R. 731.

[19] Annotation: 68 A.L.R. 1057.

but if he takes the car entirely for purposes of his own, removing the sign indicating that the car is for rent, the owner cannot be held liable.[20]

§ 379. —Use of Car to Go to Meals or to and from Home.—Whether the owner of a car is liable for injury or damage inflicted by reason of the negligence of a servant or employee in the operation thereof while using the same in going to and from his meals, is a question which does not permit of categorical answer; the answer is largely dependent on whether the servant or employee is, at the time of the injury, acting within the scope of his employment, and consequently, on the facts and circumstances of each particular case.[1] There are cases which hold that if an employee, even a chauffeur employed to care for an automobile and operate it at the request of his employer, without the knowledge or consent of his employer, uses the automobile to go to and from meals or to and from home, the employer is not liable for injuries caused by the negligent operation of the automobile by the chauffeur in making such unauthorized trips.[2] If, however, the servant, in order the better to execute and prosecute the master's business, uses the master's car to go to his meals, in order to shorten the time that it would otherwise take and correspondingly lengthen the time of service for the master, he may be deemed to be acting in furtherance of his master's business and within the scope of his employment, and the master may be held liable for injury or damage inflicted while the servant is so using the car.[3] Obviously, if an employer furnishes an employee with an automobile in which to go to and from his meals in order that he may go and come more quickly, the employer is liable for injuries resulting to third persons, caused by a collision while the employee is returning to his business.[4]

§ 380. —Effect of Fact that Employer Derives Incidental Benefit.—Incidental benefit which the employer may derive from the use of his car by an employee for purposes of his own by reason of the fact that the car bore the employer's name and would, in a measure, advertise his business;[5] the fact that the chauffeur may have incidentally been testing the car;[6] or the fact that the employee intended, during the excursion for himself, to procure accessories for use in the machine,[7] does not render the employer liable for the employee's negligence while so serving his own purposes, though where an employee using his employer's truck partly for his own pleasure and partly for his employer's benefit by soliciting business, he may be held to have been acting within the scope of his employment.[8]

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[20] Annotation: 22 A.L.R. 1436, 45 A.L.R. 497, 68 A.L.R. 1060, and 80 A.L.R. 734.

[1] Annotation: 45 A.L.R. 490, s. 68 A.L.R. 1058, and 80 A.L.R. 732.

[2] Steffen v. McNaughton, 142 Wis. 49, 124 N. W. 1016, 26 L.R.A.(N.S.) 382, 19 Ann. Cas. 1227.

Annotation: 22 A.L.R. 1420, s. 45 A.L.R. 490, 68 A.L.R. 1058, 80 A.L.R. 732.

A chauffeur employed to care for the employer's automobile and operate it at the request and direction of the owner, and who is to go to his home for his midday meal, is not, when using the automobile to go to such meal without the permission or knowledge of the owner, acting within the scope of his employment so as to render the owner liable for an injury to a pedestrian by the negligent operation of the car. Steffen v. McNaughton, 142 Wis. 49, 124 N. W. 1016, 26 L.R.A.(N.S.) 382, 19 Ann. Cas. 1227.

Where the driver of the automobile, after returning it to the master's garage after his day's delivery, took it and drove it to his home, where he had his dinner, and stayed there for about an hour, and then proceeded to return to the master's garage, on which return trip the accident occurred, the employer is not liable. Annotation: 45 A.L.R. 492.

[3] Annotation: 45 A.L.R. 490, 491, s. 68 A.L.R. 1058, and 80 A.L.R. 732.

[4] Annotation: 45 A.L.R. 491.

[5] Annotation: 22 A.L.R. 1437, 1438.

[6] Annotation: 22 A.L.R. 1428, s. 45 A.L.R. 496, 68 A.L.R. 1059.

[7] Lotz v. Hanlon, 217 Pa. 339, 66 A. 525, 10 L.R.A.(N.S.) 202, 118 Am. St. Rep. 922, 10 Ann. Cas. 751.

[8] Annotation: 68 A.L.R. 1061.

§ 381. —Particular Applications.—In the application of the general rule that an employer is not liable for injuries resulting from the negligent operation of an automobile by his employee when the latter is using the car for his own pleasure or business, when an employee, directed to take the employer's car to a particular garage where the car is kept,[9] directed to take the car to a garage for repairs,[10] directed to repair a disabled car or have it repaired and then proceed on the owner's business,[11] directed to deliver a car for shipment,[12] etc., deviates from the line of his employment and engages in an occupation on his own behalf or goes on an errand of his own, entirely disconnected from that of his employer, the employer is not liable for injuries caused by the employee's negligence.[13] A like rule applies where a chauffeur uses his employer's car for his own purposes during the time he has been directed to wait for his employer, or in the interim before he is to return for his employer.[14] Clearly, if an employee, without the consent or knowledge of his employer, takes the employer's car to earn money for himself, the employer cannot be held liable for the employee's negligence,[15] even though he had occasionally sent the employee out to drive cars for the transportation of passengers.[16] This applies to a taxi driver who, without authority, and after the time within which he was to do driving for his employer, takes his employer's taxicab to earn money for himself.[17] It has been held that an owner is not responsible for the negligence of an employee aiding other motorists on the road.[18] Nor is the owner of a car, generally speaking, liable for the negligent operation by one employee while using the car for the personal pleasure, convenience, or business of other employees.[19] This may be true though the employer's superintendent knew

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[9] Symington v. Sipes, 121 Md. 313, 88 A. 134, 47 L.R.A.(N.S.) 662.

Annotation: 22 A.L.R. 1424, 1425, s. 45 A.L.R. 493, 494, 68 A.L.R. 1059, and 80 A.L.R. 733.

A chauffeur instructed to return his employer's car to the garage is not acting within the scope of his employment when he proceeds to use the car for his own pleasure and that of his friends. Symington v. Sipes, 121 Md. 313, 88 A. 134, 47 L.R.A. (N.S.) 662.

[10] Annotation: 45 A.L.R. 495.

[11] Annotation: 22 A.L.R. 1435.

[12] Annotation: 22 A.L.R. 1437.

[13] **It is, however, a question of fact for the jury** whether an employee, who was instructed to leave the car at either of two garages for repairs, and upon finding one garage closed, decided to take the machine home with him instead of going to the other garage; and, in returning to business the following morning, collided with another car, causing injury, was engaged in his employer's business and was within the scope of his employment. Annotation: 45 A.L.R. 495, 496.

[14] Danforth v. Fisher, 75 N. H. 111, 71 A. 535, 21 L.R.A.(N.S.) 93, 139 Am. St. Rep. 670.

Annotation: 22 A.L.R. 1430, 1431, s. 45 A.L.R. 497, 68 A.L.R. 1060.

In Eakin v. Anderson, 169 Ky. 1, 183 S. W. 217, Ann. Cas. 1917D, 1003, where a chauffeur who had been given instructions to have his employer's car at a certain place about 9 o'clock in the evening took the car from the garage at 8 o'clock to go on an errand of his own, and while he was returning over a different route, and on his way to the place at which he had been instructed to report, an accident occurred at a point which was as far beyond the place where he was expected to report as it was from the garage where the car was kept, it was held that he was not acting within his master's service, and that the latter was not liable.

A verdict may be directed for the owner of the automobile which injured the plaintiff, where there is positive, unequivocal, and unimpeached testimony that the chauffeur was instructed to drive the defendant's wife and children to a certain place, and not to leave that place until they were ready to return home, that the chauffeur could not use the automobile for his own pleasure or purposes in any way or manner whatsoever, and that at the time of the accident, the chauffeur was using the car during the interval for a purpose of his own. Annotation: 22 A.L.R. 1431.

The driver of a truck, who drove around at random while waiting for articles which he was sent to get and which were not ready, with no particular purpose except to use his time until such articles were ready for delivery, may be found to be within the line of his employment, and the owner of the truck may be held liable for an injury caused while the driver was thus driving at random. Annotation: 45 A.L.R. 496.

[15] Annotation: 22 A.L.R. 1437.

[16] Annotation: 22 A.L.R. 1437.

[17] Annotation: 45 A.L.R. 498.

[18] Annotation: 45 A.L.R. 498.

[19] Annotation: 22 A.L.R. 1433, s. 45 A.L.R. 497, 68 A.L.R. 1060, and 80 A.L.R. 733.

A truck driver who, during his lunch

that liberties of this kind were taken by the driver for the employees, and did not object thereto.[20] It is obviously the rule where the driver, together with other employees, uses the employer's automobile for their pleasure, without the consent of the employer.[1] However, a mere slight deviation for the benefit of a fellow employee is not sufficient to excuse the employer from liability.[2] In all such cases, however, the employer may be held liable on the theory that at the time of the injury the employee had resumed or returned to his employment.[3] There would seem to be no question but that the owner can be held liable for his employee's negligence after the latter has returned the car.[4] According to the view of some courts, the employee, having departed from his employment, is deemed to have re-entered his employer's service when he starts upon the return trip.

§ 382. Person Whom Employee Permits to Drive.—There is some conflict of authority as to the liability of the owner of an automobile for damages for injuries resulting from the negligent operation of his automobile by one who was permitted by the owner's servant to drive it.[5] The mere fact that an employee permits another to operate the employer's car temporarily does not necessarily absolve the owner from liability for injuries due to the negligence of the temporary driver.[6] In many cases, however, the general principle of the law of agency[7] and of master and servant,[8] that an employer is not liable for the acts of one employed by his employee, without authority, express or implied, to discharge a duty intrusted to the employee, has been applied to hold the owner of an automobile not liable for injury or damage resulting from the negligent operation of the automobile by one who was permitted to operate the same by the one to whom it was intrusted by the owner, but who had no authority, express or implied, to permit another to drive, or to hire assistants,[9] at least if there is no emergency which requires that someone other than the driver operate the car.[10] If, on the other hand, one employed to drive an automobile has express or implied authority to employ or permit another to

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hour, without authority, turned off his route with the intention of carrying a fellow employee on personal business to a place 1½ miles farther away, may be found to have abandoned his employment temporarily and to have engaged in serving his own purposes, so as to excuse his employer from responsibility for injuries caused during the period of his temporary abandonment. Hickson v. W. W. Walker Co. 110 Conn. 604, 149 A. 400, 68 A.L.R. 1044.

[20] Annotation: 22 A.L.R. 1433.

[1] Annotation: 45 A.L.R. 497, s. 68 A.L.R. 1060.

[2] Annotation: 45 A.L.R. 497, s. 68 A.L.R. 1060, and 80 A.L.R. 734.

[3] See supra, § 377.

[4] Annotation: 22 A.L.R. 1436, s. 68 A.L.R. 1060, and 80 A.L.R. 734.

[5] Annotation: 44 A.L.R. 1383, s. 54 A.L.R. 852, 98 A.L.R. 1043.

The discussions of the question by the highest courts of New York and Massachusetts seem to reflect different views, although the decisions are perhaps not irreconcilable upon the actual facts. Grant v. Knepfer, 245 N. Y. 158, 156 N. E. 650, 54 A.L.R. 845; Butler v. Mechanics' Iron Foundry Co. 259 Mass. 560, 156 N. E. 720, 54 A.L.R. 849.

[6] Kayser v. Van Nest, 125 Minn. 277, 146 N. W. 1091, 51 L.R.A.(N.S.) 970.

Where the servant permits an incompetent person to drive, the employer may be held liable. Annotation: 98 A.L.R. 1051. See also American Law Institute, Restatement, Agency, Vol. 1, § 241.

[7] See Agency, Vol. 2, p. 154, §§ 196 et seq.

[8] See Master and Servant [Also 18 R. C. L. p. 785].

[9] Annotation: 44 A.L.R. 1383, s. 54 A.L.R. 852, and 98 A.L.R. 1044.

Where an employee is sent to bring an automobile to the employer's garage for repairs, the employer is not liable for the negligence of a boy to whom the employee, without authority, intrusted the operation of the machine for the purpose of taking it to the master's place of business. Annotation: 44 A.L.R. 1383, 1384.

[10] **The owner of an omnibus is not responsible** for the negligence of one to whom the duty of driving the omnibus home was delegated by the conductor after the regular driver was ordered by a policeman, about a quarter of a mile from the employer's yard, to discontinue driving, since, as the employer might have been communicated with, there was no necessity for employing another person to drive the omnibus home. Annotation: 44 A.L.R. 1384.

assist him, the employer is liable for the negligence of the assistant.[11] Some courts have held an employer liable for the negligence of one whom his employee permits to drive, on the theory of a constructive identity.[12] One court has expressed the view that there are recognized to be three grounds upon which the owner may be held liable for the negligent operation of the car, viz.: (1) Where the employee, employed for the purpose of driving the employer's automobile, negligently chooses a stranger to operate the car in his place; (2) where the employee directs or permits a stranger to operate the car in the employer's business, and in the presence of the employee; (3) where the employee selects a stranger to drive the car in his place, upon the express or implied permission or direction of the owner thereof.[13] There is, however, some question as to whether other authorities support the first proposition.[14] It has been held also that where the driver permits his helper or assistant to operate the employer's truck contrary to the instructions of the owner, while there can be no recovery against the owner under the doctrine of respondeat superior, he is liable on the theory that the damage complained of was caused by an instrumentality used by the servant in the prosecution of the master's business, and this notwithstanding the driver was not with assistant or helper when the latter was operating the truck at the time of the accident.[15]

§ 383. —Theory of Constructive Service where Employee Is Present at Time of Accident.—The general rule that the employer is not liable for the act of one whom his employee, without authority, permits to drive is subject, according to some cases at least, to the qualification that when such acts are done in the presence of the employee, the actor is considered as the alter ego of the employee, and his acts are the acts of the employee, for which the employer is liable. In other words, where the employee, to whom is intrusted the operation of an automobile, permits, in his presence, another to operate the same, the employer is liable in case of accident while the automobile is being operated by the stranger, on the theory that a person who is permitted by the employee to operate the automobile is an instrument in the hands of the employee.[16] Thus, the owner of a truck may be held liable for a collision occurring while the truck was being driven by one who was permitted by the employee in charge of the truck to operate it, if the collision was attributable to the negligent failure of the employee, who sat on the seat with the driver, to keep a proper lookout and to see that the driver kept the truck on the proper side of the road, considering the rights of other vehicles.[17] It seems that the employer is not relieved from

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[11] Annotation: 44 A.L.R. 1384, s. 54 A.L.R. 842, and 98 A.L.R. 1044.

[12] See infra, § 383.

[13] Ulman v. Lindeman, 44 N. D. 36, 176 N. W. 25, 10 A.L.R. 1440.

[14] Annotation: 44 A.L.R. 1383.

[15] Annotation: 54 A.L.R. 854.

[16] Geiss v. Twin City Taxicab Co. 120 Minn. 368, 139 N. W. 611, 45 L.R.A.(N.S.) 382; Ulman v. Lindeman, 44 N. D. 36, 176 N. W. 25, 10 A.L.R. 1440.

Gillespie Grain Co. v. Kuproski [1935] (Can.) S. C. R. 13, [1935] 4 D. L. R. 18, 98 A.L.R. 1035.

Annotation: 44 A.L.R. 1385, s. 54 A.L.R. 852, and 98 A.L.R. 1046.

In Geiss v. Twin City Taxicab Co. 120 Minn. 368, 139 N. W. 611, 45 L.R.A.(N.S.) 382, the court, in approving the rule set out in the text, said: "We have no disposition to question the soundness of the rule that under the doctrine of respondeat superior a master is not, generally speaking, responsible for the negligence of another, not his servant, or the application of this doctrine to a case where the negligent act is done by one without authority, employed by the servant to assist him, and not done in the presence of the servant and with his consent. But where the servant is present, and consents to the performance of the act by the assistant in a negligent manner, we think the negligence is that of the servant, and that the master is responsible."

[17] Gillespie Grain Co. v. Kuproski [1935] (Can.) S. C. R. 13, [1935] 4 D. L. R. 18, 98 A.L.R. 1035.

In Grant v. Knepfer, 245 N. Y. 158, 156 N. E. 650, 54 A.L.R. 845, where defendant sent out a motor truck with a driver and a salesman to deliver merchandise, and, upon the request of the salesman, the drivthe operation of this rule by reason of the fact that he had instructed the employee not to permit others to drive the car.[18] The rule has, however, been criticized,[19] and some courts have refused to follow it,[20] especially in cases where the employee has been specifically instructed not to allow others to ride on the employer's automobile or truck.[1]

§ 384. Chauffeur Furnished with Hired Car.—The fact that an employee is the general servant of one employer does not, as a matter of law, prevent him from becoming the particular servant of another, who may become liable for his acts. Indeed, as a general proposition, when one person lends his servant to another for a particular employment, the servant, for anything done in that employment, must be dealt with as the servant of the one to whom he is loaned, although he remains the general servant of the one who loaned him.[2] The determination of liability for the acts of the servant depends, however, upon the determination of who has the power to control and direct the employee at the exact time of the act in question.[3] The same principle controls in the case of the hiring of an automobile with the chauffeur of the owner, so far as the test of the liability for the negligence of the chauffeur is concerned, as controls in the case of a borrowed servant.[4] The criterion by which the courts determine whether a chauffeur in the general employment of the owner of a car is to be deemed for the time being the servant of the hirer or borrower of the car, or is to remain the servant of the owner, is whether, in the particular service which he is engaged to perform, the servant continues liable to the direction and control of his general employer, or becomes subject to that of the party to whom he is let—whether the latter is in control as proprietor, so that he can at any time stop or continue the work and determine the way in which it is to be done, with reference not only to the result to be reached, but to the method of reaching it.[5] This ordinarily raises a question of fact for

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er permitted him to operate the truck, and as a result of negligent operation, damage was done to the automobile of another, the defendant was held liable on the theory that the negligence of the driver in permitting a substitute to take the wheel, and in failing to supervise or control the conduct of the substitute, who drove the car in an improper and negligent manner, all of which was done while the driver was still in charge of the truck and on his master's business, may properly have been found by the triers of the facts to have been the cause of the collision, even though the negligence of the driver combined with that of the substitute.

[18] Annotation: 44 A.L.R. 1389, s. 54 A.L.R. 855, and 98 A.L.R. 1047.

Where the driver of a motorbus who had given the conductor permission to turn the bus around sat beside the conductor as the latter drove around for this purpose, it was held to be a question for the jury whether an injury caused by the negligent operation of the bus resulted from a breach of the driver's duty, which was either to prevent another person from driving, or, if he allowed him to drive, to see that he drove properly. Ricketts v. Tilling [1915] 1 K. B. (Eng.) 644, 6 B. R. C. 683—C. A.

As to liability of employer to one invited to ride by employee, see infra, § 394.

[19] See 7 Labatt, Commentaries on Master and Servant, 739.

[20] Annotation: 54 A.L.R. 852, s. 98 A.L.R. 1043.

[1] In Butler v. Mechanics Iron Co. 259 Mass. 560, 156 N. E. 720, 54 A.L.R. 849, while the fact that the driver had been expressly instructed to allow no one to ride on the truck does not appear to have been a controlling factor in the decision, it is obvious that the court regarded it as important in showing that the act of the driver in allowing a substitute to operate the truck was wholly unauthorized, upon which ground it based its decision holding the owner not liable for the negligence of the substitute. It will be observed, however, that no negligence on the part of the driver was shown to have contributed to the accident, and that it was wholly the fault of the substitute and could not have been prevented by the driver.

[2] See Master and Servant [Also 18 R. C. L. p. 784, § 244].

[3] Annotation: 40 L.R.A.(N.S.) 457, s. 44 L.R.A.(N.S.) 113, and 51 L.R.A.(N.S.) 1164.

[4] Annotation: 42 A.L.R. 1420.

[5] Annotation: 42 A.L.R. 1416, 1446; 40 L.R.A.(N.S.) 457, s. 44 L.R.A.(N.S.) 113, and 51 L.R.A.(N.S.) 1164.

If the driver is placed under the control of the hirer in the performance of the work, the driver becomes pro hac vice the servant of the hirer; on the other hand, if the agreement is that the owner of the truck shall do work for a consideration, with servants the jury to determine under proper instructions, unless the evidence is clear and uncontradicted.[6] The best guide, perhaps, is an individual case containing facts most nearly analogous to the facts the reader has in mind. In many instances, the owner of an automobile or truck, leased or rented to another, together with the services of a chauffeur in his general employment to run the machine, has been held liable for the negligence of such chauffeur.[7] The facts and circumstances may, however, justify the conclusion that the chauffeur was under the control and direction of the lessee, in which event the lessee, and not the owner, is liable for the chauffeur's negligence.[8]

§ 385. **—Presumption of Owner's Control.**—The responsibility of the owner for the chauffeur's negligence has been affirmed so often, many times as a matter of law, except in cases where it was clear that the hirer exercised a large degree of control over the chauffeur, that the suggestion of a prominent text-writer,[9] that a servant sent to take charge of an instrumentality placed by the owner at the disposal of a third party is presumed to remain the servant of the owner, fairly may be said to sum up the authorities as a whole, though very few courts have expressly assented to the view that a presumption arises that the chauffeur remains the servant of the owner during his special employment. Some courts have definitely announced their assent to this proposition.[10]

§ 386. **—Particular Factors to Be Considered.**—Many factors must be considered before any conclusion can be reached; every case presents facts peculiar to itself—facts which must be, and are, weighed in solving the question, "In whose business was the chauffeur engaged?"[11] The fact that the general employer pays the chauffeur's wages during the time he is let to the hirer of the automobile will not prevent the chauffeur from becoming the servant of the hirer,[12] nor is it necessary that the hirer be given express or written authority to control the driver furnished.[13] The essential thing is his right or assumption of control as proprietor over the chauffeur.[14] Even though the parties

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of his own selection, retaining the direction and control of such servants, he will be the master and will be liable for the negligence of such servants in doing the work, though the work being done will be ultimately for the benefit of the hirer. The determining factor is the power to control and direct the servants in the performance of the work, and the test is, not who actually controlled the actual movements of the servant, but who had the right to control. Annotation: 42 A.L.R. 1420.

[6] Annotation: 42 A.L.R. 1418.

[7] Forbes v. Reinman, 112 Ark. 417, 166 S. W. 563, 51 L.R.A.(N.S.) 1164; Densby v. Bartlett, 318 Ill. 616, 149 N. E. 591, 42 A.L.R. 1406; Shepard v. Jacobs, 204 Mass. 110, 90 N. E. 392, 26 L.R.A.(N.S.) 442, 134 Am. St. Rep. 648; McNamara v. Leipzig, 227 N. Y. 291, 125 N. E. 244, 8 A.L.R. 480. Annotation: 42 A.L.R. 1418, 1419.

[8] Annotation: 42 A.L.R. 1419.

[9] 1 Labatt, Master & Servant, § 53.

[10] Annotation: 42 A.L.R. 1421, 1422.

If a master hires out the use of an instrumentality owned by him, under a rental agreement, together with the services of an employee for the operation of it, to go where, and perform such work as the hirer directs, but without relinquishing to the hirer the power to discharge such servant, the legal presumption is that although the hirer directs the servant where to go and what to do in the performance of the work, the servant nevertheless remains, in the absence of an agreement to the contrary, the servant of the general employer in so far as concerns the manner and method of operating the instrumentality, and the negligence of the servant will be that of the owner, and not of the hirer. Annotation: 42 A.L.R. 1422.

Normally the driver of a hired conveyance, when furnished and paid by the owner thereof, is the servant of the owner and not of the hirer consequently, when it appears that a corporation which is regularly engaged in letting out automobiles driven by its regularly employed drivers is sued for injuries inflicted on one invited by the hirer to ride in the automobile, as a result of the negligence of the driver, the action of the trial court in submitting to the jury whether the chauffeur was the servant of the hirer or of the owner is as favorable to the owner as it can reasonably expect. Annotation: 42 A.L.R. 1423.

[11] Annotation: 42 A.L.R. 1420.

[12] Annotation: 42 A.L.R. 1420, 1429.

[13] Annotation: 42 A.L.R. 1421.

[14] Annotation: 42 A.L.R. 1428, 1429.

One engaging trucks and drivers of a transfer company to convey its employees

contract specifically that the driver shall remain the servant of the owner and shall not become the servant of the lessee, as to third persons, the driver furnished may nevertheless become the servant of the lessee during the period of the hiring, if the hirer actually exercises control over him.[15] The mere facts that the hirer has the power of directing the chauffeur when and where to go,[16] what to bring or carry,[17] or what route to take,[18] or that he rides with the chauffeur while the work is being done,[19] do not make the chauffeur furnished with the vehicle his agent, thus relieving the owner from responsibility for the driver's negligence.[20] Nor does the fact that other employees of the hirer of automobiles and drivers to transport customers to inspect property which he has for sale, refer to the machines as "our machines," and assume the attitude of ownership before customers, estop the hirer from denying liability for injuries caused by the negligence of a chauffeur in handling a car.[1] If there is no suggestion that the one hiring the services of the car and driver in any way assumed control of the car or interfered with the driver, who was selected by the owner and paid by him, the owner alone having the right to judge as to his fitness and to dismiss him, the hirer cannot be held liable on the theory of respondeat superior.[2] The right to discharge may be a controlling factor in determining who is the master of the chauffeur; however, the mere fact that the hirer can control the selection of the chauffeur by telling the owner of the truck not to send certain ones is not equivalent to authority to discharge, and not, therefore, a fact implying the relationship of master and servant between the chauffeur and the hirer.[3]

§ 387. —Where Car Is Hired for Extended Period.—The fact that an automobile and chauffeur are hired for an extended period does not necessarily mean that the chauffeur during that period is to be considered the servant of the hirer.[4] As in other cases involving the hiring of a chauffeur with a car, liability of the hirer on the theory of respondeat superior depends upon his right of control over the chauffeur.[5] If the hirer has the exclusive control of the chauffeur during the period of the hiring, he, and not the general employer, is liable for the acts of the chauffeur during that time.[6] If, on the other hand, the owner retains control over the chauffeur hired out with the car, he must respond for the negligence of the chauffeur while using the car for the benefit of the hirer.[7]

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to and from work during a street car strike, under an arrangement by which the truck drivers reported with their trucks to the corporation, which gave them instructions as to the loading and transportation of the employees, and placed the vehicles under the charge of a foreman, who marked them with the corporation's name and gave the drivers orders what to do and where to go, was to be considered the master of the drivers during that time, and liable for their negligence. Annotation: 42 A.L.R. 1428.

[15] Annotation: 42 A.L.R. 1423, 1424.

[16] Forbes v. Reinman, 112 Ark. 417, 166 S. W. 563, 51 L.R.A.(N.S.) 1164; Shepard v. Jacobs, 204 Mass. 110, 190 N. E. 392, 26 L.R.A.(N.S.) 442, 134 Am. St. Rep. 648.

Annotation: 40 L.R.A.(N.S.) 457, s. 44 L.R.A.(N.S.) 113, and 51 L.R.A.(N.S.) 1164.

[17] Annotation: 42 A.L.R. 1421.

[18] Forbes v. Reinman, 112 Ark. 417, 166 S. W. 563, 51 L.R.A.(N.S.) 1164; Meyers v. Tri-State Auto. Co. 21 Minn. 68, 140 N. W. 184, 44 L.R.A.(N.S.) 113; Gerretson v. Rambler Garage Co. 149 Wis. 528, 136 N. W. 186, 40 L.R.A.(N.S.) 457.

[19] Annotation: 42 A.L.R. 1421, 1426.

[20] Annotation: 40 L.R.A.(N.S.) 457, s. 44 L.R.A.(N.S.) 113, and 51 L.R.A.(N.S.) 1164.

[1] Densby v. Bartlett, 318 Ill. 616, 149 N. E. 591, 42 A.L.R. 1406.

[2] Annotation: 42 A.L.R. 1427.

[3] Annotation: 42 A.L.R. 1423.

[4] Annotation: 8 A.L.R. 484, s. 42 A.L.R. 1429.

[5] See supra, §§ 384–386.

[6] Annotation: 8 A.L.R. 484, s. 42 A.L.R. 1429.

[7] McNamara v. Leipzig, 227 N. Y. 291, 125 N. E. 244, 8 A.L.R. 480.

Annotation: 8 A.L.R. 484, s. 42 A.L.R. 1432.

In McNamara v. Leipzig, 227 N. Y. 291, 125 N. E. 244, 8 A.L.R. 480, it is held that the hirer of an automobile, with the service

§ 388. **—Funeral Cars.**—If an undertaker employed to conduct a funeral and to furnish automobiles in that service hires automobiles with chauffeurs from others, and has the exclusive right to direct the mode and manner in which the chauffeurs shall perform the special service in connection with the funeral, he becomes liable for a chauffeur's act of negligence during that period.[8] Some courts have held the undertaker liable to the persons to whom he furnishes transportation for the negligence of chauffeurs furnished with cars which he hired, regardless of whether he had control over such chauffeurs.[9] Other courts apply the test of control, and hold that if the lessee exercised no control or direction over the driver of the hired car other than to direct the driver where to go and whom to take, the relationship of master and servant did not exist as between them, but that the chauffeur remained exclusively the servant of the owner.[10] If it can be shown that an undertaker employed to conduct a funeral merely acted as agent for the family of the deceased in hiring automobiles for the funeral from one who furnished the drivers, and exercised no control over the drivers other than to direct them where and when to go, he will not be liable for injury caused by the negligence of one of the drivers.[11]

§ 389. **—When Returning Car to Owner.**—In general, when a chauffeur who has been working for the hirer of a motor vehicle is returning it to the owner, he is regarded as the servant of the owner, even though that relationship may have been superseded during the period of hiring.[12]

§ 390. **Chauffeur Furnished with Borrowed Car.**—Although some courts have made statements to the contrary,[13] it would seem that the principles laid down in the cases in which trucks or automobiles are hired with chauffeurs in the general employment of the owner[14] apply where an automobile and its driver are loaned without recompense to another. Who is the master of the chauffeur depends in either case upon the determination of who has control of the chauffeur during the time he is driving the automobile for another than

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of a chauffeur, for three months, to be used at any hour of the day or night he desires, the owner to pay all expenses for gasolene, repairs, and supplies, and to procure insurance covering the hirer from liability in case of accident, is not liable for the negligence of the chauffeur in running down plaintiff's intestate while driving the defendant.

[8] Annotation: 42 A.L.R. 1436.

Where it appeared that an undertaker, not having sufficient limousines of his own available to conduct the funeral, hired from other undertakers additional limousines with chauffeurs, and the testimony showed that the hirer was present at the house and at the cemetery during the funeral and burial services, directing and supervising affairs at both places, there was held to be ample evidence to show that he had full power and authority to control the operations of the chauffeurs of the hired cars during the conduct of the funeral so as to render him liable for injuries to one of the mourners, whose hand was mashed in a door of one of the cars, into which she had been directed to enter when the door was slammed shut by the driver of another of the hired cars. Annotation: 42 A.L.R. 1435.

[9] Annotation: 44 A.L.R. 1436.

In Mahany v. Kansas City R. Co. (Mo.) 254 S. W. 16, 29 A.L.R. 817, an undertaker contracting to conduct a funeral and furnish transportation to and from the cemetery for the pallbearers and mourners is liable for the negligence of the chauffeur of an automobile used in the transportation, but owned by a third party, which the undertaker had leased, together with the services of the chauffeur who was in the employment of the owner, notwithstanding that it appears that the undertaker exercised no control over the chauffeur except directing him to what cemetery to go, upon the ground that the undertaker could not avoid its contractual obligations safely to carry the mourners to the funeral, by contracting with a third party to carry them. The case follows the analogy of the rule holding railroad companies which undertake, for hire, to transport passengers in sleeping cars owned by another corporation, which also furnishes the conductor and porter and other servants to operate the car, liable to a passenger for an injury to his person by the negligence of the employees of the sleeping car company.

[10] Annotation: 42 . .L.R. 1436, 1437.

[11] Annotation: 42 A.L.R. 1437.

[12] Annotation: 42 A.L.R. 1424.

[13] Annotation: 42 A.L.R. 1446.

[14] See supra, §§ 384–387.

the owner.[15] This is dependent largely upon the facts and circumstances of the particular case. However, in cases where the automobile is loaned, the tendency is to hold that the chauffeur becomes the servant of the borrower, thus bearing out the suggestion that decisions holding that the chauffeur remains the servant of the owner where the car is hired have no application to the case where it is loaned for a purpose not connected with the owner's business. But the mere fact that the car is loaned does not, as a matter of law, make the chauffeur furnished by the owner the servant of the borrower and relieve the owner of liability for his negligence.[16] Responsibility depends on the power of the borrower to control and direct the servant during the time he is loaned. The mere use of the word "loan" or "borrow" does not, of itself, necessarily carry the implication that the master has surrendered all control over the servant during the period for which he has been loaned; it must appear from direct testimony, or as a necessary inference from the circumstances of the transaction, that the servant was, during the period of the loan, under the control of the borrower, and not under the control of the general master, before the latter can escape liability for the servant's negligence during that period.[17] It is clear, however, that a chauffeur admittedly in the general employment of the owner of a borrowed automobile may be loaned in such a way as to become the servant of the borrower for the time being with all the legal consequences of the new relation.[18] Where the owner of an automobile has loaned it, with the services of the chauffeur, to another, and a third party is given charge by the borrower, the rule of respondeat superior does not apply as between the chauffeur and the owner.[19]

§ 391. **Salesman or Collector.**—An employer's liability for the negligent operation of an automobile by or on behalf of a salesman or collector is governed by the general rules which govern the liability of an employer for the negligence of employees in the operation of automobiles. In order to hold an employer liable for injuries inflicted by an automobile while being driven by or for a salesman or collector, the relation of master and servant must exist, and the salesman or collector must, at the time, have been acting within the scope of his employment in performing an act for the employer's benefit.[20] This depends largely upon the facts of the particular case.[1] There are numerous cases in which the facts have been held sufficient to establish, as a matter of law, or at least to justify a finding by the jury, that a salesman or collector was acting within the scope of his employment.[2] The fact that one employed to solicit business about a city was not directly authorized by his employer to use an automobile to see his prospective customers does not relieve the employer from liability for injury caused by the employee's negligent use of the car, if the employer knew of such use, and it resulted in direct benefit to him.[3] Nor does the mere fact that an injury through the negligent use of an automobile used in the work by the salesman happened after the close of business hours relieve the master from liability for the injury, if it occurred in connection with the business.[4]

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[15] Annotation: 42 A.L.R. 1446; 39 L.R.A. (N.S.) 933.

[16] Hooper v. Brawner, 148 Md. 417, 129 A. 672, 42 A.L.R. 1437.
Annotation: 42 A.L.R. 1446.

[17] Hooper v. Brawner, 148 Md. 417, 129 A. 672, 42 A.L.R. 1437.

[18] Annotation: 42 A.L.R. 1447, 1448.

If the owner instructs the chauffeur to take orders from the borrower, the owner is not liable for the negligence of the chauffeur while driving the car for the benefit of the borrower. Annotation: 42 A.L.R. 1448.

Where the owner of a car agreed with a garage man that the latter should take charge of the car, store it, wash and polish it ready for running, and furnish a chauffeur whenever the owner should want to use the car, the chauffeur's wages to be included in the amount paid the garage man under the agreement, the court in Neff v. Brandeis, 91 Neb. 11, 35 N. W. 232. 39 L.R.A.(N.S.) 936, held that the relation of master and servant, or principal and agent, did not exist between the owner and a chauffeur furnished by the garage man to run the car at a time when the car had been loaned by the owner to his brother, and the garage keeper had sent it out for the brother's use in charge of a man who drove it to the place designated by the brother, and consequently the owner will not be liable for damage caused by the negligence of the chauffeur on this trip.

[19] Annotation: 42 A.L.R. 1448.

[20] Slater v. Advance Thresher Co. 97 Minn. 305, 107 N. W. 133, 5 L.R.A.(N.S.) 598; Auer v. Sinclair Ref. Co. 103 N. J. L. 372, 137 A. 555, 54 A.L.R. 623; White Oak Coal Co. v. Rivoux, 88 Ohio St. 18, 102 N. E. 302, 46 L.R.A.(N.S.) 1091, Ann. Cas. 1914C, 1082; Dishman v. Whitney, 121 Wash. 157, 209 P. 12, 29 A.L.R. 460.
Annotation: 17 A.L.R. 621, s. 29 A.L.R. 470, and 54 A.L.R. 627.

[1] Annotation: 17 A.L.R. 621, s. 29 A.L.R. 470, and 54 A.L.R. 630.

In other cases, the salesman or collector has been held or found not to be acting within the scope of his authority.[5] The owner of an automobile is not liable for an injury caused by his automobile while being driven by a third person, with the consent and in the presence of the owner's salesman, in the absence of any authority on the part of the salesman to employ or permit a substitute to drive the car, of any custom to that effect, or of any emergency.[6]

§ 392. —When Independent Contractor.—If the relation between an employer and a salesman or collector is that of independent contractor rather than that of master and servant, the employer cannot be held accountable for the negligence of the salesman or collector while using an automobile in furtherance of sales or collections.[7] It is essential, in order to hold an employer liable for injuries inflicted by an automobile while being driven by or for a salesman or collector, that the relation of master and servant exist,[8] it being well established that an employer is not as a general rule liable for the negligence of his independent contractor or of the latter's servants.[9] One of the tests to determine whether or not the salesman or collector is an independent contractor is whether the employer retained the right, or had the right under the contract, to control the mode or manner in which the work was to be done.[10] In other words, the degree of retention by the employer or principal of the right to control the manner in which the details of the work should be done must be considered.[11] A salesman, employed on a commission basis, who owned and operated an automobile to assist him in seeking his trade, and whose movements were in no way controlled by his employer, was held, with respect to the operation of the car, an independent contractor, so that his employer was not liable for injuries caused by the salesman's negligent operation of it.[12] However, unless it appears that the salesman or collector exercised control over the details of his work to the exclusion of the employer, the latter will generally be held responsible on the theory of respondeat superior, assuming, of course, that the injury complained of was inflicted by the salesman or employee while using the automobile in the furtherance of his employment.[13]

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[2] Annotation: 17 A.L.R. 624, s. 29 A.L.R. 470, and 54 A.L.R. 630.

An automobile salesman demonstrating an automobile to a prospective buyer is acting within the scope of his employment, so as to charge his employer with liability for the death of a third person invited by the salesman to accompany them on the demonstration trip, where the death was due to the salesman's negligence. Annotation: 54 A.L.R. 632.

A finding that the person driving the defendant's automobile was acting as his servant when the plaintiff was injured by the car is warranted by testimony that the car was used for collections in the business of a company of which defendant was general manager and the driver of the car was assistant manager, and that the car was also used for the parties for their pleasure, although the defendant testified that the driver did not have any of the company's collections at the time of the accident, but that he was using the car at the time on defendant's account. Annotation: 17 A.L.R. 624.

[3] Dishman v. Whitney, 121 Wash. 157, 209 P. 12, 29 A.L.R. 460.

[4] Auer v. Sinclair Ref. Co. 103 N. J. L. 372, 137 A. 555, 54 A.L.R. 623; Dishman v. Whitney, 121 Wash. 157, 209 P. 12, 29 A.L.R. 460.

A salesman driving on a public highway within his territory, a few minutes after 6 P. M., at the end of his day's work, driving from the point of his last call to the garage at his home where he kept his car, was acting within the scope of his employment, so as to render his employer liable for the death of a pedestrian hit while crossing the highway. Auer v. Sinclair Ref. Co. 103 N. J. L. 372, 137 A. 555, 54 A.L.R. 623.

[5] Annotation: 17 A.L.R. 624, s. 29 A.L.R. 470, and 54 A.L.R. 630.

[6] Annotation: 54 A.L.R. 634.

[7] Annotation: 17 A.L.R. 621, s. 29 A.L.R. 470, and 54 A.L.R. 627.

[8] See supra, § 391.

[9] See INDEPENDENT CONTRACTORS [Also 14 R. C. L. p. 79, § 17].

[10] Dishman v. Whitney, 121 Wash. 157, 209 P. 12, 29 A.L.R. 460.

[11] James v. Tobin-Sutton Co. 182 Wis. 36, 195 N. W. 848, 29 A.L.R. 457.

§ 393. **Employee Driving Own Car.**—The mere fact that an employee uses his own automobile in the business of the employer does not make the latter liable under the doctrine of respondeat superior for injuries inflicted by such employee in the operation of the automobile.[14] If, however, the other circumstances involved in the case are consistent with, or require, the inference that the activity in which the servant was engaged at the time of the tort complained of, and in which he was using his own car or one which he had hired, was within the scope of his employment, the person injured may recover from the employer, if the servant's use of the automobile or other vehicle was authorized, either expressly or impliedly.[15] Thus, if an employee, with the

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[12] Aldrich v. Tyler Grocery Co. 206 Ala. 138, 89 So. 289, 17 A.L.R. 617.

Annotation: 17 A.L.R. 621, s. 29 A.L.R. 470, and 54 A.L.R. 627.

One employed by a retail automobile dealer, who sold automobiles on a commission basis, receiving no salary, and furnishing, maintaining, and using his own car, is held to be an independent contractor, so that his employer is not liable for an injury which resulted from the negligent operation of the salesman's automobile, although it appeared that he was required to report at his employer's place of business each morning to discuss the previous day's work and receive suggestions or criticisms and prospect cards, but, after having reported, he could go where he pleased, and sell cars anywhere within the county. James v. Tobin-Sutton Co. 182 Wis. 36, 195 N. W. 848, 29 A.L.R. 457.

[13] Auer v. Sinclair Ref. Co. 103 N. J. L. 372, 137 A. 555, 54 A.L.R. 623; Dishman v. Whitney, 121 Wash. 157, 209 P. 12, 29 A.L.R. 460.

Annotation: 17 A.L.R. 621, s. 29 A.L.R. 470, and 54 A.L.R. 627.

Where the facts presented with respect to the relation of employer and employee are as consistent with the relation of agency as with that of independent contractor, the one asserting the existence of the latter relation has the burden of proof. Dishman v. Whitney, 121 Wash. 157, 209 P. 12, 29 A.L.R. 460.

In Auer v. Sinclair Ref. Co. 103 N. J. L. 372, 137 A. 555, 54 A.L.R. 623, where the defendant employed a person on a salary to devote his whole time to the sale of the company's products in a specified territory, authorizing him to use his own automobile and paying him for its upkeep and running expenses, the employee was held to be a servant of the company and not an independent contractor, where the company controlled and directed the work from its office, so as to render the company liable for the death of a person due to the negligence of the employee.

[14] Khoury v. Edison Electric Illuminating Co. 265 Mass. 236, 164 N. E. 77, 60 A.L.R. 1159.

Annotation: 57 A.L.R. 739, s. 60 A.L.R. 1163, and 87 A.L.R. 787.

The fact that the driver of a car was an employee of the defendant and had no other employment is not decisive of the relationship of master and servant at the time of the injury, since a person may be an agent or a servant as to one part of an undertaking and an independent contractor as to other parts. Khoury v. Edison Electric Illuminating Co. 265 Mass. 236, 164 N. E. 77, 60 A.L.R. 1159.

An employer is not liable, under the doctrine of respondeat superior, for the negligent operation by the employee of the latter's own car which he was using in the course of, and prosecution of, the employer's business at the time of the accident, where the employer's sole interest was that the employee should be at places where work was to be performed, the employer leaving the means of transportation to the employee's decision and convenience, limiting its own liability for expense, if the employee used his own car, to an amount equivalent to the fares of a common carrier, and assuming no obligation to keep the car in repair, such duty resting upon the employee himself. Ibid.

[15] Auer v. Sinclair Ref. Co. 103 N. J. L. 372, 54 A.L.R. 623, 137 A. 555.

Annotation: 57 A.L.R. 739, s. 60 A.L.R. 1163, and 87 A.L.R. 787.

A salesman employed on a salary to devote his whole time to the sale of the company's products in a specified territory, who is authorized to use his automobile and is paid by the company for its upkeep and running expenses, and whose work is controlled and directed by daily communications from the company's office, is the servant of the company, and not an independent contractor, so as to render the company liable for a death due to his negligent operation of the automobile while he was driving from the point of his last call knowledge and assent of the employer, repeatedly uses an automobile, not owned by the employer, in the latter's business, the employer will be held to have impliedly authorized its use and to be liable for negligence in connection therewith, but the mere fact that an automobile was used on one occasion, unaccompanied by any evidence of other similar acts, does not justify any inference that the employee was later authorized to use the machine upon the employer's business.[16] The employer is not liable where the use of the automobile or other vehicle operated by the employee is not expressly or impliedly authorized by the employer, and he exercises no control over its operation.[17] He cannot be held liable under the doctrine of respondeat superior for personal injuries inflicted by an employee while engaged in unnecessarily driving his own automobile upon the master's business, without the latter's knowledge or express or implied authorization.[18]

§ 394. Liability to Person Whom Employee Permits or Invites to Ride.—The question of the liability of the employer to a person invited by an employee to ride in an automobile driven by the employee, for injuries due to the negligent operation of the automobile by the employee, depends primarily upon whether the employee, in extending the invitation to ride, can be said to have been acting within the scope of his authority. Many cases may be found in which an employer has been held liable for injuries to persons riding with the implied consent of the driver of an automobile or truck in the employment of the owner,[19] and in any case in which there is support for a finding that the employee, in inviting a third person to ride with him, acted, either expressly or by implication, within the line of his duty and under his employment, the master can be held liable for an injury to such invitee resulting proximately from the servant's negligence.[20] The tendency of the more recent decisions, however, is to enlarge the employer's freedom from liability for the act of his employee in inviting others to ride with him[1] by holding that an employee charged with the duty of driving the employer's automobile has no implied authority, in the absence of any necessity for securing assistance from others, to invite third persons to ride with him.[2] Sending the chauffeur of a private

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to the garage at his home where he kept his car. Auer v. Sinclair Ref. Co. 103 N. J. L. 372, 137 A. 555, 54 A.L.R. 623.

[16] Annotation: 57 A.L.R. 740, 741, s. 60 A.L.R. 1163, and 87 A.L.R. 787.

[17] Annotation: 60 A.L.R. 1163, s. 87 A.L.R. 788.

[18] Kennedy v. Union Charcoal & Chemical Co. 156 Tenn. 666, 4 S. W. (2d) 354, 57 A.L.R. 733.

[19] Annotation: 20 A.L.R. 1021, s. 40 A.L.R. 1340, 47 A.L.R. 328, 51 A.L.R. 583, 61 A.L.R. 1257, and 65 A.L.R. 955.

[20] Paiewonsky v. Joffe, 101 N. J. L. 521, 129 A. 142, 40 A.L.R. 1335.

In Crowell v. Duncan, 145 Va. 489, 134 S. E. 576, 50 A.L.R. 1425, it was held that the fact that the driver of a taxicab had a friend in the taxi with him, and they both testified that they were pursuing their own pleasure, was not conclusive, as a matter of law, of the nonliability of the owner for the negligence of the driver, where the accident occurred during regular business hours, within the territory where he ordinarily solicited trade, and while a taxi sign was prominently displayed. The court observed that a taxi driver obviously has some discretion as to the routes to be taken in serving his employer.

In Anderson v. Southern Cotton Oil Co. 73 Fla. 432, 74 So. 975, L.R.A.1917E, 715, the question of the owner's liability was held to be for the jury where its chauffeur, with the knowledge of the managing officer, had used the car to go to his dinner and also to drive a friend of the chauffeur's to and from the place where she worked, and an accident occurred while he was doing an errand for his friend.

Where the evidence permits an inference that a merchant, for business reasons, adopted the practice of having the driver of his delivery automobile take customers and their companions to the customers' homes with packages purchased, the jury may find that the driver was authorized to invite a companion of a customer to ride to the customer's house with packages purchased, and hence may find the merchant liable for an injury resulting to such invitee from want of reasonable care on the part of the driver. Paiewonsky v. Joffe, 101 N. J. L. 521, 129 A. 142, 40 A.L.R. 1335.

[1] Annotation: 62 A.L.R. 1167, s. 74 A.L.R. 163.

automobile on an errand does not give him authority to take into the car a person casually met upon the highway.[3] In the absence of authority on part of the driver to invite or permit others to ride, the only duty which the employer owes to one invited or permitted to ride is to avoid a wanton or wilful injury to him; such a person is not a licensee of the employer.[4] However, one riding in an automobile with the permission of a servant is not, according to the weight of authority, deprived of all recourse against the master for an injury sustained, though the servant, in granting the permission, is not acting within the scope of his employment, or is not clothed by the master with the apparent authority to grant it. In the case of such an unauthorized permission to a third person to be on the vehicle, it is generally held that although the master is not required to exercise the same degree of care as where the permission is authorized actually or ostensibly, he is nevertheless liable for a wanton, wilful, or reckless injury inflicted on the third person by a servant who is acting within the scope of his employment.[5] But in the absence of wilfulness or wantonness on the part of the driver, the invitee or licensee of the driver cannot recover from the owner of the truck for injuries received while riding in it.[6]

§ 395. —**Where Employee Violates Instructions.**—Generally speaking, the liability of an employer for injuries to a person whom an employee, in violation of instructions of the employer, permits or invites to ride in an automobile being driven by the employee depends upon whether the employee, in granting permission or extending the invitation to ride, acted within the apparent or ostensible scope of his authority.[7] If such invitation or permission is within the scope of the servant's employment or within the apparent authority with which he has been clothed by his master, the employer is generally held liable for the failure of the employee to exercise ordinary care for the safety of the invitee, even though the invitation or permission is in violation of express instructions of the employer,[8] provided the invitee is justified in relying upon the ostensible or apparent authority of the agent.

The recent decisions, however, have shown a tendency to enlarge the freedom from liability on the part of the master for injury under the circumstances

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[2] Annotation: Ann. Cas. 1917D, 1001.

See Union Gas & E. Co. v. Crouch, 123 Ohio St. 81, 174 N. E. 6, 74 A.L.R. 160, where it is held that the owner of an automobile being driven by a servant in the business of the owner, within the scope of the servant's employment, is not liable for damages to a guest of the servant for injuries caused to such guest by the negligence of the servant while riding in the automobile without the knowledge and consent of the owner, it not appearing that such guest is, at the time, rendering necessary assistance to the servant within the scope of his employment.

[3] Rolfe v. Hewitt, 227 N. Y. 486, 125 N. E. 804, 14 A.L.R. 125.

[4] Ibid.

[5] Illinois C. R. Co. v. Messina, 240 U. S. 395, 60 L. ed. 709, 36 S. Ct. 368; Clark v. Colorado & N. W. R. Co. (C. C. A. 8th) 165 F. 408, 19 L.R.A.(N.S.) 988; Cleveland v. Pine Bluff, A. River R. Co. 107 Ark. 93, 154 S. W. 191, 44 L.R.A.(N.S.) 687; St. Louis, I. M. & S. R. Co. v. Jones, 96 Ark. 558, 132 S. W. 636, 37 L.R.A.(N.S.) 418; Houston, C. A. & N. R. Co. v. Bolling, 59 Ark. 395, 27 S. W. 492, 27 L.R.A. 190, 43 Am. St. Rep. 38; Lovejoy v. Denver & R. G. R. Co. 59 Colo. 222, 146 P. 263, L.R.A.1915E, 888, Ann. Cas. 1916E, 1075; Rolfe v. Hewitt, 227 N. Y. 486, 125 N. E. 804, 14 A.L.R. 125; Dover v. Mayes Mfg. Co. 157 N. C. 324, 72 S. E. 1067, 46 L.R.A.(N.S.) 199; Vassor v. Atlantic Coast Line R. Co. 142 N. C. 68, 54 S. E. 849, 7 L.R.A.(N.S.) 950, 9 Ann. Cas. 535; Higbee Co. v. Jackson, 101 Ohio St. 75, 128 N. E. 61, 14 A.L.R. 131, overruled on other grounds in Union Gas & E. Co. v. Crouch, 123 Ohio St. 81, 174 N. E. 6, 74 A.L.R. 160.

Annotation: 14 A.L.R. 147, s. 62 A.L.R. 1169, and 74 A.L.R. 165.

[6] Annotation: 62 A.L.R. 1171, s. 74 A.L.R. 164.

[7] Annotation: 14 A.L.R. 145, s. 62 A.L.R. 1167, and 74 A.L.R. 163.

[8] Palmer Transfer Co. v. Smith, 137 Ky. 319, 125 S. W. 725, 29 L.R.A.(N.S.) 321, 136 Am. St. Rep. 295; Louisville & N. R. Co. v. Scott (Louisville & N. R. Co. v. Weaver) 108 Ky. 392, 56 S. W. 674, 50 L.R.A. 381; Solomon v. Public Serv. R. Co. 87 N. J. L. 284, 92 A. 942, Ann. Cas. 1917C, 356.

Annotation: 14 A.L.R. 145, s. 62 A.L.R. 1167, and 74 A.L.R. 163.

herein considered. The position now generally taken is that an employee driving his employer's automobile or truck does not in the ordinary case, by virtue of his employment, have implied or apparent authority to invite others to ride on the automobile or truck and thus bind the employer by an invitation which is contrary to his express instructions to the employee not to permit others to ride.[9] Accordingly, under this view, where one riding in a pleasure automobile, with the permission or at the invitation of the owner's chauffeur, who had instructions not to permit others to ride with him, is injured or killed by the negligence of the chauffeur in operating the car, the employer is not liable.[10] Like rulings have been made with respect to persons invited to ride by the driver of a truck.[11] Clearly, one who obtains the permission to ride by collusion or by a personal payment to the servant, or under circumstances which would make it clear to a man of ordinary intelligence that the servant had no authority to grant permission,[12] or who has knowledge that the permission is a violation of instructions given by the master, cannot rely on the servant's apparent authority; such a person is not entitled to recover from the master for a failure of the servant to exercise ordinary care for his safety.[13] Nor is one riding on a vehicle in violation of a state or Federal statute justified in relying on the apparent authority of a servant to grant him permission; he is a trespasser to whom the owner of the vehicle is not liable for a failure of its servant to exercise ordinary care.[14]

§ 396. Where Car Is Loaned to Employee.—Generally speaking, the fact that an employer consents to or permits the use of his car by an employee for the latter's own personal pleasure or business does not render the employer liable for the negligence of the employee while so using the car.[15] It is also well settled that the lending of an automobile to an employee under circumstances which create the relationship of bailor and bailee does not entail liability on the owner for the negligence of the employee to whom the automobile is loaned,[16] except in jurisdictions which take the view that the possibilities of injury from the operation of an automobile are so great as to render an owner who allows his servant to use the machine on personal business liable for the negligence of the servant while so engaged,[17] or where a statutory liability is imposed for the negligence of anyone whom the owner permits to use and drive his car.[18] This assumes, of course, that the employer was not negligent in lending the car to an employee incompetent to operate it.[19] As in other cases where the master loans his automobile to a servant, the servant stands as any other borrower for whose negligence the owner is not liable.[20]

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[9] Annotation: 67 A.L.R. 1167, s. 74 A.L.R. 163.

[10] Rolfe v. Hewitt, 227 N. Y. 486, 125 N. E. 804, 14 A.L.R. 125.

Annotation: 14 A.L.R. 177, s. 62 A.L.R. 1170, and 74 A.L.R. 163.

In answer to the contention that the presumption should obtain that a servant intrusted with a pleasure automobile has ostensible or implied authority to invite others to ride, it has been said that there is no good reason apparent for holding that a jury may be allowed to infer that a servant or chauffeur driving an automobile has ostensible or implied authority to invite or permit others to ride; it is not in the interest of the ordinary automobile owner to give free rides to others and incur the risk incident to so doing. Annotation: 74 A.L.R. 163, 164.

[11] Psota v. Long Island R. Co. 246 N. Y. 388, 159 N. E. 180, 62 A.L.R. 1163; Union Gas & E. Co. v. Crouch, 123 Ohio St. 81, 174 N. E. 6, 74 A.L.R. 160.

Annotation: 14 A.L.R. 178, s. 62 A.L.R. 1171, and 74 A.L.R. 164.

A guest of a servant, riding in a truck intrusted to the servant in the course of the business of the owner who instructs the servant not to permit others to ride, is neither an invitee nor a licensee of the owner, but, on the contrary, is a trespasser to whom no duty is owing by the owner, except that of not wilfully injuring him. Union Gas & E. Co. v. Crouch, 123 Ohio St. 81, 174 N. E. 6, 74 A.L.R. 160, overruling in part Higbee v. Jackson, 101 Ohio St. 75, 128 N. E. 61, 14 A.L.R. 131.

[12] Purple v. Union P. R. Co. (C. C. A. 8th) 114 F. 123, 57 L.R.A. 700; Mendenhall v. Atchison, T. & S. F. R. Co. 66 Kan. 438, 71 P. 846, 61 L.R.A. 120, 97 Am. St. Rep. 380.

Annotation: 14 A.L.R. 150, s. 62 A.L.R. 1169, and 74 A.L.R. 163.

[13] People v. Union P. R. Co. (C. C. A. 8th) 114 F. 123, 57 L.R.A. 700.

Annotation: 14 A.L.R. 149, 150, s. 62 A.L.R. 1169, and 74 A.L.R. 163.

[14] Annotation: 14 A.L.R. 150, s. 62 A.L.R. 1169, and 74 A.L.R. 163.

See also Illinois C. R. Co. v. Messina, 240 U. S. 395, 60 L. ed. 709, 36 S. Ct. 368.

[15] See supra, § 375.

[16] Fletcher v. Meredith, 148 Md. 580, 129 A. 795, 45 A.L.R. 474; Reilly v. Connable, 214 N. Y. 586, 108 N. E. 853, L.R.A.1916A, 954, Ann. Cas. 1916A, 656.

Annotation: 36 A.L.R. 1143, s. 68 A.L.R. 1012, and 100 A.L.R. 922.

6. Statutory Liability of Owner

§ 397. Generally.—In many jurisdictions statutes have been enacted making the owner of an automobile liable for injuries negligently inflicted as a result of the operation of the automobile by persons other than the owner himself or his servant or agent acting within the scope of his employment, and others make an owner liable for the acts of a person under a certain age or an incompetent or inexperienced driver to whom he intrusts his car. These statutes vary greatly in form. Some statutes provide generally that the owner shall be liable for the negligence of anyone operating his car with his knowledge or consent; others make the owner liable for the acts of members of his family; still others make one renting an automobile liable for the bailee's negligence.[1] Their effect is to extend the common-law rules which, except in the few jurisdictions that consider an automobile to be a dangerous agency within the rule of law making the owner responsible for the manner in which it is used by anyone with his knowledge or consent,[2] limit the liability of the owner of an automobile for injuries resulting from its negligent operation by another person to cases where the owner exercises some control over its operation by such third person, as where a relationship of master and servant exists at the time of the injury complained of. These statutes recognize the present-day frequent use of motor vehicles by others than the owner, where no such relationship exists between the owner and driver as, under the common law, will create a liability on the part of the owner for the negligence of the driver.[3] Some of the earlier statutes dealing with the responsibility of owners for the operation of their automobiles by others attempted to impose liability even where the car was used without the knowledge or consent of the owner. Statutes of this character, however, have generally been held unconstitutional.[4]

§ 398. Validity of Statute.—Statutes which make the owner liable for the negligent operation of his motor vehicle when driven by others with his express or implied consent have been sustained as a valid exercise of the police power.[5] Such statutes have been sustained against attacks upon their constitutionality on the ground that they are arbitrary or oppressive, impair the obligation of contract, or deprive the owner of his liberty or property without due process of law.[6] Such a statute does not, as applied to a nonresident owner who loaned his automobile in another state by the law of which he was immune from liability for the borrower's negligence, and who was not within the state at the time of the accident, deprive him of his liberty to contract or of his property without due process of law.[7] Nor does it deny him equal protection of the law.[8] Nor does a statute making the lessor of an automobile liable for injury done by the negligent driving of the car by the lessee unconstitutionally deprive the owner of his property without due process of law.[9] Automobiles kept and used for the purpose of renting them to be driven by the lessees on the public streets may be separately classified for the purposes of regulation.[10] Legislation of this character is said to be an exercise of the police power which acts in furtherance of the public safety, health, and welfare and is coextensive with the public need. The reasonableness of its exercise in such cases must be measured largely by the same standard.[11] However, statutes which impose liability upon the owner although his car is taken without his consent or knowledge are void as a violation of constitutional guaranties of due process and of equal protection of the law[12] although a statute which establishes a conclusive presumption that an automobile driven by a member of the owner's family is so driven with his consent or knowledge has been held a valid exercise of the police power.[13]

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[17] Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629, 16 A.L.R. 255; Anderson v. Southern Cotton Oil Co. 73 Fla. 432, 74 So. 975, L.R.A.1917E, 715.

[18] See infra, §§ 397 et seq.

[19] See supra, § 355.

[20] Annotation: 36 A.L.R. 1145, s. 68 A.L.R. 1012.

[1] Annotation: 4 A.L.R. 361, s. 61 A.L.R. 866, 83 A.L.R. 878, and 88 A.L.R. 174.

[2] See supra, §§ 11, 12.

[3] Maine v. James Maine & Sons Co. 198 Iowa, 1278, 201 N. W. 20, 37 A.L.R. 161.

[4] See infra, § 398.

[5] Young v. Masci, 289 U. S. 253, 77 L. ed. 1158, 53 S. Ct. 599, 88 A.L.R. 170; Levy v. Daniels' U-Drive Auto Renting Co 108 Conn. 333, 143 A. 163, 61 A.L.R. 846; Robinson v. Bruce Rent-A-Ford Co. 205 Iowa, 261, 215 N. W. 724, 61 A.L.R. 851; Bowerman v. Sheehan, 242 Mich. 95, 219 N. W. 69, 61 A.L.R. 859; Stapleton v. Independent Brewing Co. 198 Mich. 170, 164 N. W. 520, L.R.A.1918A, 916.

Annotation: 4 A.L.R. 361, s. 61 A.L.R. 866, 83 A.L.R. 879, and 88 A.L.R. 175.

[6] Robinson v. Bruce Rent-A-Ford Co. 205

§ 399. Construction and Application.—Statutes imposing liability upon the owner of an automobile for its negligent operation by one who does not stand in the relationship of agent or servant to the owner,[14] where no personal negligence can be charged to the owner in intrusting his car to one incompetent to drive it,[15] extend the common-law liability of an automobile owner for the acts of others.[16] They, in effect, make the one who uses an automobile with the consent of the owner his agent [17] for the purpose of holding him liable for an

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Iowa, 261, 215 N. W. 724, 61 A.L.R. 851; Bowerman v. Sheehan, 242 Mich. 95, 219 N. W. 69, 61 A.L.R. 859.

The statute making one liable for injuries done by the use of his motorcar by any member of his immediate family is within the police power, and not invalid as arbitrary or oppressive. Bowerman v. Sheehan, 242 Mich. 95, 219 N. W. 69, 61 A.L.R. 859.

[7] Young v. Masci, 289 U. S. 253, 77 L. ed. 1158, 53 S. Ct. 599, 88 A.L.R. 170.

[8] Ibid.

[9] Levy v. Daniels' U-Drive Auto Renting Co. 108 Conn. 333, 143 A. 163, 61 A.L.R. 846; Robinson v. Bruce Rent-A-Ford Co. 265 Iowa, 261, 215 N. W. 724, 61 A.L.R. 851.

The imminent danger of injury to the public upon or near public highways from the rental of motor vehicles to any but competent and careful operators or to persons of unknown responsibility justifies, as a reasonable exercise of the police power, a statute requiring all who engage in such business to become responsible for any injury inflicted upon the public by the tortious operation of the rented vehicle. Levy v. Daniels' U-Drive Auto Renting Co. 108 Conn. 333, 143 A. 163, 61 A.L.R. 846.

[10] Hodge Drive-It-Yourself Co. v. Cincinnati, 123 Ohio St. 284, 175 N. E. 196, 77 A.L.R. 889, affirmed in 284 U. S. 335, 76 L. ed. 323, 52 S. Ct. 144.

Such use is a use of the streets by the lessor for the purpose of gain, although the use by the lessee is a use of such streets by a member of the public in the ordinary way. Ibid.

[11] Hodge Drive-It-Yourself Co. v. Cincinnati, 123 Ohio St. 284, 175 N. E. 196, 77 A.L.R. 889, affirmed in 284 U. S. 335, 76 L. ed. 323, 55 S. Ct. 144.

[12] Daugherty v. Thomas, 174 Mich. 371, 140 N. W. 615, 45 L.R.A.(N.S.) 699, Ann. Cas. 1915A, 1163.

Annotation: 4 A.L.R. 361, s. 61 A.L.R. 867, 83 A.L.R. 879, and 88 A.L.R. 175.

[13] Bowerman v. Sheehan, 242 Mich. 95, 219 N. W. 69, 61 A.L.R. 859.

Annotation: 61 A.L.R. 867, s. 83 A.L.R. 879, and 88 A.L.R. 175.

In Bowerman v. Sheehan, 242 Mich. 95, 219 N. W. 69, 61 A.L.R. 859, it was said: "This law should be sustained as a valid exercise of the police power upon the broad principle that he who owns property, in its nature a dangerous instrumentality when recklessly operated, will not be permitted to suffer it to be handled by a member of his immediate family, over whom he has full control, in such a negligent manner as to inflict injury upon another, without responding in damages therefor."

[14] See supra, § 397.

[15] See supra, § 355.

[16] Grant v. Knepper, 245 N. Y. 158, 156 N. E. 650, 54 A.L.R. 845.

[17] Secured Finance Co. v. Chicago, R. I. & P. R. Co. 207 Iowa, 1105, 224 N. W. 88, 61 A.L.R. 855; Maine v. James Maine & Sons Co. 198 Iowa, 1278, 201 N. W. 20, 37 A.L.R. 161.

injury caused as a result of its negligent operation. These statutes do not, however, make the driver the agent with all the legal incidents thereof.[18] A statute making the owner liable for injuries occasioned when the car is driven by his consent and declaring that where the car is driven by a member of his family, consent shall be conclusively presumed creates a substantive rule of law, rather than a mere rule of evidence.[19]

Statutes imposing liability upon an owner who consents to the use of his automobile by others for the negligence of such other persons, being in derogation of common law, must be strictly followed,[20] although their plain wording and obvious meaning cannot be avoided. A statute making the owner of an automobile liable for injuries caused by a bailee while in the performance of the owner's business within the scope of his employment does not apply to special bailments for the sole benefit of the bailee.[1]

It may be stated generally that under statutes imposing responsibility upon an owner of an automobile for negligence in its use by another, there is no need of suing the driver and detaining judgment before suing the owner.[2] However, no comprehensive rule can be stated by which to determine whose acts or what acts come within the meaning of such statutes; the varying forms of statutes found in the different states and the different situations in which they are called into application make general rules impossible.[3]

A statute making an owner liable for injuries resulting from his bailee's use of the car while attending to the owner's business applies to vehicles used for pleasure as well as profit.[4]

§ 400. —Who Are Owners within Meaning of Statute; Liability of Joint Owner.—The word "owner" as used in a statute imposing upon the owner of an automobile liability for its negligent operation by another does not include a person who might be mediately or immediately in possession, such as a person with whom a car has been left for repairs, but means only the real owner.[5] A statutory definition of the term "owner of an automobile" as including any person having lawful ownership, use, or control or the right to use or control under a lease, or otherwise, for a period of ten or more days does not affect the statutory provision making the owner of the car liable for an injury resulting from negligent operation of the car when driven by another with the owner's consent.[6] Those engaged in the business of letting automobiles for hire are, however, within the operation of the statute making the owner of an automobile liable for injury resulting from its negligent operation of one in possession with his consent, so as to be liable for injuries caused by the negligent driving of the lessee.[7] Some statutes expressly impose liability upon owners who rent out automobiles to others for the negligence of those to whom they rent cars.[8] Such a statute becomes a part of each contract of hiring by the acceptance of such condition in the voluntary renting of an automobile.[9]

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[18] Babbitt, Motor Vehicle Law, 4th ed. pp. 817–819, § 1201.

[19] Annotation: 61 A.L.R. 866.

[20] Annotation: 83 A.L.R. 880.

Babbitt, Motor Vehicle Law, 4th ed. p. 818, § 1201.

[1] Wolf v. Sulik, 93 Conn. 431, 106 A. 443, 4 A.L.R. 356.

[2] Babbitt, Motor Vehicle Law, 4th ed. p. 817, § 1201.

[3] For detailed discussion of cases construing statute, see annotation: 4 A.L.R. 361, s. 61 A.L.R. 866, 83 A.L.R. 878, and 88 A.L.R. 174.

[4] Wolf v. Sulik, 93 Conn. 431, 106 A. 443, 4 A.L.R. 356.

[5] Daugherty v. Thomas, 174 Mich. 371, 140 N. W. 615, 45 L.R.A.(N.S.) 699, Ann. Cas. 1915A, 1163.

An automobile finance corporation which purchases the notes of the purchaser of an automobile which he gives when he buys an automobile under a conditional sale agreement is not the "owner" within the meaning of a statute providing that the "owner" shall include any person, firm, copartnership, association, or corporation holding title to a vehicle or having the lawful possession or control of the same under a written sale agreement. Annotation: 61 A.L.R. 871.

[6] Robinson v. Bruce Rent-A-Ford Co. 205 Iowa, 261, 215 N. W. 724, 61 A.L.R. 851.

[7] Ibid.

The owner of an automobile is liable for injuries inflicted by her husband in using it for his own pleasure under a general authority to do so whenever he wishes to, under a statute making the owner liable for injuries done by the bailee while in the performance of the owner's business.[10]

The courts have differed as to whether municipally owned vehicles come within the meaning of statutes imposing liability on owners of automobiles for the negligence of others.[10a] The words "owner of a motor vehicle" as used in such a statute have been held to include municipalities and other political subdivisions which own and operate automobiles[11] and to make them liable for properly authorized acts in connection with the use of such automobiles.[12] Other statutes have been held inapplicable to municipal vehicles used solely for governmental purposes.[13]

One joint owner of an automobile is not rendered liable for the acts of another joint owner who has an equal right to use the car or one whom the latter permits to use the automobile by virtue of a statute imposing liability for the negligent operation of an automobile by any person operating it with the owner's express or implied permission.[14]

§ 401. —Consent of Owner to Use by Another.—Under most statutes, it is essential, in order to hold an owner liable, that it be made to appear that the car was being used with the owner's consent or permission.[15] He cannot, generally speaking, be held liable if the automobile was used without his knowledge or consent,[16] notwithstanding the automobile is operated by a minor child of the owner (assuming, of course, that the child is of such age that he can legally operate the car), although a rebuttable presumption may arise.[17] The plaintiff has the burden of establishing the fact of consent.[18] Statutes

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[8] Levy v. Daniels' U-Drive Auto Renting Co. 108 Conn. 333, 143 A. 163, 61 A.L.R. 846; Robinson v. Bruce Rent-A-Ford Co. 205 Iowa, 261, 215 N. W. 724, 61 A.L.R. 851; Hodge Drive-It-Yourself Co. v. Cincinnati, 123 Ohio St. 284, 175 N. E. 196, 77 A.L.R. 889, affirmed in 284 U. S. 335, 76 L. ed. 323, 52 S. Ct. 144.

[9] Levy v. Daniels' U-Drive Auto Renting Co. 108 Conn. 333, 143 A. 163, 61 A.L.R. 846.

[10] Wolf v. Sulik, 93 Conn. 431, 106 A. 443, 4 A.L.R. 356.

[10a] Annotation: 13 B. R. C. 481.

[11] Annotation: 61 A.L.R. 877, 878, 13 B. R. C. 481.

In Aikens v. Kingston, 53 Ont. L. Rep. 41, 13 B. R. C. 469, a municipal corporation as owner was held liable for an injury and damages resulting from the negligent operation of its motor police van by an officer in the performance of his duty, under a statute providing that "the owner of a motor vehicle shall be responsible for any violation of this act or of any regulation prescribed unless at the time of such violation the motor vehicle was in the possession of some person other than the owner, without his consent, express or implied, not being a person in the employ of the owner."

[12] **Where a municipally owned truck was being used** by the driver for his own purposes, by permission of the foreman of a gang, the city was held not liable where such permission was given without authority and outside the scope of business of the city. Annotation: 61 A.L.R. 878.

[13] Annotation: 13 B. R. C. 481.

Babbitt, Motor Vehicle Law, 4th ed. pp. 817–819, § 1201.

[14] Masci v. Young, 109 N. J. L. 453, 162 A. 623, 83 A.L.R. 869, affirmed in 289 U. S. 253, 77 L. ed. 1158, 53 S. Ct. 599.

Annotation: 61 A.L.R. 876.

A statute providing that the owner of an automobile should be equally liable with an agent or any person employed by him to operate it does not render a joint owner of an automobile liable for an injury inflicted by the machine while it is being used alone by the other co-owner for his pleasure. Hamilton v. Vioue, 90 Wash. 618, 156 P. 853, L.R.A.1916E, 1300.

[15] Maine v. James Maine & Sons Co. 198 Iowa, 1278, 201 N. W. 20, 37 A.L.R. 161.

[16] Annotation: 4 A.L.R. 364, s. 61 A.L.R. 868, 83 A.L.R. 880, and 88 A.L.R. 176.

[17] Annotation: 61 A.L.R. 873.

[18] Heavilin v. Wendell, 214 Iowa, 844, 241 N. W. 654, 83 A.L.R. 872.

Annotation: 83 A.L.R. 878.

It has been held necessary for the plaintiff to establish by a preponderance of the evidence that the car causing him damage was operated in a negligent manner, that the defendant was the owner of the car, attempting to impose liability regardless of the owner's consent to the use of his car have been held unconstitutional.[19] Some statutes, however, create a conclusive presumption of consent where the automobile is driven by a member of the owner's family.[20] It has been held, also, that the use and control of an automobile in a public place fairly gives rise to the inference that the person in control is the owner or in lawful possession of it with the express or implied consent of the owner, where the statute makes it a felony to use a motor vehicle without authority.[1] Moreover, proof of the defendant's ownership of the automobile may raise an inference that it was being driven with the owner's consent.[2] It is to be noted, also, that the Canadian courts have construed statutes making the owner of a motor vehicle responsible for any violation of motor vehicle acts to impose liability upon the owner of an automobile for an injury resulting from its negligent operation, even while it is being used by one without the knowledge or consent of the owner,[3] except where it is being operated by one who has stolen it, and there has been no negligence on his part in permitting the machine to fall into the hands of the thief.[4] Some of the Canadian statutes do not, however, extend liability to an owner whose car is used without his consent.[5] There is no formula that will aid the court in deciding whether a motor vehicle has been used or operated with the consent or permission of the owner within the meaning of statutes imposing liability upon the owner of an automobile for the negligence of anyone using the car with his permission or consent; whether or not it has been so used is to be decided as a question of fact and, in some cases, as one of fact and of law.[6] Of course, if an automobile owner expressly grants an-

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and that he had given his consent to its operation by the one driving it at the time of the accident. Annotation: 61 A.L.R. 868.

[19] See supra, § 398.

[20] Bowerman v. Sheehan, 242 Mich. 95, 219 N. W. 69, 61 A.L.R. 859.

[1] Annotation: 61 A.L.R. 871.

[2] Heavilin v. Wendell, 214 Iowa, 844, 241 N. W. 654, 83 A.L.R. 872.

[3] Annotation: 4 A.L.R. 365, 366, s. 61 A.L.R. 879, and 83 A.L.R. 885.

In Mattei v. Gillies, 16 Ont. L. Rep. 558, 12 Ann. Cas. 970, under the same provision of the statute, it was held that as between the owner and the public, the chauffeur or driver was to be regarded as the alter ego of the proprietor; that the owner of an automobile was liable for the driver's negligence in all cases where the use of the machine was with his sanction or permission; that in driving the motorcar, the chauffeur was within the ostensible scope of his employment; that liability would remain with the owner by virtue of the statute, even though the driver might be out on an errand of his own; that the provisions of the act covered responsibility with regard to fines and penalties imposed, and also civil responsibility for damages; and that a verdict against an owner for an injury inflicted by his machine while his chauffeur was making a detour for his own purposes was affirmed.

[4] Annotation: 4 A.L.R. 366.

[5] Annotation: 83 A.L.R. 885, 886.

In Halparin v. Bulling, 50 Can. S. C. 471, 20 D. L. R. 598, Ann. Cas. 1915D, 474, the courts stated that the statutes of Manitoba did not reach far enough to cover a case in which it was sought to hold the owner of an automobile liable for an injury inflicted by his machine while it was being used by his chauffeur for his own purposes without the owner's knowledge.

[6] Annotation: 61 A.L.R. 872, s. 83 A.L.R. 881, 887.

That a man was acting under his wife's authority in driving her automobile at the time he caused injury with it may be found from the fact that he had general authority to use the car and that she refrained from testifying that he was not acting under such authority at the time of the injury. Wolf v. Sulik, 93 Conn. 431, 106 A. 443, 4 A.L.R. 356.

It has been held that to permit another to use one's automobile as contemplated by the statute means to allow or consent to and is the legal equivalent of stating that a thing was done with the consent and knowledge of the person charged, implying an intent to do the thing complained of, and that knowledge and an active operation of the mind are required, that the passive happening of the event is not enough. Annotation: 83 A.L.R. 881.

Where the evidence showed that the owner rented the car and that an injury resulted from its negligent operation by the lessee several days after it was rented to him, implied permission may be found to exist, although there was evidence that the car was to be returned to the owner on the day following the letting. Annotation: 61 A.L.R. 872.

The owner of a truck who loaned it for a certain time cannot be held liable under the Michigan statute for an injury which resulted from the negligent operation of the truck after the expiration of the time other permission to use his car, he can be held liable for the latter's negligence. When one lends[7] or hires[8] his car to another, the latter drives with his express or implied consent within the meaning of such statutes. The common understanding between joint owners of an automobile when they bought the car that each should use it when he wished is not the permission contemplated.[9]

§ 402. —Acts for Which Owner Is Liable; Use of Car for Another Purpose.—The liability of an owner for the use of a car by another depends, under most statutes, upon the consent of the owner to the use of the car by the driver[10] and the negligence of the driver. If no liability is created by the act of the driver, there is no liability to be imposed upon the owner. No liability on the part of the owner, independent of the negligence of the driver, is created[11] where the driver is not liable, whether his freedom from liability arises from a want of negligence on his part or from the existence of such a relationship between himself and the person injured as to preclude any liability on his part for the injury.[12] A statute making the owner of an automobile liable for the negligence of the driver where the car is driven with the owner's consent does not operate to impose liability upon the owner for a use of the car by the person to whom the consent was given for some purpose beyond or outside of the terms of the consent given.[13]

§ 403. —Liability to Invitee or Licensee of Person Permitted to Use Car.—Statutes imposing liability upon the owner of a car for injuries resulting from the negligence of persons whom the owner permits to drive the automobile render the owner liable for injuries to persons riding in the car as invitees

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agreed upon because he failed to take steps to learn why it was not returned as agreed. Annotation: 61 A.L.R. 872.

There was held to be no issue for the jury as to whether the defendant's automobile was being operated by another with his consent at the time the accident occurred, within the meaning of the Michigan statute, where the uncontradicted evidence showed that the owner had loaned the machine, that it had not been returned within the time agreed upon, that the accident occurred after that time, and that it was being driven by a third person for his own purposes without the permission of the owner or the borrower. Annotation: 61 A.L.R. 872.

Where one leaves his automobile with an independent contractor to be repaired, he cannot be held liable for an injury occurring where the car was being driven for a road test by the contractor. Annotation: 83 A.L.R. 882.

[7] Stapleton v. Independent Brewing Co. 198 Mich. 170, 164 N. W. 520, L.R.A.1918A, 916.

[8] Annotation: 61 A.L.R. 872.

[9] Annotation: 61 A.L.R. 876.

[10] See supra, § 401.

[11] Maine v. James Maine & Sons Co. 198 Iowa, 1278, 201 N. W. 20, 37 A.L.R. 161.

It is the negligence of the driver that creates liability, and it is the statute that imposes that liability on the owner who has consented to the driver's use of the car. Ibid.

[12] Maine v. James Maine & Sons Co. 198 Iowa, 1278, 201 N. W. 20, 27 A.L.R. 161, holding that a master is not liable under a statute imposing liability on the owner of an automobile for injuries caused by another's driving of the car with his consent for personal injuries negligently inflicted by his servant upon the servant's wife where the wife has no right of action against her husband for such injuries.

A father's action for loss of services, however, comes within the meaning of the words "injuries to persons" as used in this section of the Highway Law, liability under such section not being limited to the person who receives the injury. Psota v. Long Island R. Co. (1927) 246 N. Y. 388, 159 N. E. 180, 62 A.L.R. 1163.

[13] Heavilin v. Wendell, 214 Iowa, 844, 241 N. W. 654, 83 A.L.R. 872; Maine v. James Maine & Sons Co. 198 Iowa, 1278, 201 N. W. 20, 37 A.L.R. 161.

Annotation: 83 A.L.R. 885.

In Heavilin v. Wendell, 214 Iowa, 844, 241 N. W. 654, 83 A.L.R. 872, the owner was held not liable where he had loaned the car to one representing that his wife was ill, in order to procure medicine, and an accident happened while the borrower was using the car to take a joy ride.

The owner was held entitled to a direction of a verdict where the testimony both of the driver and the owner of the automobile which caused the accident that it was loaned for a purpose other than that for which it was being driven was uncontradicted by any fact or circumstance which would tend to cast doubt upon it. Heavilin v. Wendell, 214 Iowa, 844, 241 N. W. 654, 83 ALR 872.

or licensees of the person to whom the car was intrusted, regardless of whether the owner knows of, or assents to, the presence of such persons in the car.[14] The view has been taken that a statute imposing liability upon the owner of an automobile for a personal injury resulting from its negligent operation in the business of the owner or otherwise by any person legally using the car with the owner's express or implied permission does not extend the liability of the owner of an automobile to include acts of his employee, who, contrary to his instructions and without the scope of his employment, invites children for a ride.[15]

§ 404. **—Liability for Act of Third Person Allowed to Drive.**—Some courts have construed statutes making the owner responsible or creating a lien for injury or damage inflicted by another operating his automobile not to go to the extent of making him liable for the negligent acts of any third person to whom the borrower, without the knowledge or consent of the owner, has intrusted the use and operation of the car.[16] Others, however, have construed the owner to be liable for the negligence of one to whom the permittee temporarily intrusts the automobile,[17] at least in cases where permittee was present with the one to whom he intrusted the car.[18] It seems clear, however, that one who has loaned his car cannot be held liable for an injury resulting from its negligent operation by a third person who took it for his own private use, without leave from the owner or the one to whom the owner had loaned it.[19]

§ 405. **—Extraterritorial Operation.**—Liability in a tort action must be determined by the law of the place where the wrong occurred.[20] Accordingly, the view has been taken that a statute imposing liability upon an owner of an automobile for damage resulting from its negligent operation by one using it with his permission has no application to accidents happening in another state.[1] However, statutes imposing liability upon one renting automobiles for the negligence of those to whom the automobiles are rented have been held to create a liability of a contractual nature.[2] And since the courts of one state will enforce rights of action on contracts arising in other jurisdictions unless they contravene their own law, or their own fundamental and important public policy imperatively requires their nonenforcement,[3] where the laws of a state impose the aforementioned liability, an action may be maintained against a lessor of an automobile, arising out of injuries received outside the state by reason of the negligence of the lessee, even though the state where the accident occurred imposed no liability in such case upon the lessor unless he was negligent in renting a defective vehicle and in failing to disclose the defect.[4] Moreover, the liability imposed by the law of the state in which an automobile accident occurred, on the owner of the car, for the negligence of one driving it with his permission, will be enforced by the courts of another state, even though such owner is a resident of the state of the forum and the lending of the automobile took place there.[5]

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[14] Annotation: 61 A.L.R. 875, 881, s. 83 A.L.R. 884, and 88 A.L.R. 177.

[15] Psota v. Long Island R. Co. 246 N. Y. 388, 159 N. E. 180, 62 A.L.R. 1163, wherein the court stated that the legislature by this act did not extend the liability of the master for the acts of his servant; that it placed the borrower of a car in the same relationship with the lender as that of master and servant or principal and agent, but that it did not increase the liability of the lender beyond that of a master for acts of a servant coming within the scope of his employment.

[16] Annotation: 61 A.L.R. 873.

Evidence that a dealer who loaned a car to a purchaser to use until delivery could be made of a new car, and that the one to whom the car was loaned permitted another to take it for the latter's own purposes, and that while such other was using it, through his negligence an accident occurred, is insufficient to hold the dealer liable. Annotation: 61 A.L.R. 873.

[17] Annotation: 61 A.L.R. 874, s. 83 A.L.R. 883, and 88 A.L.R. 177.

The owner of a taxicab, which he turned over to an "operator" who took complete charge of the car and hired the chauffeur, is liable for an injury which occurred through the negligent operation of the car while it was being driven by one to whom the regularly employed chauffeur had turned it over when he became ill and unable to operate it. Annotation: 61 A.L.R. 873.

It is not necessary that the particular driver be known to and his driving consented to by the owner, under a statute providing that the owner of a motor vehicle shall be liable for any injury occasioned by the negligent operation of the vehicle, whether such negligence consists in the violation of the provisions of the statutes of the state, or in the failure to observe such ordinary care in such operation as the rule of the common law requires, but that the owner shall not be liable unless the car is being driven with his or her express or implied consent or knowledge. Annotation: 83 A.L.R. 882.

[18] Grant v. Knepper, 245 N. Y. 158, 156 N. E. 650, 54 A.L.R. 845.

Annotation: 44 A.L.R. 1390.

An employee placed in charge of a truck for the transportation of persons and property is "using" it within the meaning of a statute making the owner liable for injuries resulting from the operation of the vehicle in the business of the owner, by any person legally using or operating it with the permission of the owner, while he is on the truck in furtherance of the general enterprise, although he has wrongfully permitted another to drive it. Grant v. Knepper, 245 N. Y. 158, 156 N. E. 650, 54 A.L.R. 845

[19] Annotation: 61 A.L.R. 874.

[20] See CONFLICT OF LAWS [Also 5 R. C. L. p. 1038, § 129].

§ 406. Statutes Creating Lien.—Some statutes, instead of imposing a general liability upon the owner of an automobile for injury or damage by reason of its negligent operation while in the hands of a third person, create a lien against the automobile itself for damage occasioned while it is being operated by anyone to whom the car has been loaned or hired, or who is otherwise permitted to use the car; statutes of this kind have been sustained against attacks upon their constitutionality.[6] Such liens may be given priority over other liens against the automobile.[7] Moreover, a statute subjecting an automobile, used in violation of the motor vehicle laws, and thereby causing damage to any public highway, to a lien, is not lacking in due process in that it does not provide notice and opportunity to be heard, where foreclosure of the lien must be by a bill in equity of which the owner will have notice.[8]

VII. CONTRIBUTORY NEGLIGENCE

A. In General

§ 407. Generally.[9]—The general rules defining the rights of those injured by the negligence of others to recover in the face of their own acts contributing in whole or in part to the accident complained of[10] apply with the same force and effect to automobile accidents,[11] except in those jurisdictions where the doctrine of comparative negligence is recognized,[12] or the general rules are modified by the application of the rules of last clear chance.[13] Thus, a person whose negligent acts proximately caused or contributed to an accident will be precluded from recovering against the defendant,[14] unless the latter's conduct was wanton or wilful,[15] in which event the defense of contributory negligence is unavailing.[16] Before the defense of contributory negligence will prove availing, it must be shown that the acts alleged as constituting such defense directly contributed to the injury.[17] In general, the question of the plaintiff's contributory negligence presents a question of fact for the jury to decide upon the basis of all the facts and circumstances surrounding the accident.[18]

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[1] Annotation: 61 A.L.R. 878, s. 83 A.L.R. 885, and 88 A.L.R. 177.

[2] Levy v. Daniels' U-Drive Auto Renting Co. 108 Conn. 333, 143 A. 163, 61 A.L.R. 846.

[3] See Conflict of Laws [Also 5 R. C. L. p. 931, §§ 25 et seq.].

[4] Levy v. Daniels' U-Drive Auto Renting Co. 108 Conn. 333, 143 A. 163, 61 A.L.R. 846.

[5] Masci v. Young, 109 N. J. L. 453, 162 A. 623, 83 A.L.R. 869, affirmed in 289 U. S. 253, 77 L. ed. 1158, 53 S. Ct. 599, 88 A.L.R. 170.

[6] Mammina v. Alexander Auto Serv. Co. 333 Ill. 158, 164 N. E. 173, 61 A.L.R. 649; Merchants & P. Bank v. Brigman, 106 S. C. 362, 91 S. E. 332, L.R.A.1917E, 925.

Annotation: 4 A.L.R. 362, s. 61 A.L.R. 866, 83 A.L.R. 878, and 88 A.L.R. 174; 4 A.L.R. 654.

[7] In Merchants & P. Bank v. Brigman, 106 S. C. 362, 91 S. E. 332, L.R.A.1917E, 925, where the statute provided that when a motor vehicle is operated in violation of the provisions of law, or negligently and carelessly, and when any person receives personal injury thereby, or when a wagon or other property is damaged by it, the damages done to such person or property shall be and constitute a lien next in priority to the lien for state taxes upon such motor vehicle, and that the person sustaining the damage shall have a right to attach the vehicle, but that the act shall not be effective in case the motor vehicle was stolen by the breaking of a building under a secure lock, or when the vehicle was securely locked, it was held within the power of the legislature to impose a lien upon a motor vehicle for injuries done by it, which should be superior to that of a chattel mortgage executed after the passage of a statute, but before the injury was done, and the act in question was held not unconstitutional or in violation of art. 1, § 5, or of § 17, art. 3, of the state Constitution, or in violation of the Fourteenth Amendment of the Federal Constitution.

[8] Mammina v. Alexander Auto Serv. Co. 333 Ill. 158, 164 N. E. 173, 61 A.L.R. 649.

[9] As to contributory negligence in driving on a defective street or highway, see

§ 408. **What Constitutes Contributory Negligence.**—The precise quantum of care and caution imposed upon a motorist or pedestrian in his use of the public thoroughfare is not capable of an approximation applicable to all situations. The exigencies of each case will alone set the extent of care required,[19] so that before the reciprocal duties of those who make use of the public highways can be said to have been violated, thereby making the defense of contributory negligence available to the person sued, various factors, depending upon the particular situation, must be taken into consideration. The presence of lights,[20] the speed of the car at the time of the accident,[1] conditions of visibility,[2] control of the vehicle,[3] compliance with traffic rules,[4] the condition of the automobile,[5] the condition of highway, etc.,[6] are some of the factors that may prove determinative of the plaintiff's contributory negligence. The test by which the contributory negligence of a person injured in an automobile accident is measured is whether he acted as a reasonably prudent man would have acted[7] under the peculiar circumstances of the case, considering the surrounding hazards and any other factors explanatory of the particular situation.[8]

HIGHWAYS, STREETS, AND SIDEWALKS [Also 13 R. C. L. p. 462, §§ 378 et seq.].

[10] See NEGLIGENCE [Also 20 R. C. L. pp. 99 et seq.].

[11] Hansen v. Kemmish, 201 Iowa, 1008, 209 N. W. 277, 45 A.L.R. 498; Cumberland Teleph. & Teleg. Co. v. Yeiser, 141 Ky. 15, 131 S. W. 1049, 31 L.R.A.(N.S.) 1137.

[12] See NEGLIGENCE [Also 20 R. C. L. p. 145, §§ 119, 120], generally, and see infra, § 503.

[13] See §§ 489 et seq. infra.

See NEGLIGENCE [Also 20 R. C. L. p. 1]; PROXIMATE CAUSE [Also 22 R. C. L. p. 144].

[14] Cumberland Teleph. & Teleg. Co. v. Yeiser, 141 Ky. 15, 131 S. W. 1049, 31 L.R.A. (N.S.) 1137.

See NEGLIGENCE [Also 20 R. C. L. p. 99, §§ 87 et seq.].

[15] See infra, § 414.

See NEGLIGENCE [Also 20 R. C. L. p. 20; F. S. 4846].

[16] Hopkins v. Droppers, 184 Wis. 400, 198 N. W. 738, 36 A.L.R. 1156.

[17] Cupples Mercantile Co. v. Bow, 32 Idaho, 774, 189 P. 48, 24 A.L.R. 1296; Hansen v. Kemmish, 201 Iowa, 1008, 208 N. W. 277, 45 A.L.R. 498; Norris v. Litchfield, 35 N. H. 271, 69 Am. Dec. 546.

[18] New York C. & H. R. R. Co. v. Maidment (C. C. A. 3d) 168 F. 21, 21 L.R.A. (N.S.) 794.

[19] Hatzakorzian v. Rucker-Fuller Desk Co. 197 Cal. 82, 239 P. 709, 41 A.L.R. 1027; Coffin v. Laskau, 89 Conn. 325, 94 A. 370, L.R.A.1915E, 959; Carruthers v. Campbell, 195 Iowa, 390, 192 N. W. 138, 28 A.L.R. 949; Minor v. Stevens, 65 Wash. 423, 118 P. 313, 42 L.R.A.(N.S.) 1178.

[20] See infra, § 412.

[1] See infra, § 410.

[2] See infra, § 429.

[3] See infra, § 420.

[4] See infra, § 421.

[5] See infra, § 428.

[6] See HIGHWAYS.

[7] Keller v. Breneman, 153 Wash. 208, 279 P. 588, 67 A.L.R. 92.

[8] Hatzakorzian v. Rucker-Fuller Desk Co. 197 Cal. 82, 239 P. 709, 41 A.L.R. 1027; McKeon v. Delbridge, 55 S. D. 579, 226 N. W. 947, 67 A.L.R. 311; Ritter v. Hicks, 102 W. Va. 541, 135 S. E. 601, 50 A.L.R. 1505.

§ 409. Violation of Statute or Ordinance.—It is well settled that the violation of a statute or ordinance regulating the movement of vehicles on public streets, highways, bridges, etc., which does not contribute directly to an injury, does not relieve from liability an individual who has been guilty of negligence; however, such a violation, if proximately causing an injury, may be set up as a defense by pleading it as contributory negligence.[9] The fact that the plaintiff violated a traffic regulation at the time of the accident, while not conclusive or necessarily determinative of his own contributory negligence, is a circumstance to be considered in determining whether, at the time of the accident complained of, he acted with reasonable care, so as to free himself from negligence contributing directly to the injury.[10] The mere concurrence of the violation of a traffic regulation with an accident in point of time does not, of itself, render the violation a concurring cause of the injury.[11] It should be noted however, that while the violation of a statute or ordinance, if proximately causing an injury, may be set up as a defense, the statute or ordinance violated must have been enacted for the benefit of the party who seeks to invoke its violation, as distinguished from the public generally or a class to whom the ordinance necessarily applies.[12] For example, it has been held that a street car company, in an action against it for damaging an automobile, could not plead, by way of contributory negligence, that the owner of the automobile was in the center of the street, contrary to an ordinance requiring vehicles to keep to the right of the center of the street, since this ordinance was not intended to keep vehicles off the street car track, nor was it intended for the protection of street car companies.[13]

§ 410. —Speed Laws.—Applying the rule that violation of a traffic regulation does not constitute a defense to an action by the violator to recover for negligence unless the violation proximately contributed to the injury, it has been held that violation of a speed law does not preclude a recovery for injuries where the excessive speed is not a direct, contributing cause of the injury, but that where the unlawful speed was a direct, contributing cause, it does preclude recovery.[14]

§ 411. —Rules of Road.—Violation of an ordinance providing that vehicles, in turning corners to the left, shall pass to the right of the intersection of the two streets, or, in turning to the right, shall keep as near to the curb as possible, does not preclude a recovery for injuries received in a collision with another vehicle, or resulting from a defective street or highway, except where such violation proximately contributed to the injury.[15] Nor does the mere fact itself that one has violated the rule of the road by passing or attempting to pass another vehicle on the wrong side or ahead of the same absolutely or necessarily bar all right to recover for injuries negligently inflicted, although it will have that effect if the unlawful act proximately contributes to the injury complained of.[16]

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[9] Broschart v. Tuttle, 59 Conn. 1, 21 A. 925, 11 L.R.A. 33; Coffin v. Laskau, 89 Conn. 325, 94 A. 370, L.R.A.1915E, 959; Baker v. Portland, 58 Me. 199, 4 Am. Rep. 274; Arey v. Newton, 148 Mass. 598, 20 N. E. 327, 12 Am. St. Rep. 604; Newcomb v. Boston Protective Dept. 146 Mass. 596, 16 N. E. 555, 4 Am. St. Rep. 354; Damon v. Scituate, 119 Mass. 66, 20 Am. Rep. 315; Norris v. Litchfield, 35 N. H. 271, 69 Am. Dec. 546; Keller v. Breneman, 153 Wash. 208, 279 P. 588, 67 A.L.R. 92.

Annotation: 12 A.L.R. 458.

[10] Newcomb v. Boston Protective Dept. 146 Mass. 596, 16 N. E. 555, 4 Am. St. Rep. 354.

Annotation: 12 A.L.R. 467.

The fact that one seeking to recover damages for a collision between his car and another did not give audible warning and display such light as the traffic law required, although evidential on the question of negligence, was held not conclusive on that point. Annotation: 40 A.L.R. 1245, 1246.

[11] Broschart v. Tuttle, 59 Conn. 1, 21 A. 925, 11 L.R.A. 33; Baker v. Portland, 58 Me. 199, 4 Am. Rep. 274.

[12] Rampon v. Washington Water Power Co. 94 Wash. 438, 162 P. 514, L.R.A.1917C, 998.

[13] Annotation: 12 A.L.R. 463.

[14] Coffin v. Laskau, 89 Conn. 325, 94 A. 370, L.R.A.1915E, 959; Broschart v. Tuttle, 59 Conn. 1, 21 A. 925, 11 L.R.A. 33; Hart v. Stence, 219 Iowa, 55, 257 N. W. 434, 97 A.L.R. 535.

Annotation: 12 A.L.R. 463.

The specific question as to whether the operation of an automobile at such a rate of speed that it cannot be stopped within the range of the driver's vision constitutes contributory negligence is treated elsewhere in this article. See infra, § 426.

§ 412. **—Lights on Car.**—The absence of lights on an automobile may be contributory negligence preventing recovery.[17] To make the absence of lights required on an automobile by statute a good defense to an action for damages sustained where the car ran off a road which was not kept in repair as required by statute, there must be some relation between the violation of the law and the accident, and whether the violation was such as to have caused or helped to cause the accident is for the determination of the jury; the violation of the statute does not make the offender a trespasser on the road, but only subjects him to the penalties of the act.[18]

B. FACTORS AFFECTING DEFENSE OF CONTRIBUTORY NEGLIGENCE

§ 413. **Generally.**—The defense of contributory negligence is not absolute in the sense that every act of negligence on the part of the plaintiff will operate to deprive him of the right to recover. There may be present circumstances which will serve to take the case out of the application of the conventional rules respecting contributory negligence;[19] for example, acts of wanton negligence on the part of the defendant,[20] or other factors, such as an emergency,[1] explanatory of the plaintiff's acts.

§ 414. **Wanton Negligence.**—It may be stated as a general rule that the defense of contributory negligence is unavailable where the cause of action is based upon conduct which may properly be defined as wilful and wanton.[2] For example, where the driver of an automobile carelessly and wantonly runs over a boy playing ball in the street, the contributory negligence of the boy will not relieve the driver from liability for his wanton negligence.[3]

For an act to fall within the category of "wanton" or "wilful" negligence it does not necessarily have to spring from ill will or wear the cloak of malicious intent.[4] The conduct which in law will be held wilful and wanton must be either such conduct as intentionally inflicts an injury, or that which ethically, under the facts and circumstances appearing, is the equivalent thereof.[5] While the degree of negligence necessary to preclude the defense of contributory negligence may not be defined with a nicety of precision, but must rest largely upon the factual situation of each case, it seems clear that more than mere violation of a traffic rule,[6] or a speed in excess of that defined by statute,[7] or any other act violative of the requirements of a statute or ordinance,[8] is required to constitute wanton negligence. While a violation of the law of the road is not necessarily recklessness or wantonness, it is properly to be taken into consideration in determining whether the conduct of one traveling upon the highway was reckless or wanton.[9] Thus, the operation of an automobile by a minor, contrary to statute, while constituting negligence as a matter of law, does not amount to such gross negligence as will preclude the defense of contributory negligence.[10]

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[15] Annotation: 12 A.L.R. 465.

[16] Damon v. Scituate, 119 Mass. 66, 20 Am. Rep. 315.

Annotation: 12 A.L.R. 465.

The mere violation of an ordinance prohibiting vehicles from standing transversely in a street does not preclude recovery for injuries negligently inflicted upon such a vehicle, where such unlawful position did not contribute directly to the injury. Annotation: 12 A.L.R. 466.

[17] See infra, § 426.

[18] Annotation: 14 A.L.R. 794, s. 40 A.L.R. 1243.

Before a plaintiff's violation of a statute requiring a lighted lamp in front of his automobile can operate as a bar to recovery, it must be found to have caused, or contributed to, the accident. Annotation: 14 A.L.R. 794, s. 40 A.L.R. 1243.

While it is the duty of one driving an automobile to have it equipped with the lights required by statute, and to drive on the right-hand side of the road, yet, to defeat recovery for an injury sustained when the car ran off the road, there being no proper barrier or guard rail at that point, it must appear that his failure to observe these statutory requirements contributed to his injury, the determination of which is for the jury, and that the proximate cause was the failure to maintain proper guards or barriers on the grade. Annotation: 14 A.L.R. 794, s. 40 A.L.R. 1243.

[19] See supra, § 408.

[20] See infra, § 414.

[1] See infra, § 415.

[2] Potter v. Gilmore, 282 Mass. 49, 184 N. E. 373, 87 A.L.R. 1462; Wittstruck v. Lee, 62 S. D. 290, 252 N. W. 874, 92 A.L.R. 1361.

Where defendant's conduct that occasioned a personal injury was wanton, or where it indicates that degree of indifference to the rights of others which may be justly characterized as recklessness, the doctrine of contributory negligence as a defense has no application. Carlson v. Johnke, 57 S. D. 544, 234 N. W. 25, 72 A.L.R. 1352. Annotation: 38 A.L.R. 1424, s. 72 A.L.R. 1357, and 92 A.L.R. 1367.

[3] Annotation: 44 A.L.R. 1306.

§ 415. **Emergency.**—Contributory negligence will not be attributed to a motorist who, through the negligent acts of another, is suddenly confronted with a dangerous situation and compelled to act at once to avert an accident.[11] His choice of action is not tested by the inquiry whether it was the best or most effective under the circumstances, but rather by a comparison with what might reasonably be expected of the average prudent traveler placed in a similar stiuation.[12] For example, one approaching a blind corner in an automobile is not negligent if, when another car suddenly turns the corner on the wrong side of the street, he, in the emergency, turns his car to the left to avoid the collision, although the other car also turns to that side of the street so that he is on the wrong side of the road when the accident occurs.[13] However, before one can absolve himself from liability for injury caused by acting in an emergency to save himself from harm, he must show that such emergency was brought about by no negligent act of his own and that the resultant injury could not be prevented after the peril had passed.[14]

§ 416. **—Railroad Crossings.**—Numerous cases involving the emergency rule as applied to automobile drivers have arisen out of accidents at railroad crossings in which the driver sought to avoid a charge of contributory negligence on the ground that through the defendant's negligence he was placed in a position of peril and danger, by reason of which he was not required to take the wisest course, but was excusable if the course taken by him was one which a person of ordinary prudence would have taken under the circumstances.[15] In some of these, the driver, after seeing the approaching train, attempted to cross ahead of it. The plaintiff has generally been viewed as not contributorily negligent in such a situation, where it appears that the defendant had, by its neglect of duty and failure to give timely warning, lulled plaintiff into a sense of security and brought him unawares into the peril from which he sought to extricate himself.[16] For example, where the driver of an automobile is placed in a sudden peril at a railroad crossing by reason of the railroad employees' failure to give proper signals, and without his fault, his jumping from the car instead of stopping it cannot be said to be contributory negligence as a matter of law.[17] It has been held further that where the driver of an automobile approaching a crossing, when he reaches a point where the view of the tracks is unobstructed, loses his presence of mind because of the proximity of a train approaching at a high rate of speed, without the statutory signal, and consequently loses control of his machine, by reason of which it becomes stalled on the track, he cannot be charged with contributory negligence because of a failure to exercise proper judgment.[18]

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[4] Bolin v. Chicago, St. P. M. & O. R. Co. 108 Wis. 333, 84 N. W. 446, 81 Am. St. Rep. 911.
Annotation: 31 L.R.A.(N.S.) 158.

[5] Bessemer Coal, Iron & Land Co. v. Doak, 152 Ala. 166, 44 So. 627, 12 L.R.A. (N.S.) 389; Louisville & N. R. Co. v. Anchors, 114 Ala. 492, 22 So. 279, 62 Am. St. Rep. 116; Wilson v. Chippewa Valley Electric R. Co. 120 Wis. 636, 98 N. W. 536, 66 L.R.A. 912.
Annotation: 92 A.L.R. 1369.
See NEGLIGENCE [Also 20 R. C. L. p. 20, § 15].

[6] Bentson v. Brown, 186 Wis. 629, 203 N. W. 380, 38 A.L.R. 1417.

[7] Annotation: 38 A.L.R. 1424, s. 72 A.L.R. 1357, and 92 A.L.R. 1369.

[8] Ludke v. Burck, 160 Wis. 440, 152 N. W. 190, L.R.A.1915D, 968.

[9] Carlson v. Johnke, 57 S. D. 544, 234 N. W. 25, 72 A.L.R. 1352. Annotation: 92 A.L.R. 1367.

[10] Hopkins v. Droppers, 184 Wis. 400, 198 N. W. 738, 36 A.L.R. 1156.

[11] Bragdon v. Kellogg, 118 Me. 42, 105 A. 433, 6 A.L.R. 669; Allen v. Schultz, 107 Wash. 393, 181 P. 916, 6 A.L.R. 676.
Annotation: 6 A.L.R. 680, s. 27 A.L.R. 1197, and 79 A.L.R. 1277; 57 A.L.R. 1106.

[12] Bragdon v. Kellogg, 118 Me. 42, 105 A. 433, 6 A.L.R. 669.

[13] Ibid.

[14] Allen v. Schultz, 107 Wash. 393, 181 P. 916, 6 A.L.R. 676.
Annotation: 6 A.L.R. 680, s. 27 A.L.R. 1197, and 79 A.L.R. 1277.
Failure of an automobile driver to turn sufficiently to the right to avoid collision with another automobile coming from the opposite direction is not excused as a matter of law, so as to entitle him to a directed verdict in an action, brought by one riding with him, for personal injuries sustained in the ensuing collision, by the circumstance that such other automobile had pulled over beyond the center of the road, with a view to making a right-hand turn, and that he did not become aware of its presence until within 20 or 25 feet of it. Lange v. Affleck, 160 Md. 695, 155 A. 150, 79 A.L.R. 1274.

§ 417. Contributory Negligence as Constituting Proximate Cause of Accident.—It is essential that the acts complained of as constituting contributory negligence contribute directly and proximately to the accident.[19] Contributory negligence in violating a statute by driving on the wrong side of the road must, in order to defeat recovery, have been the proximate cause of the injury.[20] The mere occurrence of an act of negligence on the part of the person instituting the action will not, of itself, preclude recovery, unless the surrounding circumstances establish such act as the direct cause of the accident resulting in the injuries complained of.[1] Thus, the defense of contributory negligence will fail where the relationship of the fault with respect to the accident as a proximate and contributing cause is not a necessary inference under the circumstances.[2]

§ 418. Degrees of Negligence.—It is essential to draw a sharp distinction between negligence contributing to the accident and negligence contributing to the damage sustained. The line of demarcation in this respect is not always easily discernible.[3] An act or omission that merely increases or adds to the extent of the loss or injury occasioned by another's negligence will not have the effect of contributory negligence to defeat a recovery.[4] Expressed differently, negligence which plays no part in causing the injury complained of, and only has the effect of adding to the damage resulting, is ineffective in barring the action.[5]

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[15] Annotation: 6 A.L.R. 681, s. 27 A.L.R. 1202, and 79 A.L.R. 1286.

[16] Annotation: 6 A.L.R. 681, s. 27 A.L.R. 1202, and 79 A.L.R. 1286.

[17] Dickinson v. Erie R. Co. 81 N. J. L. 464, 81 A. 104, 37 L.R.A.(N.S.) 150.

[18] Annotation: 6 A.L.R. 681, s. 27 A.L.R. 1202, and 79 A.L.R. 1286.
See supra, § 415.

[19] Newcomb v. Boston Protective Dept. 146 Mass. 596, 16 N. E. 555, 4 Am. St. Rep. 354; Norris v. Litchfield, 35 N. H. 271, 69 Am. Dec. 546; Keller v. Breneman, 153 Wash. 208, 279 P. 588, 67 A.L.R. 92.

[20] Jeffords v. Florence County, 165 S. C. 15, 162 S. E. 574, 81 A.L.R. 313.

[1] Melville v. Rollwage, 171 Ky. 607, 188 S. W. 638, L.R.A.1917B, 133; Hennessey v. Taylor, 189 Mass. 583, 76 N. E. 224, 3 L.R.A. (N.S.) 345, 4 Ann. Cas. 396; Gerhard v. Ford Motor Co. 155 Mich. 618, 119 N. W. 904, 20 L.R.A.(N.S.) 232; Keller v. Breneman, 153 Wash. 208, 279 P. 588, 67 A.L.R. 92; Deputy v. Kimmell, 73 W. Va. 595, 80 S. E. 919, 51 L.R.A.(N.S.) 989, Ann. Cas. 1916E, 656.

[2] Annotation: 40 A.L.R. 1244.

[3] **A driver of an automobile** negligently colliding with another car is not exonerated from liability for any part of the damage to such car by reason of the fact that because of the excessive speed with which it was traveling, it could not be brought under control in time to prevent it from running off the road and overturning, where no negligence on the part of the driver of the second car is found. Mahoney v. Beatman, 110 Conn. 184, 147 A. 762, 66 A.L.R. 1121.

C. CONTRIBUTORY NEGLIGENCE OF PARTICULAR PERSONS

§ 419. **Generally.**—The following sections are indicative of the wide variety of situations that may arise in connection with determining the contributory negligence of particular persons involved in automobile accidents. Application of the rules of law heretofore stated,[6] is indicated in the case of pedestrians,[7] motorists,[8] workmen in the road,[9] and other persons likely to become involved in an automobile accident.[10]

§ 420. **Driver or Operator of Vehicle.**—The general rules of contributory negligence apply to the driver or operator of a motor vehicle in his operation of the car upon the public highway. The more common situations in which he is placed, testing the factum of his own contributory negligence, are set out in the following sections. Regardless of the particular factual situation, however, the broad requirements as to the proper degree of care exercisable by the driver of a motor vehicle apply to each instance. In general, the operator of a motor vehicle is precluded from recovering for any injuries sustained or damage to his car, where the accident is attributable to his own negligence.[11] When the facts relating to contributory negligence are of such character that reasonable minds might reach different conclusions thereon, a question of fact is presented for the determination of the jury.[12]

§ 421. **—Violation of Statute or Ordinance.**—The mere fact that at the time of the accident the driver violated a statute or ordinance will not necessarily stamp him as contributorily negligent.[13] It is essential that the element of proximate cause be established.[14] It will not be presumed from such violation alone, and even where the defendant chooses to rest under the imputation of negligence which follows by reason of the violation of a statute or ordinance, it has been held that the motorist's negligence, no matter of what it consists, cannot create or defeat a right of action unless it is the proximate cause of the injury complained of.[15] Violation of a traffic ordinance regulating the movement of vehicles does not preclude recovery on the theory that the plaintiff is obliged to lay the foundation of his action in his own violation of law, in which case such violation would necessarily be a proximate cause, at least where the plaintiff can and does make a case without reference to any violation of law by him.[16]

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[4] Mahoney v. Beatman, 110 Conn. 184, 147 A. 762, 66 A.L.R. 1121.
Annotation: 66 A.L.R. 1134.

[5] Mahoney v. Beatman, 110 Conn. 184, 147 A. 762, 66 A.L.R. 1121 (refusing to permit mitigation of damages); Gould v. McKenna, 86 Pa. 297, 27 Am. Rep. 705.
Annotation: 66 A.L.R. 1136.

[6] See supra, §§ 407–418.

[7] See infra, §§ 446–463.

[8] See infra, §§ 420–438.

[9] See infra, § 444.

[10] See infra, §§ 439–443.

[11] See infra, §§ 421–438.

[12] Keir v. Trager, 134 Kan. 505, 7 P. (2d) 49, 81 A.L.R. 181.

[13] Broschart v. Tuttle, 59 Conn. 1, 21 A. 925, 11 L.R.A. 33; O'Malley v. Eagan, 43 Wyo. 233, 350, 2 P. (2d) 1063, 5 P. (2d) 276, 77 A.L.R. 582.
Annotation: 12 A.L.R. 458; 77 A.L.R. 598.
See supra, § 415.

[14] Arey v. Newton, 148 Mass. 598, 20 N. E. 327, 12 Am. St. Rep. 604.
Annotation: 12 A.L.R. 464.

[15] Annotation: 12 A.L.R. 464.

[16] Newcomb v. Boston Protective Dept. 146 Mass. 596, 16 N. E. 555, 4 Am. St. Rep. 354; Steele v. Burkhardt, 104 Mass. 59, 6 Am. Rep. 191.

§ 422. —Law of Road.—The law of the road, as established by common law, statute, or ordinance, is not an inflexible, hard and fast rule, the violation of which will, under the majority view, necessarily render the offender guilty of contributory negligence as a matter of law.[17] Wherever, under the peculiar circumstances of the particular situation, ordinary care requires the motorist to turn in violation of the ordinary rule of the road, to avoid an obstruction, person, or another vehicle, he will not, according to the majority view, be deemed contributorily negligent as a result thereof.[18] A deviation from the law of the road is sometimes necessary, and where the deviation is made to avoid an accident and is apparently necessary, it will not operate to prevent a plaintiff, otherwise free from negligence, from recovering for injuries sustained.[19] Thus, emergencies may arise when the failure to observe the ordinary rule of the road requiring a driver, in meeting another driver, to turn to the right, will not be accounted a basis for denying a plaintiff the right to recover for injuries sustained through the negligence of another.[20] It should be noted, however, that one cannot shield himself behind an emergency created by his own negligence.[1]

The view has been taken, however, that under a statute requiring drivers meeting and passing to pass on the right, a driver is never justified in turning to the left.[2]

§ 423. —Excessive Speed.—Applying the rule that violation of a traffic regulation does not constitute a defense to an action by the violator to recover for negligence unless the violation proximately contributed to the injury,[3] it has been held that violation of a speed law does not preclude a recovery by the plaintiff for injuries where the excessive speed was not a direct, contributing cause of the injury, but that it does preclude recovery where the unlawful speed was a direct, contributing cause.[4] Even though the disregard of statutory regulations as to speed is regarded as negligence per se, as it is in some jurisdictions,[5] it has been held that it does not preclude recovery unless it directly contributed to the injury complained of.[6]

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[17] Annotation: 24 A.L.R. 1304, s. 63 A.L.R. 277.

[18] Riepe v. Elting, 89 Iowa, 82, 56 N. W. 285, 26 L.R.A. 769, 48 Am. St. Rep. 356; Sims v. Eleazer, 116 S. C. 41, 106 S. E. 854, 24 A.L.R. 1293; Lawson v. Dye, 106 W. Va. 494, 145 S. E. 817, 63 A.L.R. 271; O'Malley v. Dorn, 7 Wis. 236, 73 Am. Dec. 403.

Annotation: 24 A.L.R. 1304, s. 63 A.L.R. 277.

[19] Annotation: 24 A.L.R. 1304, s. 63 A.L.R. 277.

[20] Lawson v. Dye, 106 W. Va. 494, 145 S. E. 817, 63 A.L.R. 271.

It has been held that it is the law of the road, based on reason, that where one driving on the right side of the road is compelled to turn to the left in order to avoid a head-on collision with another car which is violating the law of the road, he is not negligent in so doing, qualified only by the condition that he act as an ordinarily prudent person would act under similar circumstances. Annotation: 63 A.L.R. 278.

Similarly, a bicyclist cannot be said, as a matter of law, to have been guilty of contributory negligence in swerving from his proper side of the highway in an endeavor to avoid an automobile which suddenly turned from an intersecting street on the wrong side of the road, at a high speed, so as to place him in imminent danger of collision. Calahan v. Moll, 160 Wis. 523, 152 N. W. 179, L.R.A.1916A, 744.

[1] Annotation: 24 A.L.R. 1304, s. 63 A.L.R. 277.

See supra, § 415.

[2] Cupples Mercantile Co. v. Bow, 32 Idaho, 774, 189 P. 48, 24 A.L.R. 1296 (the majority opinion, although announcing this broad rule, does state that the danger was apparent, and not real; what would be held in the event of a real danger is problematical).

[3] See supra, § 417.

[4] Coffin v. Laskau, 89 Conn. 325, 94 A. 370, L.R.A.1915E, 959; Broschart v. Tuttle, 59 Conn. 1, 21 A. 925, 11 L.R.A. 33; Newcomb v. Boston Protective Dept. 146 Mass. 596, 16 N. E. 555, 4 Am. St. Rep. 354; Molin v. Wark, 113 Minn. 190, 129 N. W. 383, 41 L.R.A.(N.S.) 346; Bloom v. Bailey, 292 Pa. 348, 141 A. 150, 57 A.L.R. 585; O'Malley v. Eagan, 43 Wyo. 233, 350, 2 P. (2d) 1063, 5 P. (2d) 276, 77 A.L.R. 582.

Excessive speed cannot be said to have necessarily contributed to a collision between an automobile traveling at such speed on its proper side of the highway and a car proceeding in the opposite direction, not on its proper side. Annotation: 77 A.L.R. 598.

[5] Annotation: 12 A.L.R. 465.

[6] Annotation: 12 A.L.R. 464, 465; 77 A.L.R. 598.

§ 424. —**Skidding.**—The skidding of an automobile may be an incidental, rather than determinative, factor in judging the contributory negligence of a motorist injured in a collision.[7] Frequently, for example, the skidding will appear to follow, rather than precede, the collision. Such factors as the speed of the car, violation of the traffic rules, condition of the brakes, visibility—to suggest a few—may be involved with the skidding and prove equally as determinative as the latter, if not more so, in deciding the factum of contributory negligence. However, it is clear that the mere skidding of an automobile, even without the presence of any other acts of negligence on the part of the driver, may in some instances amount to negligence precluding a recovery for injuries sustained in a collision with another vehicle.[8] Thus, the entirely unexpected skidding of an automobile, under proper control, on a highway, has been viewed as constituting a sufficient basis upon which to deny recovery in the accident that followed, at least in the absence of any negligent acts on the part of the other motorist contributing thereto.[9] In cases holding that a motorist's contributory negligence, where his car skidded on a street railway or railroad track, precluded any recovery against the railway or railroad, the view has sometimes been taken that he cannot excuse his negligent conduct upon the ground that the slippery condition of the street or road made the skidding unavoidable.[10]

§ 425. —**Slippery Road; Collision with Street Car.**—In cases holding that a motorist's contributory negligence, where his car has skidded on a street railway or railroad track, precludes any recovery against the railway or railroad, frequently the view has been taken that he cannot excuse his negligent conduct upon the ground that the slippery condition of the street or road made the skidding unavoidable.[11] Thus, one driving a car along a country road on a stormy day was held, as a matter of law, to be chargeable with contributory negligence, precluding his recovery against the railroad, where he was driving at such speed that he was unable to stop when he saw the train coming, and so skidded onto the track.[12] A wife sitting beside her husband was held to be negligent in failing to warn him that he was driving too fast on a slippery tarvia surface on which the car suddenly skidded and tipped over onto a trolley car track.[13] Where a small truck, after turning at a corner, increased its speed and skidded on the wet street into a street car, the driver's contributory negligence was held to preclude any recovery in his behalf, the court remarking that there

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For a discussion of the rule that the speed of vehicles should be such that they can stop within the driver's range of vision, see infra, § 426.

[7] Rozycki v. Yantic Grain & Products Co. 99 Conn. 711, 122 A. 717, 37 A.L.R. 582; Gage v. Atchison, T. & S. F. R. Co. 91 Kan. 253, 137 P. 938, Ann. Cas. 1915B, 410; Linden v. Miller, 172 Wis. 20, 177 N. W. 909, 12 A.L.R. 665.

Annotation: 58 A.L.R. 265.

See infra, § 417.

[8] Annotation: 58 A.L.R. 265.

[9] Annotation: 58 A.L.R. 265.

[10] Gage v. Atchison, T. & S. F. R. Co. 91 Kan. 253, 137 P. 938, Ann. Cas. 1915B, 410.

Annotation: 58 A.L.R. 282.

[11] Annotation: 58 A.L.R. 282.

[12] Gage v. Atchison, T. & S. F. R. Co. 91 Kan. 253, 137 P. 938, Ann. Cas. 1915B, 410.

In holding that the contributory negligence of a motorist who skidded into the path of a locomotive precluded a recovery, a court said: "It is manifest the accident would not have happened if the highway had not been coated with ice. This coating of ice was not merely at the point of the accident, but general throughout the village. The condition of the highway was open to plaintiff's observation and should have been noted by him as a factor to be considered in operating his car. Every driver of a motor vehicle is bound, in using a highway, to notice the condition thereof occasioned by climatic incidents." Annotation: 58 A.L.R. 282.

[13] Lambert v. Eastern Massachusetts Street R. Co. 240 Mass. 495, 134 N. E. 340, 22 A.L.R. 1291.

was no room for the doctrine of last clear chance, the motorman having done all in his power to avert the collision.[14]

§ 426. **—Insufficient Lights.**—The failure of the operator of an automobile, traveling at night, to comply with statutory requirements as to lights, or to have such lights as will disclose the condition of the road and discover obstacles and dangerous places in time for his own safety, constitutes such negligence on his part as will preclude recovery for damages resulting from the negligence of another, at least in the absence of proof that plaintiff's failure to have proper lights did not contribute to the injury, contributory negligence having been set up as a defense.[15] In a number of cases, however, the defense of contributory negligence failed because the relationship between the accident and the fault in respect of the light, as a proximate and contributing cause, was not a necessary inference under the circumstances.[16] Whether the alleged absence of lights was the proximate cause of the accident and constituted such contributory negligence as will preclude recovery[17] is generally a question of fact for the jury to decide in the light of all the surrounding facts and circumstances.

§ 427. **—Parking without Lights.**—In various cases a party who stopped his car on the highway, without a rear light, has sought to recover damages for an injury to his car by another car colliding with it in the rear, or an action has been brought for personal injuries or death alleged to have been caused by the driver of the car approaching from the rear.[18] In such instances it has generally been held that while it is negligence to stop an automobile upon the highway after dark, without headlights or taillights,[19] such negligence does not absolve motorists approaching from the rear from the duty of exercising reasonable care and caution. A motorist who fails to exercise a degree of care commensurate with the surrounding hazards, and collides with an automobile standing without lights, will be precluded from recovery.[20]

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[14] Annotation: 58 A.L.R. 283.

[15] Phillips v. Davis (C. C. A. 3d) 3 F. (2d) 798, 40 A.L.R. 1241; Rebillard v. Minneapolis, St. P. & S. Ste. M. R. Co. (C. C. A. 8th) 216 F. 503, L.R.A.1915B, 953; Fisher v. O'Brien, 99 Kan. 621, 162 P. 317, L.R.A. 1917F, 610; Serfas v. Lehigh & N. E. R. Co. 270 Pa. 306, 113 A. 370, 14 A.L.R. 791; Lauson v. Fond du Lac, 141 Wis. 57, 123 N. W. 629, 25 L.R.A.(N.S.) 40, 135 Am. St. Rep. 30.

Annotation: 14 A.L.R. 794, s. 40 A.L.R. 1243.

In Phillips v. Davis (C. C. A. 3d) 3 F. (2d) 798, 40 A.L.R. 1241, the plaintiff was denied recovery on the ground of his contributory negligence in failing to turn on full lights long enough to ascertain the condition of a crossing, notwithstanding that the municipal ordinance required the dimming of lights.

See also supra, § 417.

[16] Annotation: 14 A.L.R. 795, s. 40 A.L.R. 1244.

Negligence with respect to headlights, on the part of one driving his automobile into collision with an animal on the highway will not prevent his holding the owner of the animal liable for the resulting injury, unless such negligence contributed thereto. Hansen v. Kemmish, 201 Iowa, 1008, 208 N. W. 277, 45 A.L.R. 498.

[17] Annotation: 14 A.L.R. 795, s. 40 A.L.R. 1243.

See NEGLIGENCE [Also 20 R. C. L. p. 1].

[18] Annotation: 24 A.L.R. 510, s. 47 A.L.R. 706, and 62 A.L.R. 972.

[19] See supra, § 426.

[20] Annotation: 62 A.L.R. 972.

Where plaintiffs stopped their truck without a rear light, on the right-hand side of the road, with the left wheels resting a few inches from the edge of the pavement, in which position it was struck by defendant's automobile moving in the same direction, the court held that as the night was clear and defendant had good lights, he could not have been observing his duty to proceed carefully and to be on the alert to avoid colliding with others, and that it would not disturb a verdict of the jury in favor of plaintiffs. Annotation: 62 A.L.R. 972.

Where plaintiff left a car standing on a highway in violation of a statute requiring a red taillight from half an hour after sunset to half an hour before sunrise, and defendant first saw plaintiff's car when he was from 30 to 50 feet in the rear thereof, but could not stop in time to prevent a collision, the court held that although the plaintiff was negligent, the evidence was sufficient to justify the application of the last clear chance doctrine, and a verdict for plaintiff was affirmed. Annotation: 62 A.L.R. 972.

See also supra, § 417.

§ 428. —Defective Brakes.—Evidence of the defective condition of the brakes on the plaintiff's vehicle at the time of the accident is an important factor in judging the presence of contributory negligence.[1] Thus, proof that the emergency brake on the automobile driven by the plaintiff was defective at the time the accident occurred would tend to show that the plaintiff was guilty of contributory negligence in using the car in that condition.[2] Where a statute requires motor vehicles to be equipped with adequate brakes, it has been held that failure to use reasonable care in complying therewith constitutes negligence as a matter of law.[3] However, it should be noted in this connection that no determination of liability can be made on the evidence of the defective brakes alone. It is essential that there be shown a causal connection between such defect and the accident.[4] It is generally within the province of the jury to decide what part, if any, the defective brakes had in causing the accident, and whether the rôle they played was of such character as might properly be made the basis for a finding of contributory negligence on the part of the plaintiff.[5]

§ 429. —Traveling with Impaired Vision.—A driver of an automobile, whose view is obscured by dust, smoke, or atmospheric conditions, and who nevertheless proceeds, disregarding the caution required in such situation, will be deemed contributorily negligent so as to bar a recovery by him for damages resulting from a collision with another vehicle.[6] The extent to which the speed of a car must be slackened or any other precautionary measures adopted is dependent upon the exigencies of the particular situation.[7] It has been held, for example, that an automobile driver encountering fog is not bound as a matter of law to stop and wait for the fog to lift in order to escape the charge of contributory negligence.[8] Whether the motorist exercised such care under the conditions of impaired visibility as will free him from the charge of contributory negligence is generally a question for the jury to decide.[9] As a general rule, a motorist who proceeds while blinded by the glaring headlights of an approaching vehicle, and meets with an accident, will be treated as contributorily negligent.[10] It appears in some instances that the duty of exercising the proper degree of care and caution under these circumstances is discharged by slowing up the speed of the vehicle; in other cases, nothing short of a full stop will suffice.[11]

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[1] Annotation: 63 A.L.R. 402.

[2] The fact that the brakes on an automobile, though applied 20 feet from the point of a collision, did not stop the car in time, does not show that they are defective, so as to make the owner guilty of contributory negligence. Annotation: 63 A.L.R. 402.

[3] Annotation: 63 A.L.R. 402.

[4] Annotation: 63 A.L.R. 403.

[5] Annotation: 63 A.L.R. 404.

[6] Phillips v. Davis (C. C. A. 3d) 3 F. (2d) 798, 40 A.L.R. 1241; Mathers v. Botsford, 86 Fla. 40, 97 So. 282, 32 A.L.R. 881; Gage v. Atchison, T. & S. F. R. Co. 91 Kan. 253, 137 P. 938, Ann. Cas. 1915B, 410; Thompson v. Bellingham, 112 Wash. 583, 192 P. 952, 19 A.L.R. 864; Schwalen v. W. P. Fuller & Co. 107 Wash. 476, 182 P. 592, 187 P. 367; Lauson v. Fond du Lac, 141 Wis. 57, 123 N. W. 629, 25 L.R.A.(N.S.) 40, 135 Am. St. Rep. 30 (holding that one driving an automobile on a dark, rainy night was not exercising ordinary care if he was driving it at such a rate of speed that he could not stop it within the distance in which objects were visible).

Annotation: 37 A.L.R. 587, s. 73 A.L.R. 1020.

See also infra, § 426.

[7] In Lindquist v. Thierman, 216 Iowa, 170, 248 N. W. 504, 87 A.L.R. 893, a motorist was held guilty of contributory negligence as a matter of law where, after seeing the headlights of a standing car facing towards him, he drove for some distance, in violation of a statute requiring the driver of a motor vehicle to stop "within the assured clear distance ahead."

See supra, § 426.

[8] Peasley v. White, 129 Me. 450, 152 A. 530, 73 A.L.R. 1017.

[9] Murphy v. Hawthorne, 117 Or. 319, 244 P. 79, 44 A.L.R. 1397.

Annotation: 37 A.L.R. 594, s. 73 A.L.R. 1025.

[10] Ruth v. Vroom, 245 Mich. 88, 222 N. W. 155, 62 A.L.R. 1528.

Annotation: 62 A.L.R. 1531.

[11] Annotation: 62 A.L.R. 1532, 1533.

§ 430. —Intoxication of Driver.—Voluntary drunkenness on the part of a motorist in no event furnishes an excuse for negligence or relieves him from exercising the degree of care required of a sober man under the same circumstances.[12] If one becomes voluntarily intoxicated, and negligently operates his automobile to the injury or damage of another, his intoxication furnishes no excuse for his negligence;[13] rather, it presents a question of fact to be considered by the jury in determining whether the intoxicated person was negligent, and to what extent, if any, his drunkenness contributed to the accident.[14] While it may be negligence per se to violate a statute making it a criminal offense to drive a motor vehicle while in an intoxicated condition,[15] there is no civil liability under a statute of that kind, so as to bar a plaintiff from recovering for injuries sustained, solely upon the basis of such violation.[16] Accordingly, it has been held that the fact that the injured person at the time of the accident was unlawfully operating a vehicle while intoxicated does not preclude recovery where it does not appear that his violation of the statute in driving while in that condition was the proximate cause of the injuries.[17]

§ 431. —Collisions at Intersections.—While it is true that one driving on a right-of-way street has a right to assume that his passage will not be impeded at intersections,[18] and that other motorists approaching the vicinity will obey the traffic regulations pertaining to the movement of vehicles at such intersections.[19] he will nevertheless be held to a reasonable degree of care in watching for other automobiles and to the exercise of such caution as is commensurate with reasonable prudence.[20] The driver of an automobile on a main or primary road has a right to rely on stop signs at the junction of a street and such highway; he is not guilty of contributory negligence in assuming that a vehicle on the street will regard the stop sign and stop before entering the primary highway, and he cannot be charged with negligence in acting upon such assumption.[1] A motorist who fails to exercise the required degree of care and caution in this respect and meets with an accident involving a vehicle being operated along the main thoroughfare will be deemed contributorily negligent, where it appears that such neglect proximately caused the accident, without which it would not have occurred.[2]

§ 432. —Turning between Intersections.—A motorist who attempted to turn his vehicle around between intersections and met with an accident while in the course of making such a turn will be deemed contributorily negligent, where it appears that a local ordinance prohibited such a maneuver,[3] or where other circumstances exist which indicate that the driver knew, or, in the exercise of reasonable care, should have known, of the hazards surrounding a turn of this character at that particular time and place, and failed to exercise the requisite degree of care and caution,[4] provided, of course, that such factors proximately contributed to the accident.[5] Traffic conditions, lights, warning signals, extent of observation by the motorist, etc., are all pertinent in connection with judging the contributory negligence of a driver who is injured in the course of making a turn between intersections.[6]

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[12] McIntosh v. Standard Oil Co. 89 Kan. 289, 131 P. 151, 47 L.R.A.(N.S.) 730, Ann. Cas. 1914D, 112; Bageard v. Consolidated Traction Co. 64 N. J. L. 316, 45 A. 620, 49 L.R.A. 424, 81 Am. St. Rep. 498.

Annotation: 36 A.L.R. 341.

[13] Powell v. Berry, 145 Ga. 696, 89 S. E. 753, L.R.A.1917A, 306.

[14] Bageard v. Consolidated Traction Co. 64 N. J. L. 316, 45 A. 620, 49 L.R.A. 424, 81 Am. St. Rep. 498.

Where an intoxicated man crowded, with three other intoxicated persons, into a small, one-seated, closed car which was being driven by one of the men who was an inexperienced driver, such act constitutes contributory negligence sufficient to bar recovery for his death from being struck at a crossing when the driver attempted to cross in the face of an approaching train, since if any of the men had used, or been in condition to use, their sight or hearing, they could not have failed to know of the train and avoid the accident. Annotation: 36 A.L.R. 340.

[15] Packard v. O'Neil, 45 Idaho, 427, 262 P. 881, 56 A.L.R. 317.

Annotation: 56 A.L.R. 327.

[16] Annotation: 56 A.L.R. 327.

[17] Annotation: 12 A.L.R. 469.

[18] Annotation: 81 A.L.R. 185.

See also supra, § 421.

[19] Keir v. Trager, 134 Kan. 505, 7 P. (2d) 49, 81 A.L.R. 181.

[20] Annotation: 81 A.L.R. 185.

[1] Keir v. Trager, 134 Kan. 505, 7 P. (2d) 49, 81 A.L.R. 181.

[2] Annotation: 81 A.L.R. 186.

§ 433. **—Turning without Signaling.**—A driver who turns from the course he is following and drives into an intersecting street or a private driveway without giving any signal to drivers in the rear, as it is his duty to do,[7] is guilty of contributory negligence precluding recovery for injuries sustained as a result of a collision with a vehicle in the rear.[8] However, even though the driver of an automobile fails to give any signal of his intention to turn, the circumstances may be such as to render the driver of an automobile approaching from the rear, and colliding therewith, guilty of contributory negligence as matter of law, precluding recovery by him for the resulting injury.[9] Thus, where the defendant, approaching the top of a hill with the car in low gear, having looked back and seen no car approaching from the rear, turned to the left into an unfrequented driveway without signaling, and collided with the plaintiff, a motorcycle officer, who was following and who attempted to pass without warning, the latter was held to be guilty of contributory negligence as a matter of law.[10]

§ 434. **—Backing Vehicle.**—A motorist is guilty of contributory negligence if in backing his vehicle in a public highway, he fails to look backward, not only before he begins to back up, but also while the car is in motion, or if he fails to signal other motorists who may be in the car's path, and as a result thereof an accident occurs.[11] In appraising the contributory negligence of a driver whose car was involved in an accident while backing up, there are several factors that should be carefully considered. The direction in which the car was traveling, the rate of speed, whether any signal or warning was given, the condition of traffic, visibility, the direction and general position of the other vehicle, and what observation, if any, the one in charge of the car made while backing it, are all pertinent in this connection.[12] Generally, the issue of the driver's contributory negligence in an accident occurring while his vehicle is backing up is a question of fact for the jury to decide in the light of all the surrounding facts and circumstances.[13]

§ 435. **—Parking on Wrong Side.**—While the standing of an automobile on the wrong side of the street or highway may afford a sufficient basis for a finding of contributory negligence,[14] it is a factor which must be considered in its relation to other matters, such as whether it was daylight or dark,[15] whether the street or highway is frequented or isolated in character,[16] whether there were lights on the car,[17] and whether the parking or stopping was unavoidable.[18] The questions of negligence, contributory negligence, and proximate cause must be determined from all of the circumstances, and not from the mere fact of standing on the wrong side of the street or highway.[19] It has also been held, in this connection, that a driver of an automobile on a public highway at night, who sees in front of him the headlights of another car facing him, has a right to assume to a reasonable extent that such car is in motion and will be operated in conformity with the law of the road; he cannot be charged with contributory negligence as matter of law in failing to stop or to discover that the other car is stalled.[20] The inquiry whether the acts alleged as constituting contributory negligence proximately caused the accident is generally a question for the jury to decide in the light of all the surrounding facts and circumstances.[1]

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[3] Nashville v. Black, 142 Tenn. 397, 219 S. W. 1043, 12 A.L.R. 453 (violation of ordinance prohibiting turning of vehicles upon street between corners of block may prevent recovery for injury resulting when wheel of vehicle drops into hole negligently left in pavement).

[4] Annotation: 57 A.L.R. 1107, 1108.

[5] Newcomb v. Boston Protective Dept. 146 Mass. 596, 16 N. E. 555, 4 Am. St. Rep. 354; Norris v. Litchfield, 35 N. H. 271, 69 Am. Dec. 546.

See also supra, § 417.

[6] Annotation: 57 A.L.R. 1107, 1108; 62 A.L.R. 976.

[7] See supra, § 432.

[8] Annotation: 62 A.L.R. 979.

[9] Annotation: 62 A.L.R. 979.

[10] Annotation: 62 A.L.R. 979.

[11] Taulborg v. Andresen, 119 Neb. 273, 228 N. W. 528, 67 A.L.R. 642.

Annotation: 67 A.L.R. 647.

See also supra, § 433.

[12] Sheldon v. James, 175 Cal. 474, 166 P. 8, 2 A.L.R. 1493.

[13] Annotation: 67 A.L.R. 647.

See supra, § 408.

§ 436. **—Disregard of Traffic Signal.**—While there is little authority on the question of what effect the signal of a traffic officer has upon the issue of a motorist's contributory negligence where he chooses to disregard such signal and thereafter meets with an accident, it would seem clear that the violation of a traffic warning or direction is an important factor in determining the driver's contributory negligence. Here, as in all other phases of the broad subject of contributory negligence in automobile accidents, the determination of a plaintiff's negligence precluding recovery presupposes the performance of a definite duty on his part, for the breach of which he will be barred from maintaining the action.[2] It is unquestioned that a motorist may rely to a reasonable extent upon the signal of a traffic officer,[3] at least to the point where he sees, or in the exercise of ordinary care should see, that to follow the course indicated by the signal would be to proceed in the face of danger. Then it becomes his duty to stop or take such other measures as are warranted by the exigencies of the situation.[4] The blind disregard of a traffic signal, resulting in an accident which, had the motorist obeyed the warning, never would have occurred, will undoubtedly operate to deprive the driver of his right of recovery.[5]

§ 437. **—At Railroad Crossings.**—A motorist who approaches a railroad crossing without exercising such care and caution as an ordinarily prudent person would exercise under like circumstances is guilty of contributory negligence, barring recovery for any injuries resulting from a collision with a railroad train.[6] Failure to stop, look, and listen as the vehicle approaches the crossing may constitute contributory negligence as a matter of law. The duty to exercise such precautions is not, however, a hard and fast one, applicable to all situations alike, but is largely dictated by the exigencies of the particular case.[7] Some jurisdictions apply the hard and fast rule that a motorist who enters upon a railroad crossing without first stopping, looking, and listening for approaching trains is guilty of contributory negligence per se barring recovery.[8] The fact that a motorist, in coming to a stop at a railroad crossing, does not shut off his motor, does not necessarily render him guilty of contributory negligence.[9]

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[14] Rozycki v. Yantic Grain & Products Co. 99 Conn. 711, 122 A. 717, 37 A.L.R. 582; Whitworth v. Riley, 132 Okla. 72, 269 P. 350, 59 A.L.R. 584; Waynick v. Walrond, 155 Va. 400, 154 S. E. 522, 70 A.L.R. 1014.
Annotation: 70 A.L.R. 1021.

[15] See supra, § 426.

[16] See supra, §§ 165–170.

[17] See supra, § 412.

[18] Annotation: 70 A.L.R. 1021.
See supra, § 415.

[19] Waynick v. Walrond, 155 Va. 400, 154 S. E. 522, 70 A.L.R. 1014.

[20] Whitworth v. Riley, 132 Okla. 72, 269 P. 350, 59 A.L.R. 584.

[1] Annotation: 70 A.L.R. 1026.

[2] See supra, § 408.

[3] Annotation: L.R.A.1917B, 137, 138.

[4] Melville v. Rollwage, 171 Ky. 607, 188 S. W. 638, L.R.A.1917B, 133, holding that the signal of a traffic officer to an automobilist to cross a street intersection did not absolve him from the duty of exercising reasonable care for the safety of pedestrians in the vicinity.

[5] Annotation: L.R.A.1917B, 138.

The stopping of a street car at the customary place for the discharge and taking on of passengers is no invitation to a motorist to cross ahead of the street car before it proceeds on its journey if the motorist is so situated that the street car can safely proceed and he yields the right of way; he may be held guilty of contributory negligence if he sees, or could see, that the street car has started in time to stop his automobile before reaching the tracks, and does not do so.[10] Moreover, the facts may be such as to make the motorist guilty of contributory negligence as a matter of law in driving or backing across the street car tracks without ascertaining whether a street car was approaching.[11]

§ 438. —Injury by Frightened Horse.[12]—A motorist who sustains injuries as a result of an accident caused by a horse taking fright at his vehicle may be guilty of contributory negligence barring recovery, if he knew, or in the exercise of reasonable care should have known, that the horse was about to become frightened and that there was danger of its running away; and if, notwithstanding he had time to get out of the vehicle, he remained inside and was injured.[13] Similarly, the driver of restive horses may be debarred from recovery by his own negligence in trying to force them past an automobile after they had become unmanageable.[14]

§ 439. Motorcyclists.—Motorcycles being included within the category of "motor vehicles,"[15] and those who operate same being held to a degree of care and caution not dissimilar from that imposed upon operators of automobiles,[16] it is generally held that the operator of a motorcycle is to be deemed contributorily negligent so as to bar recovery for any injuries sustained in an accident involving an automobile or another motorcycle, where the same acts would constitute contributory negligence if applied to the driver of an automobile.[17]

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[6] Pennsylvania R. Co. v. Yingling, 148 Md. 169, 129 A. 36, 41 A.L.R. 398; Union Trust Co. v. Detroit, G. H. & M. R. Co. 239 Mich. 97, 214 N. W. 166, 66 A.L.R. 1515.
Annotation: 1 A.L.R. 203, s. 2 A.L.R. 767, 41 A.L.R. 405; 54 A.L.R. 542.

[7] Pennsylvania R. Co. v. Yingling, 148 Md. 169, 129 A. 36, 41 A.L.R. 398; Union Trust Co. v. Detroit, G. H. & M. R. Co. 239 Mich. 97, 214 N. W. 166, 66 A.L.R. 1515.
Annotation: 1 A.L.R. 204, s. 2 A.L.R. 767, and 41 A.L.R. 405.

[8] Annotation: 1 A.L.R. 203, s. 2 A.L.R. 767, and 41 A.L.R. 405.

In Pennsylvania the rule that a motorist is required to stop, look, and listen is strictly applied, so that failure to comply therewith constitutes contributory negligence per se. Aiken v. Pennsylvania R. Co. 130 Pa. 380, 18 A. 619, 17 Am. St. Rep. 775.

[9] Townsend v. Missouri P. R. Co. 163 La. 872, 113 So. 130, 54 A.L.R. 538.
For further discussion of this subject, see supra, § 173. And see RAILROADS [Also 22 R. C. L. p. 1028, § 260].

[10] Dering v. Milwaukee Electric R. & Light Co. 171 Wis. 8, 176 N. W. 343, 14 A.L.R. 809.
Annotation: 14 A.L.R. 811.

[11] Annotation: 14 A.L.R. 811.

[12] As to duty toward horses, see infra, § 441.

[13] Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035, 1 L.R.A.(N.S.) 215, 108 Am. St. Rep. 196, 3 Ann. Cas. 487.

[14] Cumberland Teleph. & Teleg. Co. v. Yeiser, 141 Ky. 15, 131 S. W. 1049, 31 L.R.A. (N.S.) 1137.
See also, in this connection, Pease v. Cochran, 42 S. D. 130, 173 N. W. 158, 5 A.L.R. 936, holding that one who operates upon the road a motorcar loaded in such manner that a horse drawing a buggy becomes frightened at it is not negligent.

[15] See supra, § 5.
See also annotation: 21 L.R.A.(N.S.) 41.

[16] See supra, § 5.

§ 440. **Bicyclists.**—The mere use of a bicycle on the public highway does not make the user guilty of contributory negligence.[18] The reciprocal duties of a bicyclist and automobilist being governed by the common-law rule that each is bound to exercise reasonable care toward the other in their use of the public highways,[19] the same rules as to lack of care constituting contributory negligence are generally applied to a bicyclist as to a motorist or motorcyclist.[20]

§ 441. **Drivers of Horse-drawn Vehicles or Riders of Horses.**—It being well settled that the driver of an automobile and the driver or rider of a horse upon a highway are each held to the observance of mutual care and caution to avoid injury to the other,[1] it is generally held that the driver or rider of a horse, when approached by a motor vehicle, is required to exercise the care and caution of a reasonably prudent person,[2] and that for a failure to exercise such care he will be deemed contributorily negligent.[3] To drive upon the road with a horse known to be afraid of automobiles is not, in itself, a sufficient basis upon which to predicate a finding of contributory negligence,[4] although evidence that the horse was easily frightened in the presence of motor vehicles and would run away without apparent cause is competent upon the issue of contributory negligence.[5] A driver of a horse-drawn vehicle, who sees that the horse is about to become frightened at an approaching automobile, or is already frightened, and who fails either to stop or to take such other measures as are warranted by the exigencies of the situation, will be precluded by his negligence from recovering for any injuries resulting from a collision with the motor vehicle.[6]

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[17] Nordby v. Sorlie, 35 N. D. 395, 160 N. W. 70, L.R.A.1917B, 753; Spillers v. Griffin, 109 S. C. 78, 95 S. E. 133, L.R.A.1918D, 1193.

Annotation: Ann. Cas. 1917A, 222.

The duty of one riding a motorcycle to avoid an injury to himself by collision with an automobile is not altered by the existence of conditions in the road which make it dangerous to turn out when riding rapidly. Nordby v. Sorlie, 35 N. D. 395, 160 N. W. 70, L.R.A.1917B, 753.

[18] Annotation: 28 L.R.A.(N.S.) 944.

[19] Rogers v. Phillips, 206 Mass. 308, 92 N. E. 327, 28 L.R.A.(N.S.) 944.

See supra, § 184.

[20] Simpson v. Snellenburg, 96 N. J. L. 518, 115 A. 403, 24 A.L.R. 503; Calahan v. Moll, 160 Wis. 523, 152 N. W. 179, L.R.A. 1916A, 744.

When an automobile suddenly turns from an intersecting street on the wrong side of the road at high speed, so as to place a bicyclist traveling on the right side of the road in imminent danger of collision, the latter is not negligent per se in turning from side to side to avoid a collision. Calahan v. Moll, 160 Wis. 523, 152 N. W. 179, L.R.A.1916A, 744.

It is not negligence per se for a man riding a bicycle along a street in front of an automobile to attempt to cross the road in front of the machine if it is so far behind him that it may reasonably be expected that the driver will see him, and can and will, by the exercise of proper care, so manage the machine as to avoid a collision; but the question is one for the jury under all the circumstances of the case. Rogers v. Phillips, 206 Mass. 308, 92 N. E. 327, 28 L.R.A.(N.S.) 944.

See supra, § 439.

[1] Butler v. McCabe, 116 Ark. 26, 171 S. W. 1190, L.R.A.1915C, 702; Minor v. Mapes, 102 Ark. 351, 144 S. W. 219, 39 L.R.A.(N.S.) 214; Millsaps v. Brogdon, 97 Ark. 469, 134 S. W. 632, 32 L.R.A.(N.S.) 1177; McIntyre v. Orner, 166 Ind. 57, 76 N. E. 750, 4 L.R.A. (N.S.) 1130, 117 Am. St. Rep. 359, 8 Ann. Cas. 1087; Indiana Springs Co. v. Brown, 165 Ind. 465, 74 N. E. 615, 1 L.R.A.(N.S.) 238, 6 Ann. Cas. 656; Dreier v. McDermott, 157 Iowa, 726, 141 N. W. 315, 50 L.R.A. (N.S.) 566; Ware v. Saufley, 194 Ky. 53, 237 S. W. 1060, 24 A.L.R. 500; Shinkle v. McCullough, 116 Ky. 960, 77 S. W. 196, 105 Am. St. Rep. 249.

Annotation: 48 L.R.A.(N.S.) 947.

The driver of a team on a public highway may be found not to be negligent in failing to turn out to meet an approaching automobile if there is room in the highway for the automobile to pass without his doing so. Savoy v. McLeod, 111 Me. 234, 88 A. 721, 48 L.R.A.(N.S.) 971.

Contributory negligence on the part of one driving a cow along a public highway when it was killed by an automobile will defeat recovery for its death. Bombard v. Newton, 94 Vt. 354, 111 A. 510, 11 A.L.R. 1402.

The rider of a vicious horse, upon seeing an automobile approach and knowing that an attempt to pass it will result in a struggle for the mastery between himself and the horse, is negligent in attempting to keep the horse in the road while the automobile passes without warning the driver of the danger, so that, in case he is thrown and killed, the driver of the automobile cannot be held liable for the injury. Dreier v. McDermott, 157 Iowa, 726, 141 N. W. 315, 50 L.R.A.(N.S.) 566.

See supra, § 419.

[2] Millsaps v. Brogdon, 97 Ark. 469, 134 S. W. 632, 32 L.R.A.(N.S.) 1177; Ware v. Saufley, 194 Ky. 53, 237 S. W. 1060, 24 A.L.R. 500.

The question of the negligence of a delivery boy who is struck and injured by an automobile is for the jury where the evidence tends to show that before leaving his wagon, he looked, but did not see the automobile, and that after he had reached the ground and taken the packages he was to deliver, he walked a few steps beside the wagon, waiting for it to pass so that he could walk behind it to approach the house where the packages were to be delivered, when he was struck by the automobile coming rapidly up behind him. Gerhard v.

§ 442. Motorist Repairing Vehicle in Road.—A traveler engaged about an automobile in the highway is bound to use reasonable care for his own safety. The questions whether such care has been exercised, and whether one is guilty of contributory negligence, depend upon the facts in each case and are ordinarily questions of fact for the jury.[7] It has been held in this connection that a traveler is not confined to the right-hand side of the highway under penalty of being charged with contributory negligence, provided he does not unreasonably interfere with other motorists in their use of the road.[8] Nor is the duty of constant, unceasing vigilance imposed upon him as he works upon the automobile.[9] Similarly, the fact that the person working over the car is outside the line of the vehicle will not necessarily make him contributorily negligent.[10]

§ 443. Police or Traffic Officer.—While it may be accepted as the general rule that a traffic officer is not required to use the same degree of care in looking for approaching vehicles as would be required of an ordinary pedestrian,[11] he is, nevertheless, required to exercise such care and caution as are dictated by the exigencies of the particular situation,[12] and for a failure to discharge such duty, resulting in an accident with an automobile, the traffic

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Ford Motor Co. 155 Mich. 618, 119 N. W. 904, 20 L.R.A.(N.S.) 232.

The failure of the driver of a horse-drawn vehicle to give the statutory signal to stop to the driver of an automobile does not preclude a recovery by him for injury suffered in an action based on common-law negligence. Messer v. Bruening, 25 N. D. 599, 142 N. W. 158, 48 L.R.A.(N.S.) 945.

[3] Dreier v. McDermott, 157 Iowa, 726, 141 N. W. 315, 50 L.R.A.(N.S.) 566.

The driver of a buggy, who refuses to yield the road when an automobile attempts to pass from behind, can recover no damages for injuries inflicted by collision between the vehicles. Ware v. Saufley, 194 Ky. 53, 237 S. W. 1060, 24 A.L.R. 500.

The driver of a restive horse who, upon seeing an automobile approaching, drives into an offset from the road, where the horse becomes unmanageable, assumes the risk of injury in attempting to force it past the machine after it has been stopped beside the road. Cumberland Teleph. & Teleg. Co. v. Yeiser, 141 Ky. 15, 131 S. W. 1049, 31 L.R.A.(N.S.) 1137.

[4] Butler v. Cabe, 116 Ark. 26, 171 S. W. 1190, L.R.A.1915C, 702.

[5] Bliss v. Wolcott, 40 Mont. 491, 107 P. 423, 50 L.R.A.(N.S.) 566, 135 Am. St. Rep. 636.

[6] McIntyre v. Orner, 166 Ind. 57, 76 N. E. 750, 4 L.R.A.(N.S.) 1130, 117 Am. St. Rep. 359, 8 Ann. Cas. 1087.

[7] Daughraty v. Tebbets, 122 Me. 397, 120 A. 354, 34 A.L.R. 1507; Humes v. Schaller, 39 R. I. 519, 99 A. 55, L.R.A. 1917B, 316; Long v. Steffen, 194 Wis. 179, 215 N. W. 892, 61 A.L.R. 1155; Schacht v. Quick, 178 Wis. 330, 190 N. W. 87, 25 A.L.R. 130.

A truck driver who, to repair a punctured tire, places his truck on the side of the road, with ample passing space in the highway, with lights lighted and a person on guard to signal approaching cars while he works in front of the car within its protection, is free from contributory negligence as a matter of law. Annotation: 25 A.L.R. 136, s. 34 A.L.R. 1513, and 61 A.L.R. 1159.

[8] Southall v. Smith, 151 La. 967, 92 So. 402, 27 A.L.R. 1194; Schacht v. Quick, 178 Wis. 330, 25 A.L.R. 130, 190 N. W. 87.

Annotation: 25 A.L.R. 136, s. 34 A.L.R. 1515, and 61 A.L.R. 1164.

[9] Annotation: 34 A.L.R. 1515, s. 61 A.L.R. 1164.

[10] Annotation: 61 A.L.R. 1166.

[11] Beyrent v. Kaplan, 315 Pa. 353, 172 A. 651, 92 A.L.R. 1515.

See infra, § 446.

[12] Annotation: 92 A.L.R. 1520.

officer will be viewed as contributorily negligent, barring a recovery. Precisely what will be treated as the minimum of reasonable care in this respect, so as to preclude application of the doctrine of contributory negligence, is largely a question of fact for the jury to decide in the light of all the surrounding facts and circumstances.[13] For example, a traffic officer was held contributorily negligent where, after informing a motorist that her car was improperly parked and that she must move on, he walked behind the vehicle and was injured when it backed up, it appearing that that was the only way the motorist could comply with the officer's request to move on.[14]

§ 444. Persons Working in Road.—The general rule is that a workman employed in the street, being required to exercise only that degree of care which a reasonably prudent or careful person would exercise under the same circumstances,[15] is justified in assuming that the driver of an automobile will exercise some care to avoid striking him.[16] Accordingly, it has been held that since a person employed at work in a street must necessarily devote his attention to his work, he is not guilty of contributory negligence for failure to keep a sharp lookout for approaching vehicles.[17] While it is clear that in some instances one working in the road may be held guilty of contributory negligence as a matter of law, precluding recovery for an injury received when he was struck by an automobile,[18] the question of his contributory negligence is generally one for the jury to decide.[19]

§ 445. Persons Alighting from or Boarding Street Car.—A passenger who is about to get off a stationary trolley car at its regular stopping place is not, as a matter of law, contributorily negligent because he fails to look out for approaching vehicles.[20] He may assume to a reasonable extent that the car itself, in coming to a stop at a customary stopping place, will warn vehicles in the vicinity not to pass too close, and that if they do pass, they will give him sufficient space to clear safely the street car.[1] However, situations may arise where failure on the part of the passenger to look before leaving the street car, or while crossing to the curb, will constitute such contributory negligence as will preclude recovery.[2] Whether a person is chargeable with contributory negligence for failure to look in both directions after alighting from the street car, before starting to cross the street, is a question for the jury to determine.[3] Similarly, the question whether a person standing in the street at the regular stopping place of an approaching street car, intending to board the car, is guilty of contributory negligence in failing to observe the approach of an automobile is largely a factual one for the jury to decide.[4] In general, the rules applicable to the care and caution properly exercisable by a pedestrian in crossing a road or street will prevail in determining the contributory negligence of a person who is injured while crossing to or from a trolley car.[5]

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[13] Annotation: 92 A.L.R. 1520.

[14] Annotation: 92 A.L.R. 1520.

[15] Chaney v. Moore, 101 W. Va. 621, 134 S. E. 204, 47 A.L.R. 800.
Annotation: 47 A.L.R. 808.

[16] Annotation: 47 A.L.R. 808.

[17] Chaney v. Moore, 101 W. Va. 621, 134 S. E. 204, 47 A.L.R. 800.
Annotation: 47 A.L.R. 809.

[18] Annotation: 47 A.L.R. 809.

[19] Annotation: 47 A.L.R. 809.

In one case where an employee of a street railway company, while working in the road, was struck from the rear by defendant's automobile, it was held to be proper to submit the case to the jury under the doctrine of last clear chance, where the evidence showed that the plaintiff, while engaged in his work in broad daylight on the street, was standing with his back to the defendant's automobile when it was approaching him. Annotation: 47 A.L.R. 810.

[20] Annotation: 47 A.L.R. 1244.

A passenger is not negligent in alighting from a street car, knowing that an automobile is following the car, if it is not so close that it cannot be stopped by the exercise of ordinary care and prudence on the part of the driver before it reaches him. Marsh v. Boyden, 33 R. I. 519, 82 A. 393, 40 L.R.A.(N.S.) 582.

[1] Marsh v. Boyden, 33 R. I. 519, 82 A. 393, 40 L.R.A.(N.S.) 582.
Annotation: 47 A.L.R. 1244, 1247.

A passenger alighting from a street car at a place other than a crosswalk has a right to presume that the driver of an automobile following the car will pass to the left as required by statute, and the jury may consider the driver's failure to do so, to the injury of the passenger, as evidence of negligence on his part. Foster v. Curtis, 213 Mass. 79, 99 N. E. 961, 42 L.R.A. (N.S.) 1188, Ann. Cas. 1913C, 1116.

[2] Day v. Cunningham, 125 Me. 328, 133 A. 855, 47 A.L.R. 1229.
Annotation: 47 A.L.R. 1246.

§ 446. Pedestrians—In General.—It is sought to include herein the more common situations involving a pedestrian's contributory negligence in his use of the public streets. As in other instances in which the negligence of a motorist or the person injured through the operation of the vehicle is tested by familiar rules to determine whether any acts on the part of the person seeking recovery are of such character that they may reasonably be said to have proximately contributed to the accident, so, with pedestrians injured by an automobile upon the street, it is essential to determine the reciprocal duties of the automobilist as well as of the pedestrian before any determination relative to contributory negligence can be arrived at. Reference to the foregoing sections should therefore be supplemented by a perusal of such textual material elsewhere in this work as defines the duties of pedestrians in specific situations and the correlative duties of motorists in connection therewith.[6]

§ 447. —Rules Applicable to Pedestrians.—The general rule is stated that pedestrians have the right to use a public street at any time of day or night.[7] They not only have the legal right to travel in the street, but, in the absence of a restrictive statute or ordinance, may cross or traverse the road at any point and in any direction, and the mere fact that one does so does not render him guilty of contributory negligence as a matter of law.[8] As in other cases, however, he must exercise reasonable care for his own safety, taking into account all the circumstances, and where he seeks to cross at a point other than the intersection, he may be chargeable with some additional vigilance over that required of those who use the road under less dangerous conditions.[9] Negligence of a pedestrian in his use of the public thoroughfares, contributing to an accident involving an automobile being operated thereupon, will bar recovery for any resulting injuries,[10] subject, of course, to the general requirement that the acts

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[3] Wolfe v. Ives, 83 Conn. 174, 76 A. 526, 19 Ann. Cas. 752.

Annotation: 47 A.L.R. 1244.

See supra, § 215.

Stepping off a moving car when an automobile is in plain view and only a few feet away has been viewed as constituting contributory negligence as a matter of law. Annotation: 47 A.L.R. 1249.

[4] Hennessey v. Taylor, 189 Mass. 583, 76 N. E. 224, 3 L.R.A.(N.S.) 345, 4 Ann. Cas. 396; Ouellette v. Superior Motor & Mach. Works, 157 Wis. 531, 147 N. W. 1014, 52 L.R.A.(N.S.) 299.

Annotation: 47 A.L.R. 1252.

It is not negligence per se for a pedestrian to stop at a point upon a crosswalk to await the passing of a street car, to which point he had proceeded after satisfying himself that no automobile was in the immediate vicinity, without thereafter keeping a constant watch for the approach of such vehicles. Melville v. Rollwage, 117 Ky. 607, 188 S. W. 638, L.R.A.1917B, 133.

[5] See infra, § 451.

[6] See supra, §§ 187–228.

[7] Annotation: 50 A.L.R. 1512; 67 A.L.R. 109.

See also infra, § 189.

[8] Hatzakorzian v. Rucker-Fuller Desk Co. 197 Cal. 82, 239 P. 709, 41 A.L.R. 1027.

See supra, § 211.

[9] See supra, § 211.

[10] Baker v. Close, 204 N. Y. 92, 97 N. E. 501, 37 L.R.A.(N.S.) 487; Ludke v. Burck, 160 Wis. 440, 152 N. W. 190, L.R.A.1915D, 968; Minor v. Stevens, 65 Wash. 423, 118 P. 313, 42 L.R.A.(N.S.) 1178; Ritter v. Hicks, 102 W. Va. 541, 135 S. E. 601, 50 A.L.R. 1505.

Annotation: Ann. Cas. 1916E, 669.

A pedestrian is not, however, bound, as a matter of law, when lawfully using the public highways, to be continuously looking or listening to ascertain if automobiles are approaching under penalty that upon his failure to do so, if he is injured, his own complained of as constituting contributory negligence must be the proximate cause of the accident.[11] Thus, a pedestrian who, while crossing a street, sees an automobile approaching and thereafter voluntarily leaves a place of safety and attempts to cross in front of the vehicle, will be deemed contributorily negligent so as to bar recovery, even though the driver failed to sound a warning signal.[12]

§ 448. —**Nature of Pedestrian's Right.**—The rights of pedestrians and vehicular traffic in the use of streets and highways are generally "mutual, equal, and co-ordinate." A pedestrian should use ordinary care for his own safety when crossing a street or highway; however, he has the right to assume that others will use a like care to avoid injuring him.[12a] It is not necessary for a pedestrian to look and listen continually for the approach of a motor vehicle.[12b] In case of injury to a pedestrian by a vehicle, what constitutes ordinary care is generally a question of fact for the jury.[13] The law does not view a pedestrian as contributorily negligent because he has not looked a certain number of times before crossing a street or highway, nor does it impose the absolute duty of waiting until an approaching vehicle passes before attempting a crossing, unless its proximity or speed renders crossing hazardous.[14]

§ 449. —**Walking along Road.**—The rule is generally recognized that in the absence of an applicable statute or ordinance, a pedestrian has the right to walk longitudinally in a street or highway and is not, as a matter of law, guilty of contributory negligence in doing so.[15] However, a pedestrian walking longitudinally in a street or highway must exercise reasonable or ordinary care for his safety.[16] The fact that a pedestrian walks along the traveled parts of the highway, while not contributory negligence as a matter of law, is a circumstance to be considered in determining the degree of care required under the existing conditions.[17] The strict law of the road, that where one is traveling in a vehicle

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negligence must be conclusively presumed. Gerhard v. Ford Motor Co. 155 Mich. 618, 119 N. W. 904, 20 L.R.A.(N.S.) 232.

[11] Keller v. Breneman, 153 Wash. 208, 279 P. 588, 67 A.L.R. 92; Salsich v. Bunn, 205 Wis. 524, 238 N. W. 394, 79 A.L.R. 1069.
Annotation: 65 A.L.R. 205; 79 A.L.R. 1069.
See also supra, § 417.

[12] Annotation: 65 A.L.R. 205.
A finding that no recovery could be had upon the ground that the plaintiff was guilty of contributory negligence was held sustained where there was evidence that he had taken a step or two into a street, 35 feet wide, when he saw approaching the taxicab which hit him, and that when he had proceeded to within about 5 feet of the curb, the cab was about 80 feet away, and that he was struck just as he was stepping from the street to the curb. Annotation: 65 A.L.R. 206.

Where it is found that a pedestrian, without looking, stepped off the curb immediately in front of defendant's automobile, which was moving slowly and carefully and giving warning signals, no recovery can be had. Annotation: 65 A.L.R. 205.

It is not necessary that pedestrians look at the precise moment when they step from the curb, but they must look at such a time and place as reasonably to be of some benefit in protecting them, and so as to give them knowledge of the condition of the traffic. Annotation: 65 A.L.R. 205.
See infra, § 451.

[12a] Annotation: Ann. Cas. 1916E, 670.

[12b] Bachelder v. Morgan, 179 Ala. 339, 60 So. 815, Ann. Cas. 1915C, 888; Baker v. Close, 204 N. Y. 92, 97 N. E. 501, 38 L.R.A. (N.S.) 487; Mosso v. E. H. Stanton Co. 75 Wash. 220, 134 P. 941, L.R.A.1916A, 943.
Annotation: Ann. Cas. 1916E, 669.

[13] Ritter v. Hicks, 102 W. Va. 541, 135 S. E. 601, 50 A.L.R. 1505; Salsich v. Bunn, 205 Wis. 524, 238 N. W. 394, 79 A.L.R. 1069.
See supra, § 447.

[14] Ritter v. Hicks, 102 W. Va. 541, 135 S. E. 601, 50 A.L.R. 1505.

[15] Hatzakorzian v. Rucker-Fuller Desk Co. 197 Cal. 82, 239 P. 709, 41 A.L.R. 1027; Marton v. Pickrell, 112 Wash. 117, 191 P. 1101, 17 A.L.R. 68.
Annotation: 67 A.L.R. 109.

[16] Hatzakorzian v. Rucker-Fuller Desk Co. 197 Cal. 82, 239 P. 709, 41 A.L.R. 1027; Marton v. Pickrell, 112 Wash. 117, 191 P. 1101, 17 A.L.R. 68.

[17] Hatzakorzian v. Rucker-Fuller Desk Co. 197 Cal. 82, 239 P. 709, 41 A.L.R. 1027.
A pedestrian walking along a highway is required by law to use only reasonable and ordinary care under the circumstances, and it is error to instruct the jury that "he must use all his senses to prevent an accident." Annotation: 67 A.L.R. 111.

and meets another vehicle, he must turn to the right, does not apply to pedestrians.[18] It has been held that a pedestrian who walks along a street or highway in violation of a statute requiring pedestrians at night to walk on the left-hand side of the street or roadway is guilty of contributory negligence as a matter of law.[19] However, a pedestrian lawfully walking longitudinally in a street or highway is not, as a matter of law, guilty of contributory negligence because he does not look, or continue to look, back for the approach of automobiles from the rear.[20] Pedestrians walking along on the left-hand side of a street would not naturally expect an automobile to come up behind them on that side of the road, and they are under no legal obligation to look back to see whether they are in danger of being struck from behind.[1] It is for the jury to determine the questions of relative negligence in case of a collision between an automobile and a pedestrian who was walking along the road.[2]

§ 450. **—Crossing Road Generally.**—The contributory negligence of a pedestrian who meets with injury by an automobile while crossing the street, always a source of prolific litigation, is, to a very large extent, a factual question and dependent in the main upon the peculiar circumstances of the individual case, rather than upon abstract rules of conduct, nonconformity to which may or may not form a sufficient basis upon which to predicate a finding of contributory negligence. The conditions of traffic at the time of the accident,[3] extent of visibility,[4] character of crossing attempted,—whether diagonal,[5] between intersections,[6] or at crossings,[7]—and any other explanatory factors, are all pertinent in connection with an evaluation of the pedestrian's conduct at the time of the accident.

§ 451. **—Failure to Look while Crossing Road.**—A pedestrian, upon stepping from the curb on to a traveled street, is bound to take notice of the conditions of traffic, and must not blindly step into a place of obvious danger.[8] Similarly, a pedestrian will be viewed as guilty of contributory negligence where it appears that she attempted to cross the street ahead of a vehicle which was plainly visible and approaching from a distance at a rate that rendered her attempt to cross palpably dangerous.[9] However, a pedestrian who is lawfully crossing a public thoroughfare need not be constantly looking or listening to ascertain if automobiles are approaching, under the penalty that if he fails to do so and is injured, his failure conclusively charges him with negligence.[10]

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[18] Marton v. Pickrell, 112 Wash. 117, 191 P. 1101, 17 A.L.R. 68.
Annotation: 17 A.L.R. 71; 67 A.L.R. 111.

[19] Keller v. Breneman, 153 Wash. 208, 279 P. 588, 67 A.L.R. 92.

[20] Hatzakorzian v. Rucker-Fuller Desk Co. 197 Cal. 82, 239 P. 709, 41 A.L.R. 1027.

[1] Hatzakorzian v. Rucker-Fuller Desk Co. 197 Cal. 82, 239 P. 709, 41 A.L.R. 1027; Marton v. Pickrell, 112 Wash. 117, 191 P. 1101, 17 A.L.R. 68.
Annotation: 67 A.L.R. 112.

[2] Annotation: 17 A.L.R. 72.

[3] See supra, § 413.

[4] See infra, § 459.

[5] See infra, § 456.

[6] See infra, § 454.

[7] See infra, § 452.

[8] Zoltovski v. Gzella, 159 Mich. 620, 124 N. W. 527, 26 L.R.A.(N.S.) 435, 134 Am. St. Rep. 752; Salsich v. Bunn, 205 Wis. 524, 238 N. W. 394, 79 A.L.R. 1069.

A pedestrian is required to use such care as a reasonably prudent person in a like situation would use. Wolfe v. Ives, 83 Conn. 174, 76 A. 526, 19 Ann. Cas. 752.
Annotation: 65 A.L.R. 205; 79 A.L.R. 1073.

The jury must determine how far failure to observe the amount and kind of travel on the street is indicative of such want of care as ought to bar his recovery. Hennessey v. Taylor, 189 Mass. 583, 76 N. E. 224, 3 L.R.A.(N.S.) 345, 4 Ann. Cas. 396.

[9] Annotation: 65 A.L.R. 205.

[10] Ritter v. Hicks, 102 W. Va. 541, 135 S. E. 601, 50 A.L.R. 1505; Deputy v. Kimmell, 73 W. Va. 595, 80 S. E. 919, 51 L.R.A.(N.S.) 989, Ann. Cas. 1916E, 656.

Ordinary care requires that a pedestrian crossing a busy city street observe, before leaving the zone of safety at the sidewalk or curb, the traffic approaching from the left, and, when at or near the center, note the traffic approaching from the right, unless there are attending circumstances

Nor is he under a duty to look for automobiles traveling on the wrong side of the street, under penalty of being deemed contributorily negligent in the event of an accident.[11] In determining the existence of contributory negligence, it is not required that the pedestrian shall have looked at the precise moment when he stepped from the curb, but rather, at such time and place as would reasonably have been of some benefit in protecting him, and would have given him knowledge of the condition of traffic.[12]

§ **452. —At Intersections.**—Since the general rule is that a pedestrian is under no absolute duty to look up and down the street which intersects the one he is about to cross, to see if there are any vehicles approaching from such direction,[13] his failure so to act is not contributory negligence as a matter of law.[14] Similarly, since it is well settled that a pedestrian is not under a duty, on crossing a street at a proper place, constantly to keep his eyes on an automobile which, without warning, turns a corner, since his rights are equal to those of the driver,[15] a finding of contributory negligence on the part of the pedestrian is not warranted where it is shown he exercised reasonable care in traversing the intersection.[16] Generally the question of the pedestrian's contributory negligence under these circumstances is for the jury to decide, in the light of all the surrounding facts and circumstances.[17] However, the situation may be such as to make the pedestrian guilty of contributory negligence as a matter of law,[18] as where a pedestrian enters upon an intersection without using his senses of sight and hearing, and blindly proceeds in the face of dangers which would have been observed had he exercised reasonable care.[19]

Statutes or ordinances giving pedestrians the right of way at street crossings create a preferential, but not an absolute, right in their favor; notwithstanding such statutes or ordinances, pedestrians still owe a duty to exercise ordinary care for their own safety.[20] They have, however, a right to assume that the driver of an approaching automobile will exercise reasonable care and comply with

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which reasonably cause his attention to be diverted. Ivy v. Marx, 205 Ala. 60, 87 So. 813, 14 A.L.R. 1173; Wolfe v. Ives, 83 Conn. 174, 76 A. 526, 19 Ann. Cas. 752; Hennessey v. Taylor, 189 Mass. 583, 76 N. E. 224, 3 L.R.A.(N.S.) 345, 4 Ann. Cas. 396; Baker v. Close, 204 N. Y. 92, 97 N. E. 501, 38 L.R.A.(N.S.) 487; Salsich v. Bunn, 205 Wis. 524, 238 N. W. 394, 79 A.L.R. 1069; Bentson v. Brown, 186 Wis. 629, 203 N. W. 380, 38 A.L.R. 1417.

If observation is made before entering the street, failure to look the second time while crossing the thoroughfare is not contributory negligence, as a matter of law, but the question is one for the jury to determine. Annotation: 79 A.L.R. 1083.

[11] Annotation: 79 A.L.R. 1089.

[12] See infra, § 458.

A pedestrian about to cross a city street is not necessarily negligent in failing to look backward for approaching automobiles. Cusick v. Miller, 102 Kan. 663, 171 P. 599, L.R.A.1918D, 1086.

[13] See supra, § 451.

[14] **In one instance** a pedestrian struck by an automobile turning around the corner from an intersecting street was held not to be guilty of contributory negligence as matter of law because she failed, before crossing, to look in the direction from which the car came, the court saying that if she had done so and had seen the automobile, she could not have known it would turn around the corner, but, on the contrary, would have had the right to assume that it would not make the turn, because no horn was blown. Hempel v. Hall, 136 Md. 174, 110 A. 210, 9 A.L.R. 1245. Annotation: 9 A.L.R. 1248, s. 44 A.L.R. 1299; 96 A.L.R. 786.

[15] See supra, § 448.

[16] Annotation: 44 A.L.R. 1301.

[17] Annotation: 44 A.L.R. 1300; 96 A.L.R. 788.

[18] Annotation: 44 A.L.R. 1301.

It has been held that where a boy running along a street sees and constantly watches an automobile coming from the opposite direction on the street on which he is running, and, when starting across the intersecting street, slows up a little on the thought that the car may turn into such street, but, being unable to stop in time when the car suddenly turns into the intersecting street, tries to pass diagonally in front of it and is struck by it, he is guilty of contributory negligence as matter of law. Stewart v. Olson, 188 Wis. 487, 206 N. W. 909, 44 A.L.R. 1292.

[19] Henderson v. O'Leary, 177 Wis. 130, 187 N. W. 994, 24 A.L.R. 942.

[20] Horwitz v. Eurove, 129 Ohio St. 8, 193 N. E. 644, 96 A.L.R. 782.
Annotation: 96 A.L.R. 786.

the provisions of the statutes or ordinances governing the movement of vehicles at intersections.[21] The question of the pedestrian's contributory negligence in such cases is generally one of fact for the jury.[22]

§ 453. —**Reliance on Traffic Signal.**—In accordance with the well-settled rule that a pedestrian starting to cross a street at a crossing, with the traffic signal in his favor, has the right of way over traffic until he reaches the opposite curb,[23] it is clear that a pedestrian who does not continually look for approaching vehicles as he makes such crossing is not thereby rendered contributorily negligent in the event of an accident.

§ 454. —**Between Intersections.**—In accordance with the general rule that a pedestrian has the right, in the absence of prohibition by statute or ordinance, to cross a street at any point, either directly or diagonally, and is not restricted to the regular crossings,[1] it may be accepted as the prevailing rule, subject, of course, to local statutory exceptions thereto, that the fact that a pedestrian undertakes to cross a street at a place other than a regular crossing will not, of itself, constitute contributory negligence, so as to defeat an action for injuries received on being struck by an automobile.[2] However, such fact is a circumstance to be taken into consideration in determining his contributory negligence.[3] It is clear that while a pedestrian has the right to cross between crossings, if he elects to do so rather than go to the regular crossing, he will be required to use greater care for his own safety than is required of him when he crosses at the place provided for pedestrians.[4] However, an instruction that a pedestrian attempting to cross a street at a place other than a crosswalk must exercise greater care for his safety than one attempting to cross on a crosswalk has been viewed as too general in scope.[5] It appears, from a review of the decisions treating the point, that the rule by which to determine whether one crossing a street between crossings has exercised the proper degree of care is the rule of ordinary caution, i. e., Did he use the care which the ordinarily prudent person would use in the same place and under the same circumstances?[6]

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[21] Annotation: 96 A.L.R. 787.

The element of reassurance as to the right of way and the expected yielding thereof on the part of the driver of an automobile takes some of the burden of the necessity of dodging across streets from the pedestrians. Annotation: 96 A.L.R. 787.

[22] Horwitz v. Eurove, 129 Ohio St. 8, 193 N. E. 644, 96 A.L.R. 782.
Annotation: 96 A.L.R. 788.

[23] Railway Exp. Agency v. Little (C. C. A. 3d) 50 F. (2d) 59, 75 A.L.R. 963; Railway Exp. Agency v. Little (C. C. A. 3d) 50 F. (2d) 59, 75 A.L.R. 963.
Annotation: 75 A.L.R. 970.
See also supra, § 448.

[1] Stringer v. Frost, 116 Ind. 477, 19 N. E. 331, 2 L.R.A. 614, 9 Am. St. Rep. 875.

[2] Peterson v. Ballantine, 205 N. Y. 29, 98 N. E. 202, 39 L.R.A.(N.S.) 1147; Watts v. Plymouth, 255 Pa. 185, 99 A. 470, 3 A.L.R. 1110; McKeon v. Delbridge, 55 S. D. 579, 226 N. W. 947, 67 A.L.R. 311; Ritter v. Hicks, 102 W. Va. 541, 135 S. E. 601, 50 A.L.R. 1505.
Annotation: 14 A.L.R. 1183, s. 67 A.L.R. 320.

[3] Annotation: 14 A.L.R. 1184, s. 67 A.L.R. 320.

[4] Ivy v. Marx, 205 Ala. 60, 87 So. 813, 14 A.L.R. 1173.
Annotation: 67 A.L.R. 321.
See supra, § 450.

[5] Annotation: 67 A.L.R. 321.

It has been held that one attempting to cross a congested street diagonally does not exercise his full duty of care by merely looking in the direction from which traffic may be expected under a municipal ordinance; he must also look out for automobiles which may be backing into a parking space. Sheldon v. James, 175 Cal. 474, 166 P. 8, 2 A.L.R. 1493.

[6] Peterson v. Ballantine, 205 N. Y. 29, 98 N. E. 202, 39 L.R.A.(N.S.) 1147; Watts v. Plymouth, 255 Pa. 185, 99 A. 470, 3 A.L.R. 1110.
Annotation: 67 A.L.R. 321.

A pedestrian crossing a street 40 feet from an intersection is not required to anticipate heedless acts on the part of automobile drivers, but may assume that they will act with care. Ritter v. Hicks, 102 W. Va. 541, 135 S. E. 601, 50 A.L.R. 1505.
See also supra, § 448.

§ 455. **—Effect of Violation of Statute or Ordinance.**—In some jurisdictions pedestrians are forbidden by statute or ordinance from crossing a street between intersections. The decisions interpreting the effect of a violation of such statutes or ordinances are not entirely in accord. In a few jurisdictions the view has been expressed that the mere violation of such a statute or ordinance would not alone, as a matter of law, render the pedestrian guilty of contributory negligence if he was struck by an automobile, unless his act constituted the proximate cause of the accident.[7] The decisions in other jurisdictions favor a more strict construction of such regulatory provisions and hold a pedestrian to be contributorily negligent as a matter of law if he crosses a street in violation of a statute or ordinance.[8] However, it appears that even in such instances the contributory negligence of the pedestrian in violating the statute or ordinance will not necessarily operate as a bar to recovery. Such questions as the proximate cause of the accident, whether the defendant saw the pedestrian in time to avoid the occurrence, and the degree of care or vigilance exercised by the motorist, may make the issue one of fact for the jury to decide in the light of all the surrounding circumstances.[9]

§ 456. **—Diagonal Crossing.**—The degree of care imposed upon a pedestrian who crosses a street at a point other than the crosswalk[10] is particularly emphasized where he does not essay a direct crossing, but pursues a long diagonal route.[11] A pedestrian who seeks to make a diagonal crossing will be held contributorily negligent if he fails to exercise the degree of caution and observance imposed by the dangers and hazards surrounding such a course.[12] Thus, it has been held that where a pedestrian crosses diagonally a street on which considerable automobile traffic moves, it becomes his duty to look for automobiles not only when he leaves the curb, but also when he arrives at the center of the street, before proceeding across the path of any oncoming traffic on his right,[13] and that if he fails to perform such duty, he will be viewed as contributorily negligent.[14]

§ 457. **—Turning or Jumping Back.**—The sudden jumping or turning back of a pedestrian as he crosses the street may make him guilty of such contributory negligence as will preclude recovery for any injuries sustained in an accident with an automobile being driven along the street.[15] Having gained a place of comparative safety, or adopted a course calculated to remove him from danger, a pedestrian who thereafter confuses a motorist by suddenly placing himself in the car's path is viewed as having contributed directly to the resulting accident.[16] Whether the pedestrian's conduct in turning or jumping back constituted the proximate cause of the accident is generally a question for the jury to decide.[17]

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[7] Ivy v. Marx, 205 Ala. 60, 87 So. 813, 14 A.L.R. 1173.

Annotation: 14 A.L.R. 1198, s. 67 A.L.R. 333.

[8] Annotation: 14 A.L.R. 1198, s. 67 A.L.R. 333; 49 A.L.R. 1407, 1408.

[9] Snyder v. Campbell, 145 Miss. 287, 110 So. 678, 49 A.L.R. 1402, holding that while such violation may be viewed as necessarily contributing to the accident, the plaintiff is not thereby precluded from recovery, but that any amount recovered should be reduced in the proportion that his negligence bore to the negligence of the defendant.

Annotation: 14 A.L.R. 1198, s. 67 A.L.R. 335.

[10] See supra, § 454.

[11] Sheldon v. James, 175 Cal. 474, 166 P. 8, 2 A.L.R. 1493.

The duty of using due care requires a greater degree of alertness when a pedestrian is crossing a street diagonally than is necessary when he is crossing at a crosswalk. Annotation: 79 A.L.R. 1092.

[12] Annotation: 79 A.L.R. 1092.

[13] Mosso v. E. H. Stanton Co. 75 Wash. 220, 134 P. 941, L.R.A.1916A, 943 (contributory negligence of pedestrian held question for jury).

Annotation: 79 A.L.R. 1092.

[14] Sheldon v. James, 175 Cal. 474, 166 P. 8, 2 A.L.R. 1493; Mosso v. E. H. Stanton Co. 75 Wash. 220, 134 P. 941, L.R.A.1916A, 943.

[15] Annotation: 93 A.L.R. 565.

A pedestrian crossing a wide street, who stops in the roadway, at a safe place beside the street car track, for a street car to pass, and then walks back in the direction from which he came, without looking for approaching vehicles, is guilty of contributory negligence where, in retracing his steps, he walks in front of an automobile proceeding at a moderate rate of speed and is knocked down and injured before the motorist can avoid him. Annotation: 65 A.L.R. 209.

§ 458. —**Failure to Look Behind.**—A pedestrian who arrives at a street intersection and attempts to make a crossing is not contributorily negligent because he fails to look behind him for approaching vehicles.[18] However, situations may arise, due to the dangerous character of the surrounding circumstances, where such failure will be viewed as contributory negligence barring a recovery.[19] For example, such dangerous conditions may be congested and dangerous traffic conditions at an intersection,[20] obscured vision,[1] poor visibility, etc.[2]

§ 459. —**Obstructed View.**—Under the rule requiring every user of the highway to exercise reasonable care for his own safety and protection, a pedestrian crossing or about to cross a street or highway when his view of an approaching motor vehicle is obstructed is usually required to exercise a greater degree of care than would under other circumstances be necessary, and he is contributorily negligent if he fails to take proper precautions to discover and observe the approach of such vehicles before placing himself in a position of danger and as a result meets with an accident.[3] There are cases which state that how often or how thoroughly a person must look before crossing a street is a question of fact for the jury. But these same cases assert his duty to use his eyes for self-protection, and they assume a view through sufficient space to give him a reasonable assurance of safety. Looking only when the view is so obstructed as not to give such assurance is no better than not looking at all. To illustrate, it has been held that a pedestrian who attempts to cross from one side of a bridge to the other by stepping onto the roadway, which he knows to be used by automobiles, in immediate proximity to a cloud of smoke which completely obscures his vision, is so negligent as a matter of law as to prevent his holding the owner of an automobile liable for injuries inflicted upon him when it emerges from the smoke.[4] But it is not contributory negligence as a matter of law for a pedestrian to attempt to cross a street merely because his view to the right is obstructed. For example, to require a pedestrian to refrain from crossing a busy street intersection in the business section of a large city during a rush hour until the street is free from obstructions would be to require more than ordinary care and to impose on such pedestrian the degree of care applicable in all its strictness only to travelers at a railroad crossing in looking out for approaching trains.[5]

§ 460. —**Standing on Sidewalk.**—While the sidewalk is considered a safety zone for pedestrians thereon[6] so as to absolve them from the duty of looking and listening for the approach of a vehicle,[7] it is clear that if the failure of a pedestrian to use ordinary and reasonable care contributes to cause his injury by a motor vehicle while he is on the sidewalk, he cannot recover.[8]

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[16] Annotation: 65 A.L.R. 210.

[17] Annotation: 65 A.L.R. 210.

[18] Cusick v. Miller, 102 Kan. 663, 171 P. 599, L.R.A.1918D, 1086.

[19] Annotation: 79 A.L.R. 1094.

[20] See supra, § 452.

[1] See infra, § 459.

[2] See infra, § 459.

[3] Annotation: 79 A.L.R. 1094.

[4] State ex rel. Schaffer v. Allen (Mo.) 253 S. W. 768, 28 A.L.R. 1270.

[5] Annotation: 79 A.L.R. 1094.

A pedestrian's failure to see an automobile approaching in a blinding and tempestuous rainstorm, with its lights difficult to distinguish from street lights, or even his failure to lok at all, has been held not to constitute contributory negligence as a matter of law. Annotation: 79 A.L.R. 1094.

[6] See supra, § 189.

§ 461. **—Crossing Private Driveway.**—A pedestrian on the sidewalk has the right to assume that motorists driving their vehicles along an intersecting private driveway into the road will give proper warning of their approach.[9] Thus, a pedestrian will not be deemed guilty of contributory negligence when struck by an automobile which is being backed from a driveway while he is passing along the sidewalk merely because he fails to look up the intersecting drive for the approach of the vehicle.[10] However, circumstances may exist which will impose upon the pedestrian a greater degree of vigilance and caution than would ordinarily be exacted. Any facts that would serve to increase the caution of the prudent person—as, for example, prior knowledge of the presence of a driveway at that particular point—will prove pertinent in determining the pedestrian's contributory negligence at the time of the accident.[11]

§ 462. **—Stepping around Vehicle.**—When a pedestrian steps from behind one automobile in front of another automobile, without looking or listening, and is injured by the moving car, he is guilty of contributory negligence as a matter of law.[12] Accordingly, a pedestrian who suddenly comes into the street from behind a standing automobile immediately in front of a car being driven along the highway is guilty of contributory negligence and is not entitled to recover for the resulting injuries.[13] However, one attempting to cross a street in front of a standing street car is not negligent in failing to observe that an automobile is attempting to pass the car on the left contrary to the municipal ordinances.[13a]

§ 463. **—Struck by Backing Vehicle.**—A pedestrian crossing a street will be viewed as contributorily negligent if he fails to exercise ordinary care to protect himself against automobiles which may be backing in or into the street. The observation of ordinary care in this connection is not fully performed by the pedestrian's merely looking to the left or right as he steps on the street.[14] If the pedestrian observes the approach of the backing vehicle in time to avoid its approach,[15] or is placed in such a position that if he looks and exercises the care demanded of the prudent pedestrian, he will be able to avoid being struck by the vehicle as it backs up, he will be deemed contributorily negligent so as to preclude a recovery.[16]

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[7] Corona Coal & I. Co. v. White, 158 Ala. 627, 48 So. 362, 20 L.R.A.(N.S.) 958; Brown v. Des Moines Steam Bottling Works, 174 Iowa, 715, 156 N. W. 829, 1 A.L.R. 835.

Annotation: 1 A.L.R. 853, s. 75 A.L.R. 575.

[8] Mastin v. New York, 201 N. Y. 81, 94 N. E. 611, 33 L.R.A.(N.S.) 784.

Annotation: 1 A.L.R. 856, s. 75 A.L.R. 575.

It was held, in one case, that a photographer who placed his camera on the sidewalk near the curb and covered his face with a dark cloth to focus the instrument and, while in that position, was struck by an ashcart, was guilty of contributory negligence. Mastin v. New York, 201 N. Y. 81, 94 N. E. 611, 33 L.R.A.(N.S.) 784.

A child over five years of age cannot be said to be guilty of contributory negligence if, while playing upon the sidewalk in front of her home on a narrow city street, she hugs an electric lamppost with her arm and it is crushed by a long iron pipe extending from the rear of a truck which the driver is attempting to turn from the street into an alley on the opposite side. Annotation: 75 A.L.R. 575.

See supra, § 417.

[9] See supra, § 447.

[10] Annotation: 67 A.L.R. 661.

[11] See supra, § 447.

[12] Annotation: 65 A.L.R. 207.

The driver of an automobile is not liable for the death of a person suddenly stepping into the path of the machine from the protection of a standing car. Grein v. Gordon, 280 Pa. 576, 124 A. 737, 34 A.L.R. 1511

[13] Annotation: 65 A.L.R. 208.

As to contributory negligence of one repairing automobile along highway, see supra, § 442.

[13a] Harris v. Johnson, 174 Cal. 55, 161 P. 1155, L.R.A.1917C, 477.

[14] Sheldon v. James, 175 Cal. 474, 166 P. 8, 2 A.L.R. 1493.

[15] Annotation: 67 A.L.R. 662.

§ 464. Persons under Disability—In General.—While persons of impaired faculties—as, for example, persons who are deaf, blind, or paralyzed—are equally with other pedestrians entitled to the use of the streets and highways and it is not necessarily negligence for them to travel thereon unattended, yet they, like other persons, will be held contributorily negligent if they fail to exercise reasonable care for their own safety and, as a result thereof, meet with an accident.[17] Like those in possession of all of their faculties, persons under disabilities are required to use ordinary care under the circumstances. In order to exercise that care, however, such persons are undoubtedly called upon to take precautions which one under no disability need not take.[18] Precisely what quantum of care and caution will be exacted in each situation is obviously dependent upon the facts of the individual case, as well as upon the nature and extent of the disability of the person involved.[19]

§ 465. —Blind Persons.—The mere circumstance that a person who is injured in an automobile accident on a street or highway is blind does not necessarily make him guilty of contributory negligence.[20] A blind pedestrian is held to the exercise of ordinary care in his use of the streets and highways.[1] In evaluating the measure of care properly exercisable under such circumstances, the oft-repeated statement that a blind person is called upon to take precautions which one under no disability need not take [2] is logically interpreted as meaning that he must use such prudence in his conduct as conforms to the test of what a reasonably cautious person similarly afflicted would use under like circumstances.[3] The general requirement that a blind pedestrian should make greater use of his other senses to discover, if possible, whether any vehicle is approaching the street over which he is passing,[4] does not carry with it the implication that in the discharge of such duty, the disabled person is held to anything higher than the exercise of ordinary care as that expression is used herein.[5]

§ 466. —Deaf Persons.—The fact that one is deaf does not in itself make it negligence for him to be on the public streets.[6] A citizen's right to be upon the public highway does not depend upon his ability to hear, so long as he makes proper use of his sight and other faculties.[7] A pedestrian whose hearing is impaired, like other persons using the highway,[8] is bound to use ordinary care; but one so afflicted may be obliged, under penalty of being considered contributorily negligent, to take precautions, practice diligence, and sharpen other senses, unnecessary for a normal person in order to exercise the ordinary care which the law requires of all.[9]

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[16] Annotation: 67 A.L.R. 662.

[17] Weinstein v. Wheeler, 127 Or. 411, 271 P. 733, 62 A.L.R. 574.
Annotation: 62 A.L.R. 578.

[18] Deputy v. Kimmell, 73 W. Va. 595, 80 S. E. 919, 51 L.R.A.(N.S.) 989, Ann. Cas. 1916E, 656.
Annotation: 62 A.L.R. 580.

[19] Annotation: 62 A.L.R. 580.

[20] Weinstein v. Wheeler, 127 Or. 411, 271 P. 733, 62 A.L.R. 574.
Annotation: 62 A.L.R. 581.

[1] Annotation: 62 A.L.R. 581.

[2] Annotation: 62 A.L.R. 580.

[3] Keith v. Worcester & B. Valley Street R. Co. 196 Mass. 478, 82 N. E. 680, 14 L.R.A. (N.S.) 648; Neff v. Wellesley, 148 Mass. 487, 20 N. E. 111, 2 L.R.A. 500; Weinstein v. Wheeler, 127 Or. 411, 271 P. 733, 62 A.L.R. 574.
Annotation: 62 A.L.R. 581.

[4] Annotation: 62 A.L.R. 581.

[5] Keith v. Worcester & B. Valley Street R. Co. 196 Mass. 478, 82 N. E. 680, 14 L.R.A.(N.S.) 648.

[6] Annotation: 62 A.L.R. 580.

[7] Annotation: 62 A.L.R. 580.

[8] See supra, § 449.

[9] Annotation: 62 A.L.R. 582.
A pedestrian who was struck by an auto-

§ 467. **—Aged Persons.**—A person is not prohibited from using the streets because he has reached old age,[10] nor will contributory negligence be attributed to him solely because of the infirmities incidental to his advanced years where he is involved in an automobile accident.[11] The aged person is held to the exercise of ordinary care in his use of the streets,[12] and it is only for a failure to use such care that he may be deemed contributorily negligent so as to bar recovery for injuries sustained in an automobile accident.[13]

§ 468. **—Intoxicated Persons.**—The fact that a pedestrian who was injured by an automobile was intoxicated at the time of the accident does not of itself charge him with contributory negligence,[14] although in an action to recover for the injuries sustained, the voluntary intoxication of the plaintiff may be considered by the jury in determining whether, at the time of the accident, he was taking such care of his safety as would be required of a reasonably prudent man under the circumstances.[15] His intoxication will not operate to relieve him from the necessity of exercising the ordinary care for his safety which the law imposes upon a sober man.[16] No greater care, however, is required of such a person than is required of one in his sober senses, and the fact that he was intoxicated becomes immaterial if he exercised the degree of care required of a sober person.[17]

§ 469. **—Other Disabilities.**—The circumstance that one is subject to vertigo or other illness will not serve to make him contributorily negligent in his use of the public thoroughfares.[18] He has as much right to the use of the

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mobile which was backing out across the sidewalk had a perfect right to assume that the sidewalk was safe for her to walk upon and that it was as safe for a deaf and nearsighted person as it was for those whose sight and hearing were normal. Annotation: 62 A.L.R. 582.

[10] Annotation: 62 A.L.R. 580.

[11] Annotation: 62 A.L.R. 580.

[12] Annotation: 62 A.L.R. 583.

The degree of care which a pedestrian about to cross a street at an intersection must exercise is ordinary care—that is, such care as persons of ordinary prudence would use under similar circumstances. It is error in an action by a pedestrian sixty-eight years of age who was struck by an automobile to instruct the jury that the plaintiff could only be held to that degree of care which might reasonably be expected from one under the same conditions of the same age, sex, intelligence, and judgment, there being no claim of incompetency due to any of these causes. If the person did not use ordinary care for her own safety, she was not to be excused on account of her age, because she was neither too young nor too old to be unappreciative of the dangers to which she was exposed, and her sex was no excuse for her carelessness. Annotation: 62 A.L.R. 582.

[13] See supra, § 408.

An elderly man is not as a matter of law guilty of contributory negligence, but the question is one for the jury, where there is evidence that at 10 o'clock in the evening he attempted to cross a street intersection; that before leaving the curb, he looked up and down the street and saw only one automobile and waited for that to pass; that he then took two steps off the curb and looked again both ways and, seeing no automobile, proceeded to cross the street, which was 50 or 60 feet wide, and had reached a point about 15 feet from the opposite curb when, suddenly confronted by the glare of the headlights of the defendant's automobile, which he had not seen, he became confused, stopped, turned around sharply, put up his hands, started again, and was struck by the car which was approaching very fast and gave no audible signal. Annotation: 62 A.L.R. 583.

[14] Annotation: 62 A.L.R. 583.

[15] **While a drunken man is as much entitled to a safe street as a sober one,** nevertheless evidence of the plaintiff's physical and mental condition as to sobriety or intoxication is relevant, in an action by him to recover for an injury, to the issue as to whether he had heedlessly and witlessly exposed himself to injury at the immediate moment of the accident. Annotation: 62 A.L.R. 584.

The plaintiff in an action to recover for an injury resulting from being run into by an automobile may be cross-examined as to whether or not he was intoxicated at the time, since such evidence reflects upon his capacity for accurate observation, correct memory, and unbiased judgment. Annotation: 62 A.L.R. 584.

See also NEGLIGENCE [Also 20 R. C. L. p. 1].

[16] Annotaiton: 62 A.L.R. 584.

[17] Annotation: 62 A.L.R. 584. See supra, § 408.

[18] Woodson v. Metropolitan Street R. Co. 224 Mo. 685, 123 S. W. 820, 30 L.R.A.(N.S.) 931, 20 Ann. Cas. 1039.

streets as one not so afflicted.[19] Similarly, a person who faints upon the road is not for that reason viewed as contributorily negligent;[20] and the same applies to one who is lame or a cripple.[1]

§ 470. Children.—The defense of contributory negligence may be invoked in an action by or on behalf of a child for injuries sustained in an automobile accident[2] where the child was of sufficient age to exercise discretion for the avoidance of the injury;[3] but a child is not held to the same precautions as an adult and is required to exercise only that care which is ordinarily exercised by minors of like age, mental capacity, and discretion.[4] There is no precise age at which, as a matter of law, a child is to be held accountable for his actions to the same extent as an adult, but the question as to the capacity of a particular child at a particular time to exercise care to avoid a particular danger is one of fact falling within the province of a jury to determine.[5] However, the doctrine of contributory negligence admits of no general application in the instance of children involved in automobile accidents. It can only apply where the child is of sufficient age, knowledge, experience, intelligence, and discretion to be capable to some extent of deliberating and acting upon his own experience and judgment.[6] In the event it appears that the conduct of a motorist in striking a child is wanton in character, the contributory negligence of the infant will not relieve the driver of liability.[7]

§ 471. —Playing in Street.—A boy playing in the street has the right to assume to a reasonable extent that an automobile driver will exercise the care required by law, and will give some warning before running him down, and to that degree is not bound to use constant viligance to avoid a charge of contributory negligence.[8] At the same time, however, an infant is not given the full run of the streets for play to the exclusion of motorists who may be driving in the vicinity.[9] Where it appears that the child's play is attended by dangers which the infant is fully capable of appreciating, taking into consideration all the factors explanatory thereof,[10] such as his age, intelligence, etc.,[11] he will generally be viewed as having assumed the risk of playing in the street under the particular circumstances surrounding the accident and will hence be barred by his contributory negligence from recovery for any resulting injuries.[12] In no sense are motorists on the highway insurers against accidents arising from negligence of children,[13] although such negligence in a particular case may not be a defense for a driver who is also guilty of negligence.[14]

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[19] See supra, § 447.

[20] McGee v. Jones County, 161 Iowa, 296, 142 N. W. 957, 48 L.R.A.(N.S.) 141.

[1] Annotation: 14 L.R.A.(N.S.) 648 et seq.; 103 Am. St. Rep. 276.

[2] Annotation: 67 A.L.R. 329.

[3] See NEGLIGENCE [Also 20 R. C. L. p. 124, §§ 105 et seq.].

[4] **Although not requiring from a child an adult's caution,** the law requires that in order for him to absolve himself from the charge of contributory negligence, he must exercise that degree of care which ordinarily prudent children of his age and experience are accustomed to use under similar circumstances. Day v. Cunningham, 125 Me. 328, 133 A. 855, 47 A.L.R. 1229. Annotation: 67 A.L.R. 330.

See supra, § 447.

[5] Annotation: 67 A.L.R. 329.

[6] Zoltovski v. Gzella, 159 Mich. 620, 124 N. W. 527, 26 L.R.A.(N.S.) 435, 134 Am. St. Rep. 752.

The degree of care required of a boy playing ball in the street in order to be free from the charge of contributory negligence when he is struck by an automobile has been defined as the same care that a person of the same age, education, and mental and physical capacity ordinarily uses under like circumstances. If he has greater natural capacity and intelligence than the average boy of his age, he is bound to use a degree of care proportionately greater. Annotation: 44 A.L.R. 1305.

A boy between fourteen and fifteen years of age who, while playing ball in the street, ran backward to catch a ball and was struck by a motor truck, was held guilty of contributory negligence, there being no element of danger which a boy of his age was not capable of fully appreciating. Day v. Cunningham, 125 Me. 328, 133 A. 855, 47 A.L.R. 1229; Zoltovski v. Gzella, 159 Mich. 620, 124 N. W. 527, 26 L.R.A.(N.S.) 435, 134 Am. St. Rep. 752; Clerici v. Gennari, 102 N. J. L. 377, 132 A. 667, 44 A.L.R. 1302.

[7] Annotation: 44 A.L.R. 1306.

See supra, § 414.

[8] Annotation: 44 A.L.R. 1305.

[9] Clerici v. Gennari, 102 N. J. L. 377, 132 A. 667, 44 A.L.R. 1302.

See infra, § 447.

[10] **If the child has greater natural capacity** and intelligence than the average boy of his age, he is bound to use a degree of care proportionately greater. Annotation: 44 A.L.R. 1305.

[11] Zoltovski v. Gzella, 159 Mich. 620, 124 N. W. 527, 26 L.R.A.(N.S.) 435, 134 Am. St. Rep. 752.

See supra, § 470.

§ 472. **—Coasting along Road.**—The fact that a child injured by an automobile was coasting in the street or highway at the time of the accident does not necessarily render him contributorily negligent so as to preclude recovery for the resulting injuries.[15] For example, children who coast along snow-laden streets upon sleds are not thereby viewed by the law as contributorily negligent in the event of an automobile accident. The precise degree of care and caution that devolves upon those who use the highways or streets for this purpose must depend upon the facts and circumstances of the individual case, considering the hazards of the situation. Whether a motorist exercised the requisite degree of care and vigilance in watching for coasters in his path is a factual question for the jury to decide, unless the facts are not in dispute.[16]

§ 473. **—Alighting from or Boarding Street Car.**—The conventional rules of conduct applicable to a person who alights from or boards a street car [17] do not generally apply to children with the same force and effect,[18] for it is generally held that the failure of a child to look carefully for any automobiles in the immediate vicinity as he boards or leaves a street car will not of itself constitute contributory negligence as a matter of law so as to bar recovery for any resulting injuries.[19] The standard of care and caution properly exercisable by the child in boarding or alighting from the street car is that which may reasonably be expected of one of the same age and intelligence.[20]

§ 474. **—Darting in Front of Automobile.**—The rule that when any person, without looking or listening, suddenly steps from behind an object in the street in front of another object, which injures him, he is guilty of contributory negligence,[1] is not applicable with the same strictness in the case of a child of immature years.[2] But an infant who recklessly leaves a place of safety and runs into the face of danger without such regard for the hazards of his actions as may reasonably be looked for in one of his age and capacity will be viewed as contributorily negligent.[3]

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[12] Clerici v. Gennari, 102 N. J. L. 377, 132 A. 667, 44 A.L.R. 1302.

Where a thirteen-year-old boy at play in the street became so engrossed in his play that he attempted to run across the street directly in front of an approaching automobile, without taking any precaution to look, such evidence was held sufficient to show contributory negligence. Zoltovski v. Gzella, 159 Mich. 620, 124 N. W. 527, 26 L.R.A.(N.S.) 435, 134 Am. St. Rep. 752.

[13] See supra, § 447.

[14] Albert v. Munch, 141 La. 686, 75 So. 513, L.R.A.1918A, 240.

[15] Terrill v. Virginia Brewing Co. 130 Minn. 46, 153 N. W. 136, L.R.A.1915E, 1028, Ann. Cas. 1917C, 453.

Annotation: 20 A.L.R. 1435.

[16] Terrill v. Virginia Brewing Co. 130 Minn. 46, 153 N. W. 136, L.R.A.1915E, 1028, Ann. Cas. 1917C, 453.

Annotation: 20 A.L.R. 1438.

[17] See supra, § 215.

[18] Annotation: 47 A.L.R. 1253.

See supra, § 470.

[19] Day v. Cunningham, 125 Me. 328, 133 A. 855, 47 A.L.R. 1229 (expressive of the minority view that the negligence of a parent is imputed to the child).

Annotation: 47 A.L.R. 1253, 1254.

[20] Annotation: 4 A.L.R. 1191; 47 A.L.R. 1253.

[1] See supra, § 462.

[2] Annotation: 65 A.L.R. 214.

[3] Zoltovski v. Gzella, 159 Mich. 620, 124 N. W. 527, 26 L.R.A.(N.S.) 435, 134 Am. St. Rep. 752.

A boy eight years old who alighted from a vehicle in the street and started to run across, then stopped when he saw the defendant's automobile approaching a few

§ 475. Occupant of Car—In General.—A person riding in an automobile driven by another, even though generally not chargeable with the driver's negligence,[4] is not absolved from all personal care for his own safety, but is under the duty of exercising reasonable care to avoid injury.[5] The care exacted is that which an ordinarily prudent person would exercise under like circumstances.[6] The law fixes no different standard of duty for a passenger in an automobile than for the driver. Each is bound to use reasonable care. What conduct on the passenger's part is necessary to comply with this duty must depend upon all the circumstances, one of which—and unquestionably an important one—is that he is merely a passenger having no control over the management of the vehicle in which he is riding.[7]

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feet away, and again started and endeavored to cross the street in front of the car, which he either ran against or was struck by, was held guilty as a matter of law of contributory negligence so as to bar a recovery. Annotation: 65 A.L.R. 215.

While the driver of an automobile is required to be vigilant, he is not bound to anticipate that a child will suddenly dart from the side of the street or suddenly run across the street in front of his car. Annotation: 65 A.L.R. 197.

See supra, § 470.

[4] As to imputing the negligence of the driver to the occupant, see infra, § 494.

[5] Ferguson v. Lang, 126 Kan. 273, 268 P. 117, 63 A.L.R. 1423; Winston v. Henderson (Farmers' Bank & T. Co. v. Henderson) 179 Ky. 220, 200 S. W. 330, L.R.A.1918C, 646; Wachsmith v. Baltimore & O. R. Co. 233 Pa. 465, 82 A. 755, Ann. Cas. 1913B, 679; Schwartz v. Johnson, 152 Tenn. 586, 280 S. W. 32, 47 A.L.R. 323.

Annotation: 18 A.L.R. 309, s. 22 A.L.R. 1294, 41 A.L.R. 767, 47 A.L.R. 293, 63 A.L.R. 1432, and 90 A.L.R. 984.

A guest in a car is not barred from recovering against the driver or owner for injuries resulting from the negligent operation of the automobile on the theory of joint enterprise or joint adventure if he had no control over the operation of the car. Annotation: 18 A.L.R. 309, s. 22 A.L.R. 1294, 41 A.L.R. 767, 47 A.L.R. 293, 63 A.L.R. 1432, and 90 A.L.R. 984.

Noncompliance with a statutory requirement that automobiles should be supplied with two lights at the front of the car does not as a matter of law amount to contributory negligence on the part of a guest riding in the car. Chambers v. Minneapolis, St. P. & S. Ste. M. R. Co. 37 N. D. 377, 163 N. W. 824, Ann. Cas. 1918C, 954. See also, in same connection, Tyree v. Tudor, 183 N. C. 340, 111 S. E. 714, citing R. C. L.

A person who, possessed of all his faculties and knowing that there is always some danger in traveling in an automobile, accepts an invitation to ride as the guest of the driver, assumes the risk of the ordinary dangers of which he is aware and cannot hold the driver of the car responsible in damages for an accident if there was no fault or negligence or imprudence on the driver's part. Jacobs v. Jacobs, 141 La. 272, 74 So. 992, L.R.A.1917F, 253.

The voluntary drinking of liquor until intoxicated, by one subsequently killed while riding in an automobile because of the negligent operation thereof by the driver, who was himself intoxicated, furnishes no excuse for the former's negligence, or relief to him from the consequences thereof. Powell v. Berry, 145 Ga. 696, 89 S. E. 753, L.R.A.1917A, 306.

[6] Brommer v. Pennsylvania R. Co. (C. C. A. 3d) 179 F. 577, 29 L.R.A.(N.S.) 924, writ of certiorari denied in 223 U. S. 718, 56 L. ed. 628, 32 S. Ct. 522; Davis v. Chicago, R. I. & P. R. Co. (C. C. A. 8th) 159 F. 10, 16 L.R.A.(N.S.) 424; Cotton v. Willmar & S. F. R. Co. 99 Minn. 366, 109 N. W. 835, 8 L.R.A.(N.S.) 643, 116 Am St. Rep. 422, 9 Ann. Cas. 935; Howe v. Minneapolis, St. P. & S. Ste. M. R. Co. 62 Minn. 71, 64 N. W. 102, 30 L.R.A. 684, 54 Am. St. Rep. 616; Minnich v. Easton Transit Co. 267 Pa. 200, 110 A. 273, 18 A.L.R. 296; Wachsmith v. Baltimore & O. R. Co. 233 Pa. 465, 82 A. 755, Ann. Cas. 1913B, 679.

Annotation: 18 A.L.R. 311, s. 22 A.L.R. 1294, 41 A.L.R. 767, 47 A.L.R. 293, 63 A.L.R. 1432, and 90 A.L.R. 984.

The circumstances of a case may be such that a guest may be held to have assumed risks arising from the operation of an automobile. Walker v. Kroger Grocery & Baking Co. 214 Wis. 519, 252 N. W. 721, 92 A.L.R. 680.

If the passenger or guest does not exercise such care as a reasonably prudent person should exercise in the circumstances, not being an infant non sui juris, he cannot recover for injuries occasioned by a failure to exercise such care. Union Traction Co. v. Gaunt, 193 Ind. 109, 135 N. E. 486, 23 A.L.R. 649.

Whether a passenger or guest in a public or private conveyance, including a wife riding in a car driven by her husband, having no control over its movement, may be denied recovery for personal injury or death on the ground of contributory negligence, depends upon his or her own failure to exercise a proper degree of care, and not upon that of the driver. Miller v. Union P. R. Co. 290 U. S. 227, 78 L. ed. 285, 54 S. Ct. 172.

[7] Annotation: 18 A.L.R. 311, s. 22 A.L.R. 1294, 41 A.L.R. 767, 47 A.L.R. 293, 63 A.L.R. 1432, and 90 A.L.R. 984.

A guest riding in the front seat of a motor vehicle is not excused from all responsibility with reference to watching the road for approaching cars, but he may rely upon the driver's watchfulness more or less, according to the circumstances, without forfeiting his right of recovery against one through whose negligence he is injured. Leclair v. Boudreau, 101 Vt. 270, 143 A. 401, 63 A.L.R. 1427.

See infra, § 494.

§ 476. —Extent of Reliance.—The general rule may be stated to be that ordinarily a driver is intrusted with caring for the safety of the occupants of his car, and that unless the danger is obvious or is known to the guest, the latter may rely upon the assumption that the driver will exercise proper care and caution; but that if a guest in an automobile driven by another sees, or ought by due diligence to see, a danger not obvious to the driver, or sees that the driver is incompetent,[8] careless, or not taking proper precautions,[9] it is his duty to give some warning of danger,[10] and that a failure to do so constitutes contributory negligence.[11] Accordingly, a passenger in an automobile who was injured by a street car when the automobile skidded and overturned on the street car track cannot hold the street car company liable for the injury if he abandoned the exercise of his own faculties and trusted entirely to the care and caution of the driver whose negligence caused or contributed to the accident.[12] In other words, a passenger may not rely blindly upon the skill and driving judgment of the person at the wheel.[13]

On the other hand, there is the general rule that ordinarily, a passenger in an automobile should sit still and say nothing because any other course may be dangerous.[14] At precisely what point the duty arises to change from passive reliance to active protest is largely a factual question to be properly decided by the jury upon the basis of the available facts and circumstances.[15] Generally speaking, the duty to remain silent exists in sudden emergencies.[16]

§ 477. —Knowledge of Driver's Habits.—There can be no contributory negligence or assumption of risk arising on the part of an invited guest from the mere knowledge that the driver on former occasions has so driven his automobile as to indicate that he is likely to drive recklessly, although this may be a circumstance imposing upon the guest the exercise of reasonable care.[17] To ride with a person whom one knows to be negligent does not of itself constitute contributory negligence.[18] Accordingly, a guest who hesitates about accepting an invitation to ride by reason of having considered the driver careless on previous occasions has been held not negligent in finally consenting to go along, particularly where he asks the defendant to slow up after the latter has been speeding.[19] Where the facts are in dispute as to the driver's incompetency and the guest's knowledge thereof, the question of the guest's contributory negligence is for the jury.[20]

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[8] See supra, § 74.

[9] See infra, § 479.

[10] See infra, § 478.

[11] Annotation: 20 A.L.R. 1026.

A passenger on the back seat of an automobile traveling over a road in apparently good condition is not bound to pay constant atention to the management of the car or to keep constant lookout for imperfections in the road. Brubaker v. Iowa County, 174 Wis. 574, 183 N. W. 690, 18 A.L.R. 303. Annotation: 18 A.L.R. 309, s. 22 A.L.R. 1294, 41 A.L.R. 767, 47 A.L.R. 293, 63 A.L.R. 1432, and 90 A.L.R. 984.

A wife riding in an automobile driven by her husband when it collided at night with an unlighted train at a railroad crossing cannot be said as a matter of law to have assumed the risk of her husband's negligence where, though his eyesight and hearing were defective, there was no evidence that the wife knew that his hearing was defective, or that such defects had any causal relation to the accident, and the jury found upon sufficient evidence that the automobile was not being driven at an improper rate of speed. Archer v. Chicago, M. St. P. & P. R. Co. 215 Wis. 509, 255 N. W. 67, 95 A.L.R. 851.

[12] Lambert v. Eastern Massachusetts Street R. Co. 240 Mass. 495, 134 N. E. 340, 22 A.L.R. 1291.

In one case it was held that although the defendant was driving his automobile at an excessive speed, if the plaintiff's deceased was riding in the car and did not protest against the rate of speed at which the automobile was being driven and, by his failure so to object, acquiesced in the speed at which the automobile was being driven, and such speed was the proximate cause of his death, then the deceased was guilty of negligence which contributed to his own death and the plaintiff could not recover. Annotation: 26 A.L.R. 1428.

The apt observation has been made that it is impossible to lay down fixed rules by which to determine "just when and under what circumstances an automobile should be driven from the rear seat. Each case must rest upon its own facts." Annotation: 40 A.L.R. 1341.

To aid in determining whether one injured while riding as a passenger in an automobile was guilty of contributory negligence, the courts of Pennsylvania have laid down in striking form a rule to the effect that if a passenger voluntarily joins the driver in testing a known or manifest danger, the former is chargeable with such contributory negligence as will prevent a recovery. Minnich v. Easton Transit Co. 267 Pa. 200, 110 A. 273, 18 A.L.R. 296; Hardie v. Barrett, 257 Pa. 42, 101 A. 75, L.R.A.1917F, 444; Wachsmith v. Baltimore & O. R. Co. 233 Pa. 465, 82 A. 755, Ann. Cas. 1913B, 679.

The same rule was laid down by the supreme court of Colorado, in reference to persons riding in other vehicles. Colorado & S. R. Co. v. Thomas, 33 Colo. 517, 81 P. 801, 70 L.R.A. 681, 3 Ann. Cas. 700.

[13] Ferguson v. Lang, 126 Kan. 273, 268 P. 117, 63 A.L.R. 1423.

Annotation: 41 A.L.R. 767, s. 47 A.L.R. 293, 63 A.L.R. 1432, and 90 A.L.R. 984.

[14] See infra, § 482.

[15] Annotation: 18 A.L.R. 311, s. 22 A.L.R. 1294, 41 A.L.R. 768, 47 A.L.R. 293, 63 A.L.R. 1432, and 90 A.L.R. 984.

See NEGLIGENCE [Also 20 R. C. L. p. 1].

[16] See infra, § 482.

§ 478. —Duty to Warn Driver.—When dangers which are either reasonably manifest or known to an invited guest confront the driver of a vehicle and the guest has an adequate and proper opportunity to control or influence the situation for safety, if he sits by without warning or protest and permits himself to be driven carelessly to his injury, this is negligence which will bar recovery.[1] Accordingly, a person riding in the automobile of another, who fails to warn of approaching danger which, had he been reasonably careful, he could have observed in time, will be deemed contributorily negligent.[2] But if the occupant, by such use of his eyes and ears as the situation permits and such as a prudent person would have made, fails to discover a peril in time to avoid an accident, or if the situation was such as to excuse a prudent person from the duty of active care, he is not contributorily negligent.[3]

The place which a passenger occupies in an automobile is important in determining whether he exercised reasonable care and prudence to detect and warn against danger, for one on the front seat with the driver may have a far better opportunity of discovering any danger ahead in the path of the car than one in the back seat.[4]

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[17] Annotation: 51 A.L.R. 584, s. 61 A.L.R. 1252, and 65 A.L.R. 952; 91 A.L.R. 556.

One about to enter a motorcar should exercise reasonable care to see that the driver in charge is an experienced, reasonably safe, and sober person; and if he fails to do this and injury results to him from a defect in the street to which the negligence or want of skill or care on the part of the driver contributed, such negligence is chargeable to him. Winston v. Henderson (Farmers' Bank & T. Co. v. Henderson) 179 Ky. 220, 200 S. W. 330, L.R.A.1918C, 646.

[18] Annotation: 61 A.L.R. 1261, s. 65 A.L.R. 952.

The belief or fear by a guest, based upon past experience, that the driver of a car may drive negligently, does not make him contributorily negligent in his acceptance of the invitation to ride with such driver. Marks v. Dorkin, 105 Conn. 521, 136 A. 83, 61 A.L.R. 1224.

[19] Marks v. Dorkin, 105 Conn. 521, 136 A. 83, 61 A.L.R. 1224.

[20] Annotation: 91 A.L.R. 556.

[1] Ferguson v. Lang, 126 Kan. 273, 268 P. 117, 63 A.L.R. 1423; Minnich v. Easton Transit Co. 267 Pa. 200, 110 A. 273, 18 A.L.R. 296.

A policeman clothed with authority to enforce speed laws, who makes no effort to control the speed of an automobile in which he is riding as a guest, is, where such automobile is driven at an unlawful rate of speed, guilty of negligence which will preclude him from recovering damages occasioned by the negligence of the driver of another vehicle. Hubbard v. Bartholomew, 163 Iowa, 58, 144 N. W. 13, 49 L.R.A.(N.S.) 443.

[2] Kirby v. Kansas City, K. V. & W. R. Co. 106 Kan. 163, 186 P. 744, 18 A.L.R. 299.

Annotation: 20 A.L.R. 1027, s. 26 A.L.R. 1425, 40 A.L.R. 1338, 47 A.L.R. 327, 51 A.L.R. 581, 61 A.L.R. 1252, and 65 A.L.R. 952; 41 A.L.R. 780.

The failure of a passenger in an automobile who saw another automobile approaching a street intersection while 140 feet away to give warning of the danger to the driver was held not to be contributory negligence as a matter of law, but under the circumstances, to raise a question of fact for the jury. See also Avery v. Thompson, 117 Me. 120, 103 A. 4, L.R.A. 1918D, 205.

If an adult, while riding in an automobile driven by another, sees, or ought by due diligence to see, a danger not obvious to the driver, or who sees that the driver is incompetent or careless, or is not taking proper precautions, it is his duty to give some warning of danger, and a failure to do so is negligence. Knoxville R. & Light Co. v. Vangilder, 132 Tenn. 487, 178 S. W. 1117, L.R.A.1916A, 1111.

See supra, § 77.

[3] Annotation: 41 A.L.R. 769, s. 47 A.L.R. 293, 63 A.L.R. 1432, and 90 A.L.R. 984.

The warning in those cases where it is required should be issued promptly and as soon as the passenger observes the danger.[5]

§ 479. —Duty to Protest.—An invited guest riding in an automobile driven in a reckless and dangerous manner is required to exercise such care as is reasonable and practicable to avoid injury to himself; and if he fails to warn the driver, remonstrate with him, or demand that the automobile be stopped so that he may leave it, or take any precaution for his own protection when there are time and opportunity to do so, no recovery can be had for injuries sustained by him through the negligent operation of the car.[6] By accepting the hospitality of a friend he does not excuse himself from the duty of acting for his own safety as a reasonably prudent person would, under like conditions. An invited guest is not expected to sit back and act the rôle of "mere freight."[7] A mild protest is unavailing, particularly where the passenger continues to ride in the car without further protest or request to stop.[8] But the duty of a passenger to remonstrate against excessive speed or to withdraw from the automobile if a reasonable opportunity is afforded is not absolute; he must use ordinary care for his own safety, and it is incumbent upon him to take proper steps for his own protection. But whether failing to protest against the conduct of the driver or failing to leave the automobile constitutes a want of ordinary care proximately contributing to the injury is a

[4] Annotation: 63 A.L.R. 1435.

It has been held that the occupants of the rear seat of an automobile, whose only means of observation was through the isinglass in the side curtains, it being nighttime, had a right to rely on the superior opportunity of the driver to look and listen, and on his judgment and discretion in going upon a crossing; but that the occupant of the front seat, who had an opportunity to realize the dangerous situation, owed the duty to exercise care and warn the driver of any danger ahead. Annotation: 63 A.L.R. 1435.

The fact that the passenger is on the rear seat with the side curtains up has been viewed as lessening such passenger's obligation to keep a lookout. Annotation: 63 A.L.R. 1435.

The fact that the plaintiff was sitting upon a seat running lengthwise of a bus, with his back to the approaching train, has been held to lighten his obligation to keep a lookout for his own safety. Annotation: 63 A.L.R. 1435.

An occupant of the rear seat of an automobile, although he did not do or say anything, was held not to be guilty of contributory negligence where it appeared that by reason of banks on both sides of the road, no view could be had of an approaching train until the traveler was very near the crossing. Annotation: 41 A.L.R. 775.

An instruction which could be construed to the effect that it was as much the duty of an invited guest sitting on the rear seat to learn of danger and avoid it as it was of the driver was held erroneous. Annotation: 61 A.L.R. 1262.

[5] Annotation: 41 A.L.R. 775, 776, s. 47 A.L.R. 293, 63 A.L.R. 1432, and 90 A.L.R. 984.

Where an occupant of an automobile approaching a railroad crossing saw an approaching train as soon as it could be seen and a second later warned the driver thereof, she cannot be said to be guilty of contributory negligence as a matter of law. Annotation: 41 A.L.R. 775, 776, s. 47 A.L.R. 293, 63 A.L.R. 1432, and 90 A.L.R. 984.

[6] Sharp v. Sproat, 111 Kan. 735, 208 P. 613, 26 A.L.R. 1421; Anthony v. Kiefner, 96 Kan. 194, 150 P. 524, L.R.A.1915F, 876, Ann. Cas. 1916E. 264.

A guest who consents to stay in an automobile when the driver attempts to run it after dark, without lights, along a road with which no one in the car is familiar, is so negligent that he cannot hold the one responsible for an unguarded excavation in the road liable for injury caused by the machine falling into it. Rebillard v. Minneapolis, St. P. & S. Ste. M. R. Co. (C. C. A. 6th) 216 F. 503, L.R.A.1915B, 953.

One who, without protest, permits the chauffeur of a hired automobile to drive at a manifestly dangerous speed on the wrong side of the road is guilty of contributory negligence so that he cannot recover from the owner of a wagon with which the automobile comes into collision. Ferguson v. Lang, 126 Kan. 273, 268 P. 117, 63 A.L.R. 1423; Hardie v. Barrett, 257 Pa. 42, 101 A. 75, L.R.A.1916F, 444. Annotation: 40 A.L.R. 1343, s. 47 A.L.R. 327, 51 A.L.R. 581, 61 A.L.R. 1252, and 65 A.L.R. 952.

[7] Sharp v. Sproat, 111 Kan. 735, 208 P. 613, 26 A.L.R. 1421; Hardie v. Barrett, 257 Pa. 42, 101 A. 75, L.R.A.1917F, 444.

[8] Annotation: 40 A.L.R. 1343, s. 47 A.L.R. 327, 51 A.L.R. 581, 61 A.L.R. 1252, and 65 A.L.R. 952.

question of fact for the jury.[9] A jury should not, however, be permitted to infer that a guest acquiesced by his silence in the reckless manner in which the driver was operating the automobile at the time of the accident, unless the reckless driving continued long enough to give the guest a reasonable opportunity to protest against it.[10]

§ 480. **—Duty to Observe Danger.**—A passenger in an automobile cannot be charged with contributory negligence in failing to see warning signals along the road or to observe a dangerous condition in the path where there is no evidence that any existed which would warn an ordinarily prudent person.[11] Similarly, with respect to the speed of the car, no negligence can properly be attributed to the passenger in failing to observe and warn against any excessive speed where there is nothing to show that he could have formed an intelligent estimate of the rate of speed.[12] Directly pertinent to this duty is the relative position of the passenger in the car.[13] It may well be, for example, that the person in the rear seat of the car did not enjoy the same range of vision as one seated next to the driver. Hence, this factor becomes important in judging the proper degree of care exercised in a particular situation.[14]

§ 481. **—Duty to Leave Vehicle.**—If a passenger knows or should, as a reasonably cautious and prudent person, know that danger may follow the operation of the car in a particular manner or in a particular course, it is his duty to take such measures as may be open to him to avoid it and he is guilty of negligence if he fails to do so.[15] If the discharge of such duty can only be met by leaving the vehicle at the first available opportunity, the passenger may be deemed contributorily negligent if he elects to remain in the car. But the passenger's duty to leave the automobile must be judged in the light of all the surrounding facts and circumstances.[16] Thus, an elderly lady sitting in the back seat of a car which was proceeding in the rain at an isolated part of a highway and skidded over the embankment was held not required to insist on being let out of the car, but to have done enough in cautioning the driver to reduce its speed.[17]

§ 482. **—Interfering with Driver.**—In certain situations the safest course is for a passenger in an automobile to sit still and say nothing, because any other course is dangerous. Certainly, interference by laying hold of an operating lever or, in an emergency, by exclamation, or even by direction or inquiry, is generally to be deprecated, as in the long run the greater safety lies in letting the driver alone.[18] The apt suggestion has been made that accidents are as likely to be caused as to be averted by outcries and unwarranted suggestions or other interference with the driver.[19] At the same time, however, a situation may arise where the circumstances are of so impelling a nature as to justify, and in some instances require, interference by the passenger—as, for example, an imminent collision of which the driver is not aware.[20] Where the exercise of reasonable care requires interference on the part of the passenger, he will be deemed contributorily negligent where he fails to take such steps as are warranted by the exigencies of the situation.[1]

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[9] Annotation: 47 A.L.R. 331, s. 51 A.L.R. 581, 61 A.L.R. 1252, and 65 A.L.R. 952.

[10] Annotation: 51 A.L.R. 585, s. 61 A.L.R. 1252, and 65 A.L.R. 952.
See supra, § 476.

[11] Brubaker v. Iowa County, 174 Wis. 574, 183 N. W. 690, 18 A.L.R. 303.
See supra, § 476.

[12] Brubaker v. Iowa County, 174 Wis. 574, 183 N. W. 690, 18 A.L.R. 303.

[13] See supra, § 484.

[14] Annotation: 63 A.L.R. 1435, s. 90 A.L.R. 984.

[15] Annotation: 63 A.L.R. 1435.
A guest may be held negligent who consents to stay in an automobile when the driver attempts to run it after dark without light on an unfamiliar road. Rebillard v. Minneapolis, etc. R. Co. 216 F. 503, 133 C. C. A. 9, L.R.A.1915B, 953.

[16] Annotation: 65 A.L.R. 957.

[17] Annotation: 61 A.L.R. 1262, s. 65 A.L.R. 952.

Where a guest told the owner that the operator (another guest) was not physically fit to drive, the former was held not required to leave the car, rather than continue therein, where she was far from home near midnight on a dark and rainy night. Annotation: 61 A.L.R. 1262.

Where the evidence did not show how many times a guest riding to the defendant's automobile had spoken to the latter concerning the speed of the car and the speed itself was uncertain prior to the accident, it was held that the guest was not required as a matter of law to have gotten out "and not have gone any further with the party;" nor was he guilty of such negligence as would necessarily bar a recovery. Annotation: 40 A.L.R. 1342, s. 47 A.L.R. 327, 51 A.L.R. 581, 61 A.L.R. 1252, and 65 A.L.R. 952.

§ 483. **—Intoxication of Driver.**—A passenger who enters a car with knowledge of the driver's intoxicated condition and thereafter rides with him under such conditions as would impel a reasonably prudent man to take all possible measures to stop or leave the vehicle is guilty of contributory negligence.[2] One is contributorily negligent in riding in an automobile with knowledge that the chauffeur is drunk so as to prevent his holding the driver of another automobile liable for an injury to him resulting from a collision of the two cars if the injury was caused by the act of the driver of the car in which he was riding.[3] But it should be clear that the accident resulting in the injuries complained of was proximately caused by the driver's lack of control over the wheel. Where, for example, it appears that an accident resulted, not from the defendant's incapacity to handle the car, but from his lack of care and desire to do a stunt to frighten his passengers, the latter may not be deemed contributorily negligent in having entered the car in the first place.[4] It should be carefully noted that the mere circumstance of having entered a car driven by an intoxicated person is not of itself determinative of the passenger's contributory negligence.[5]

§ 484. **—Riding in Dangerous Position.**—The position that a passenger assumes in an automobile while riding therein may prove important in determining his contributory negligence.[6] Where it is clear that the injuries complained of would not have happened except for the dangerous or precarious position of the passenger injured, he is barred from a recovery.[7] The mere assumption of an unconventional position in or upon the vehicle is not of itself, however, a sufficient basis upon which to predicate a finding of contributory negligence.[8] Several cases have held that it cannot be said as a matter of law to be contributory negligence on the part of one injured in a traffic accident to ride on the running board, but that in such case the question is for the jury.[9] It would appear, however, that in some situations, because of the surrounding circumstances, riding on the running board of an automobile would constitute contributory negligence as a matter of law.[10]

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[18] Annotation: 18 AL.R. 314, s. 22 A.L.R. 1294, 41 A.L.R. 767, 47 A.L.R. 293, 63 A.L.R. 1432, and 90 A.L.R. 984.

It has been held that in many cases the highest degree of caution may consist of inaction. "In situations of great and sudden peril, meddlesome interference with those having control, either by physical act or by disturbing suggestions and needless warnings, may be disastrous in its results." Ibid.

[19] Annotation: 18 A.L.R. 354, 355, s. 22 A.L.R. 1294, 41 A.L.R. 767, 47 A.L.R. 293, 63 A.L.R. 1432, and 90 A.L.R. 984.

[20] Annotation: 18 A.L.R. 355, s. 22 A.L.R. 1294, 41 A.L.R. 767, 47 A.L.R. 293, 63 A.L.R. 1432, and 90 A.L.R. 984.

[1] See supra, § 479.

[2] Powell v. Berry, 145 Ga. 696, 89 S. E. 753, L.R.A.1917A, 306; Schwartz v. Johnson, 152 Tenn. 586, 280 S. W. 32, 47 A.L.R. 323; Wayson v. Rainier Taxi Co. (Wayson v. Gould) 136 Wash. 274, 239 P. 559, 45 A.L.R. 290.

[3] Lynn v. Goodwin, 170 Cal. 112, 148 P. 927, L.R.A.1915E, 588.

The application of this rule is particularly emphasized where the car is driven through the traffic of a populous city. Schwartz v. Johnson, 152 Tenn. 586, 280 S. W. 32, 47 A.L.R. 323.

[4] Annotation: 20 A.L.R. 1028, s. 26 A.L.R. 1425; 40 A.L.R. 1338; 47 A.L.R. 327; 51 A.L.R. 581; 61 A.L.R. 1252, and 65 A.L.R. 952.

[5] **Accordingly, an instruction,** in an action by a guest to recover for an injury sustained while riding in the defendant's automobile, that the plaintiff's mere knowledge that the defendant was under the influence of intoxicants would as a matter of law bar any recovery was held erroneous, upon the theory that this withdrew from the jury the essential factor of the plaintiff's volition in continuing the journey up to the place of the collision. Annotation: 20 A.L.R. 1028, 1029, s. 26 A.L.R. 1425; 40 A.L.R. 1338; 47 A.L.R. 327; 51 A.L.R. 581; 61 A.L.R. 1252, and 65 A.L.R. 952.

Where the evidence is conflicting as to the intoxication of the driver of the car in which the plaintiff in an automobile accident case was riding, the question of plaintiff's contributory negligence in riding with a drunken driver is for the jury. Meese v. Goodman, 167 Md. 658, 176 A. 621, 98 A.L.R. 480.

[6] Annotation: 20 A.L.R. 1028.

§ 485. **—Excessive Speed, Acquiescence in.**—It is the duty of a passenger to register protest against the excessive rate of speed of a car in which he is riding and to take such measures looking to his safety as may be expected of a reasonably prudent man under similar circumstances.[11] For a failure to discharge his duty in this respect, he will be considered contributorily negligent.[12] Precisely what manner or form such protest may assume is largely governed by the facts of each case, just as a determination of the proper degree of care exercisable under the circumstances must meet its solution by the same test. For example, a guest will not be held guilty of contributory negligence on the ground that he acquiesced in a high or dangerous rate of speed where, at the beginning of the journey, the driver proceeded at a moderate rate of speed until he struck a concrete road, whereupon he increased the speed to about 30 miles an hour and the guest protested at this rate of speed three different times in a distance of 4 miles.[13] Then again, it has been held that where one was riding as the guest of the driver of an automobile without making any objection to the unlawful rate of speed at which the car was being driven and without paying any attention to what was in front of the car on the road, but leaned back and talked to other passengers on the rear seat, he could not recover for injuries sustained when the car overturned because of the unlawful speed at which it was being driven.[14] Similarly, a person shown to be familiar with the speed of automobiles who makes no effort to control the speed of an automobile in which he is riding as a guest is, where such automobile is driven at an unlawful rate of speed, guilty of negligence which will preclude him from recovering damages occasioned by the negligence of the driver of another automobile.[15] In the determination of whether a guest is contributorily negligent by acquiescing in a high rate of speed, due consideration should be given to the guest's ability to judge speed, whether he ever owned or drove a car, and the extent to which he has ridden in motor vehicles.[16]

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[7] Annotation: 20 A.L.R. 1028, s. 26 A.L.R. 1425, 40 A.L.R. 1338, 47 A.L.R. 327, 51 A.L.R. 581, 61 A.L.R. 1252, and 65 A.L.R. 952.

[8] Annotation: 41 A.L.R. 779, 780 (fourth occupant of a three-passenger automobile); 51 A.L.R. 585 (sitting in lap of another passenger).

[9] Vandell v. Sanders, 85 N. H. 143, 155 A. 193, 80 A.L.R. 550; Schomaker v. Havey, 291 Pa. 30, 139 A. 495, 61 A.L.R. 1241.

Annotation: 63 A.L.R. 1449.

[10] Annotation: 80 A.L.R. 561.

Riding at night on the running board of a swiftly moving automobile, though offered a seat inside, constitutes negligence as a matter of law, so as to bar a recovery for injuries received when thrown from the automobile under a truck which the driver of the automobile barely escaped colliding with when driving on the wrong side of the road on a sharp curve. Annotation: 41 A.L.R. 778.

[11] Annotation: 47 A.L.R. 331.

[12] Annotation: 18 A.L.R. 353, s. 41 A.L.R. 778, 47 A.L.R. 331.

A policeman clothed with authority to enforce speed laws who makes no effort to control the speed of an automobile in which he is riding as a guest is, where such automobile is driven at an unlawful rate of speed, guilty of negligence which will preclude him from recovering damages occasioned by the negligence of the driver of another automobile. Hubbard v. Bartholomew, 163 Iowa, 58, 144 N. W. 13, 49 L.R.A.(N.S.) 443.

[13] Annotation: 47 A.L.R. 331.

There was held to be no evidence whatever of any contributory negligence on the part of a back-seat guest who did not know the speed at which the car was going and who had ridden with the defendant many times and considered him a careful driver. Annotation. 65 A.L.R. 957.

[14] Annotation: 47 A.L.R. 331.

§ 486. **—At Railroad Crossings.**—It is the duty of one riding in an automobile with another, on approaching a railroad crossing, to use ordinary care for his own protection and safety by looking or listening a reasonable distance from the railroad tracks for the approach of a train, so that he can, by the exercise of ordinary care, inform the driver of the approaching train in time to prevent a collision; and if he sees, or can see the approaching train if he looks, in time to inform the driver of the approach of the train and to cause the driver to stop the automobile and thereby prevent the collision, but fails to do so, he is guilty of contributory negligence as a matter of law.[17] The mere sight of a railroad crossing, however, by a passenger in an automobile approaching such crossing does not of itself impose a duty to warn the driver of what lies ahead.[18] While it is true that under the circumstances here suggested a guest is not required to exercise the same degree of care and watchfulness as the driver of an automobile, yet if he sits by without warning or protest and permits himself to be driven carelessly to his injury, he will be held guilty of contributory negligence.[19] Under the Pennsylvania rule, where it is contributory negligence as a matter of law to fail to stop, look, and listen before crossing a railroad track, a passenger in an automobile who knowingly suffers a violation thereof is also guilty of contributory negligence.[20] The sudden presence of imminent danger is an element in determining the contributory negligence of a passenger in an automobile approaching a railroad crossing.[1] In the determination of the contributory negligence of the passenger, it is for the jury to decide whether he exercised such care for his own safety as a reasonably prudent person would have exercised under like circumstances.[2]

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[15] Hubbard v. Bartholomew, 163 Iowa, 58, 144 N. W. 13, 49 L.R.A.(N.S.) 443 (traffic officer).

[16] Annotation: 47 A.L.R. 330, s. 51 A.L.R. 584.

[17] Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A.L.R. 1327; East Tennessee, V. & G. R. Co. v. Markens, 88 Ga. 60, 13 S. E. 855, 14 L.R.A. 281; Crowley v. Chicago, B. & Q. R. Co. 204 Iowa, 1385, 213 N. W. 403, 53 A.L.R. 964; Illinois C. R. Co. v. McLeod, 78 Miss. 334, 29 So. 76, 52 L.R.A. 954, 84 Am. St. Rep. 630; Brickell v. New York C. & H. R. R. Co. 120 N. Y. 290, 24 N. E. 449, 17 Am. St. Rep. 648; Dean v. Pennsylvania R. Co. 129 Pa. 514, 18 A. 718, 6 L.R.A. 143, 15 Am. St. Rep. 733.

Annotation: 18 A.L.R. 315, s. 41 A.L.R. 770, 47 A.L.R. 295, 63 A.L.R. 1436, and 90 A.L.R. 990.

A passenger in an automobile performs his duty at a railroad crossing by exercising a reasonable degree of watchfulness and, when occasion arises, by warning the driver of the threatening danger. Annotation: 41 A.L.R. 768.

The rule that a passenger of an automobile must use reasonable care for his own safety at railroad crossings does not apply with the same degree of strictness where he is sitting in the back seat of an auto with closed curtains as it would were he in the front seat with a like opportunity to observe as, and in close communication with, the driver. Annotation: 41 A.L.R. 769.

The following cases are examples of contributory negligence on the part of a passenger in a vehicle approaching a railroad crossing:

— Where a passenger sat quietly in an automobile while approaching a railroad crossing and allowed the driver to take him into a place of danger without effectively exercising his senses for his own protection or without warning the driver or making a protest. Annotation: 41 A.L.R. 771;

— Where an occupant of an automobile had a better opportunity than the driver of seeing an approaching train, but did not look in time and warned the driver too late. Annotation: 41 A.L.R. 771, s. 47 A.L.R. 295, 63 A.L.R. 1436, and 90 A.L.R. 990;

— Where a normal boy of eighteen, when approaching a railroad crossing in an automobile with the curtains closed, failed to look for an approaching train, as requested by the driver of the automobile, when it could have been seen for three quarters of a mile. Annotation: 41 A.L.R. 771;

— Where a woman, on approaching a railroad crossing in an automobile driven by her husband, had a better opportunity than he of observing the approach of a train and could have seen it in sufficient time to have warned him of the danger, but did not do so. Annotation: 41 A.L.R. 771;

—Where the occupant of the rear seat of an automobile failed to see a railway crossing signboard and utter a timely warning, where the driver apparently had not noticed the sign. Annotation: 41 A.L.R. 771;

— Where a passenger joined with the driver in testing the danger of attempting to cross the tracks in front of the train. Colorado & S. R. Co. v. Thomas, 33 Colo. 517, 81 P. 801, 70 L.R.A. 681, 3 Ann. Cas. 700.

But the mere fact that a guest in an automobile, injured as a result of a collision at a highway crossing, stated that she was willing to take a chance with the driver in going across the track without stopping or slowing up to see if a car was coming, did not, as a matter of law, indicate that she joined with the driver in testing the danger, where he had the car under full control, indicated a sense of care and responsibility by sounding the horn, and the driver and guest were both keeping a lookout for danger. Minnich v. Easton Transit Co. 267 Pa. 200, 110 A. 273, 18 A.L.R. 296.

[18] Crowley v. Chicago, B. & Q. R. Co. 204 Iowa, 1385, 213 N. W. 403, 53 A.L.R. 964.

Annotation: 18 A.L.R. 315, s. 22 A.L.R. 1294, 47 A.L.R. 295, 63 A.L.R. 1436, and 90 A.L.R. 990.

§ 487. —As to Street Cars.—With respect to street railway crossings, the general rule is that the mere failure of a passenger to look and listen for approaching cars before the vehicle in which he is driving is driven across the tracks does not ordinarily constitute contributory negligence.[3] But here, as in the instance of accidents to passengers at railroad crossings,[4] the suggested inquiry for determining the contributory negligence of guests in the car is whether their conduct conformed to the conventional test of what might be expected of reasonably prudent persons under like circumstances.[5] To that extent each case must set its own pattern of liability.[6] For example, if dan-

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[19] Howe v. Minneapolis, St. P. & S. Ste. M. R. Co. 62 Minn. 71, 64 N. W. 102, 30 L.R.A. 684, 54 Am. St. Rep. 616.

Annotation: 41 A.L.R. 769, s. 47 A.L.R. 295, 63 A.L.R. 1436, and 90 A.L.R. 990.

The duty, on approaching a railroad crossing, of looking from where he can see or listening from where he can hear is incumbent upon a passenger, as well as upon the driver of an automobile, where he has an equal chance; and if the passenger does nothing to carry out this direction of the law, he is negligent on his own account. Annotation: 41 A.L.R. 770.

[20] Brommer v. Pennsylvania R. Co. (C. C. A. 3d) 179 F. 577, 29 L.R.A.(N.S.) 924.

Annotation: 18 A.L.R. 317, s. 22 A.L.R. 1494, 47 A.L.R. 295, 63 A.L.R. 1436, and 90 A.L.R. 990.

[1] Colorado & S. R. Co. v. Thomas, 33 Colo. 517, 81 P. 801, 70 L.R.A. 681, 3 Ann. Cas. 700.

Although the failure of the enginemen to sound the whistle or ring the bell as required by statute does not excuse one riding in an automobile from the exercise of due care for his own safety, it is a circumstance to be taken into consideration in determining whether he exercised the requisite care or not, for negligence cannot be imputed to one who is deceived by circumstances calculated to mislead a prudent man. Annotation: 41 A.L.R. 769.

The failure of an occupant of an automobile to warn the driver of an approaching train at a railroad crossing was held to be negligence on her part where she knew the crossing and, as they neared the crossing, was continuously looking in the direction of approaching trains and the train was visible to her and she was necessarily aware of the danger. Atchison, T. & S. F. R. Co. v. McNulty (C. C. A. 8th) 285 F. 97, writ of certiorari denied in 262 U. S. 746, 67 L. ed. 1212, 43 S. Ct. 521.

[2] Annotation: 41 A.L.R. 768, s. 47 A.L.R. 295, 63 A.L.R. 1436, and 9 0A.L.R. 990.

[3] Annotation: 18 A.L.R. 344, s. 22 A.L.R. 1300, 41 A.L.R. 777, 47 A.L.R. 297, and 63 A.L.R. 1445.

[4] See supra, § 416.

[5] Mahany v. Kansas City R. Co. (Mo.) 254 S. W. 16, 29 A.L.R. 817; Minnich v. Easton Transit Co. 267 Pa. 200, 110 A. 273, 18 A.L.R. 296.

A passenger in an automobile who is injured by being struck by a street car after the automobile has skidded and overturned on the track cannot recover damages from the street car company if in the exercise of common prudence he ought to have warned the driver of careless driving which caused the skidding or should have observed and directed the attention of the driver to the approaching street car. Lambert v. Eastern Massachusetts Street R. Co. 240 Mass. 495, 134 N. E. 340, 22 A.L.R. 1291.

[6] **The following cases were held,** upon the issue of contributory negligence, to be questions of fact:

—Where the plaintiff remained in an automobile standing on the street car tracks on the side of the street to allow passengers to alight after she saw a street car approaching from the rear until it was too late to escape injury, where another passenger of the automobile had gone back to stop the street car. Fitch v. Bay State Street R. Co. 237 Mass. 65, 129 N. E. 423, 15 A.L.R. 234;

— Where, as the automobile in which he was riding, approached a dangerous situation, the plaintiff, in response to an inquiry, discounted the dangers ahead. Wilson v. Puget Sound Electric Co. 52 Wash. 522, gers which are either reasonably manifest or known to a guest confront the driver of a vehicle approaching street railway tracks and the guest, with an adequate and proper opportunity to control or influence the situation for safety, sits by without warning or protest and permits himself to be driven carelessly to his injury, this is negligence which will bar recovery.[7]

§ 488. **—At Street Intersections.**—Since no duty is imposed upon a guest to keep a lookout for impending danger at street intersections,[8] he will not be viewed as contributorily negligent where an accident results at an intersection and it appears that the passenger failed to keep any watch or observe the condition of traffic in the vicinity.[9] It is clear that the law does not hold a passenger equally bound with the driver to watch for the approach of vehicular traffic at street intersections, for so to hold would require such constant interference with the driver as to increase, rather than diminish, the danger.[10]

D. Last Clear Chance

§ 489. **Generally.**—Inasmuch as the doctrine of last clear chance will be treated more exhaustively and in greater detail elsewhere in this work,[11] no attempt will be made here to formulate rules for determining the applicability of the doctrine in any specific case involving an automobile accident. The reader will find the doctrine discussed under the various factual situations found herein.[12]

The doctrine of last clear chance, in its origin at least, seems to have been but a phase of the doctrine of proximate cause.[13] It is frequently said that the doctrine presupposes negligence on the part of the person injured or whose property is damaged which, apart from the doctrine itself, would constitute contributory negligence so as to preclude recovery in spite of the defendant's negligence.[14]

§ 490. **Statement of Rule.**—In general, it may be stated that under the doctrine of last clear chance, irrespective of the negligent acts of a person injured by an automobile in placing himself in the path of the vehicle, or otherwise negligently putting himself in a position of danger, he may recover as against the defendant in the event the latter failed to use reasonable and ordinary care in avoiding the accident after he discovered the perilous position of the plaintiff.[15] The cases are not agreed upon the application of the doctrine

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101 P. 50, 18 A.L.R. 349, 132 Am. St. Rep. 1044;

— **Where one was riding on the running board of a coupé, because of the great number of its passengers, at the time of its collision with a street car.** Annotation: 41 A.L.R. 778.

[7] Stoker v. Tri-City R. Co. 182 Iowa, 1090, 165 N. W. 30, L.R.A.1918F, 515; Minnich v. Eastern Transit Co. 267 Pa. 200, 110 A. 273, 18 A.L.R. 296.

Annotation: 18 A.L.R. 339, s. 22 A.L.R. 1300, 47 A.L.R. 297, 63 A.L.R. 1445, and 90 A.L.R. 998.

A passenger in a street car cannot sit inactive when the danger of collision with a street car is imminent and be regarded as having exercised due care for his own safety. Annotation: 18 A.L.R. 339.

[8] See supra, § 480.

[9] Campion v. Eakle, 79 Colo. 320, 246 P. 280, 47 A.L.R. 289.

[10] Annotation: 47 A.L.R. 298, s. 63 A.L.R. 1445, and 90 A.L.R. 998.

[11] See Negligence [Also 20 R. C. L. p. 138, §§ 114 et seq.].

[12] As to pedestrians, see supra, § 446.

As to passing at intersections, see supra, § 452.

As to a person working in the road, see supra, § 444.

[13] Annotation: 92 A.L.R. 47.

[14] Annotation: 47 A.L.R. 293, s. 63 A.L.R. 1432, and 90 A.L.R. 984.

[15] Johnson v. Boston & M. R. Co. 83 N. H. 350, 143 A. 516, 61 A.L.R. 1178.

Even though the plaintiff was negligent, yet if the defendant saw the plaintiff in time to avoid the collision, the plaintiff might still recover where there was a collision of the plaintiff's motorcycle with the defendant's automobile. Rogers v. Interstate Transit Co. 212 Cal. 36, 297 P. 884, where the danger is not actually discovered. The more carefully considered cases make the application of the doctrine in such cases depend upon the duty to discover the danger. In those situations where there is a duty to keep a lookout, as in the case of automobiles being driven upon the public streets and highways, street cars operating on the streets of a city, and railroads passing over public crossings, the doctrine of last clear chance applies if the danger could have been discovered had the driver kept a proper lookout.[16] Here again, the question of the injured person's physical ability to escape enters into the problem. Obviously, if he is unable to escape and the danger ought to have been discovered, the doctrine applies.[17] But where he was physically able to escape, the great weight of authority denies the application of the doctrine where the danger was not actually discovered although it should have been.[18] The doctrine presupposes time for action. The doctrine is not applicable where the emergency is so sudden that there is no time in which to avoid the accident.[19]

The jurisdictions are not uniform in their application of this rule. While it is clear that in many instances the apparent differences in the use of the rule rest largely in the terminology employed, rather than in any basic conflict, the same practical result being achieved in either event,[20] there exists no doubt that the doctrine of last clear chance has received conflicting constructions and that varying theories regarding its applicability have been expressed by the courts.[1]

§ 491. Application to Various Situations.—In the application of the last clear chance doctrine to actions arising out of collisions between automobiles

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writ of certiorari denied in 284 U. S. 640, 76 L. ed. 545, 52 S. Ct. 22; Spillers v. Griffin, 109 S. C. 78, 95 S. E. 133, L.R.A. 1918D, 1193 (automobile which the plaintiff was driving struck by auto stage after the plaintiff, going in the same direction, had passed it). Annotation: 92 A.L.R. 84 (motorman, by exercise of due care after the car struck the auto, could have stopped it in time to have prevented fatal injury).

This doctrine was held applicable on the assumption that the plaintiff, whose automobile was struck by a street car, was negligent before he entered the zone of danger, but was afterwards in a position from which he could not escape, while it was still possible for the motorman, if he had kept a proper lookout, to have averted the accident. Annotation: 92 A.L.R. 103.

A plaintiff who negligently placed himself or his property in a situation of imminent peril and was either unconscious of the situation or unable to avoid the danger, or both, was held entitled to recover damages of the defendant who negligently inflicted the injury. Smith v. Gould, 110 W. Va. 579, 159 S. E. 53, 92 A.L.R. 28.

[16] Nicol v. Oregon-Washington R. & Nav. Co. 71 Wash. 409, 128 P. 628, 43 L.R.A. (N.S.) 174.

This doctrine was applied in a case where an automobile stalled on a track was struck by a train, upon the theory that the motorist properly signaled the approaching train, so that if the engineer had been on the lookout, as was his duty, he would have seen the signal in time to have avoided the accident. Ibid.

If the driver of an automobile could, by the exercise of ordinary care, have discovered the peril of one crossing the street in such a manner as to be likely to come in contact with the vehicle and who was oblivious of his danger in time to have avoided the collision, his negligence in failing to do so, and not that of the pedestrian in walking into the side of the vehicle, was held to be the proximate cause of the injury. Hornbuckle v. McCarty, 295 Mo. 162, 243 S. W. 327, 25 A.L.R. 1508.

A contention that the last clear chance doctrine includes knowledge of helpless peril only, and does not include the duty to exercise vigilance to discover helpless peril has been considered and has been held to be unsound. Leinbach v. Pickwick Greyhound Lines, 138 Kan. 50, 23 P. (2d) 449, 92 A.L.R. 1.

[17] Annotation: 92 A.L.R. 101.

[18] Annotation: 92 A.L.R. 128.

[19] Annotation: 28 A.L.R. 286, s. 46 A.L.R. 1046.

The last clear chance doctrine can never apply where the party charged is required to act instantaneously and where the injury cannot be avoided by the application of all means at hand after the peril is or should have been discovered, at least in cases in which any previous negligence of the party charged cannot be said to have contributed to the injury. O'Mally v. Eagan, 43 Wyo. 233, 2 P. (2d) 1063, 77 A.L.R. 582, rehearing denied in 43 Wyo. 350, 5 P. (2d) 276, 77 A.L.R. 597.

[20] Annotation: 92 A.L.R. 53.

[1] Smith v. Gould, 110 W. Va. 579, 159 S. E. 53, 92 A.L.R. 28.

Annotation: 92 A.L.R. 47–150.

See NEGLIGENCE [Also 20 R. C. L. p. 1].

and street cars at street intersections, the general rule is that a street railway company is liable for injuries due to a collision between one of its cars, negligently operated, and an automobile, notwithstanding negligence of the driver of the motorcar, if the operator of the street car, knowing of the perilous position of the automobile, could, by the exercise of ordinary care, have prevented the collision.[2] A pedestrian who is struck by an automobile while crossing a street not at a regular crossing, may recover under some circumstances, even though negligent, by reason of the last clear chance doctrine. Accordingly, where a person in charge of an automobile could, by keeping a reasonably careful lookout commensurate with the dangerous character of the vehicle and the nature of the locality, have discovered the dangerous situation of a pedestrian crossing the street in time to avoid injuring him by the exercise of reasonable care and injury results from failure to perform such duty, the doctrine of last clear chance applies.[3] The motorist is liable in such case, regardless of the pedestrian's prior negligence, if such negligence of the pedestrian has terminated or culminated in a situation of peril from which the exercise of ordinary care on his part would not thereafter extricate him.[4]

E. Imputed Negligence

§ 492. Generally.—The question frequently arises as to whether, assuming that the plaintiff in an automobile accident case is himself free from personal contributory negligence,[5] he can be so charged with the contributory negligence of another as to bar his recovery against a third person whose concurrent negligence injured him.[6] The question generally arises in actions by a passenger in an automobile injured in a collision with another car who brings suit against the driver or owner of such other's car.[7] Generally, however, the negligence of the driver cannot be considered against the occupant injured in a collision with another car unless that negligence was the sole cause of the accident,[8] unless the driver was the agent or servant of the occupant and subject to his direction and control at the time and place of the injury,[9] or unless the driver and occupant were engaged in a joint enterprise under circumstances which gave a right to share in the control of the automobile.[10] It is only in those instances where the passenger or guest has some control or authority over the operation of the car that the negligence of the driver may be imputed to him.[11] It makes no difference in this respect that the injured person was riding uninvited and without the knowledge of the driver of the vehicle.

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[2] Washington R. & Electric Co. v. Stuart, 50 App. D. C. 74, 267 F. 632, writ of certiorari denied in 254 U. S. 649, 65 L. ed. 456, 41 S. Ct. 63; Norman v. Charlotte Electric R. Co. 167 N. C. 533, 83 S. E. 835, Ann. Cas. 1916E, 508.

Annotation: 28 A.L.R. 284, s. 46 A.L.R. 1047.

Where if the motorman of a street car did not avail himself of the last opportunity to avoid a collision with a stalled automobilist, after his helplessness was or should have been discovered, the street railway could not be relieved from liability because of the motorist's prior negligence. Annotation: 28 A.L.R. 284, s. 46 A.L.R. 1047.

[3] Mosso v. E. H. Stanton Co. 75 Wash. 220, 134 P. 941, L.R.A.1916A, 943.

[4] Ibid.

Annotation: 14 A.L.R. 1191, s. 67 A.L.R. 328.

See also, § 490, supra.

[5] See supra, §§ 408 et seq.

[6] For general discussion of the doctrine of imputed contributory negligence, see Negligence [Also 20 R. C. L. p. 148, §§ 121 et seq.].

[7] See supra, §§ 475–488.

[8] Drury v. Franke, 247 Ky. 758, 57 S. W. (2d) 969, 88 A.L.R. 917.

It is well settled that where a person is riding in a vehicle over which he has no authority and where he has no control over the driver and has no reason to suspect a want of care, skill, or sobriety upon his part and is injured by the concurring negligence of the driver and some third person or corporation, the negligence of the driver is not imputed to him so as to prevent a recovery for damages from the other tort-feasor. Annotation: 90 A.L.R. 631.

[9] See supra, § 384.

[10] See supra, § 346.

[11] Corley v. Atchison, T. & S. F. R. Co. 90 Kan. 70, 133 P. 555, Ann. Cas. 1915B, 764;

The question of imputed contributory negligence may also arise in an action by the owner of an automobile against the driver or owner of another car for damages to the car caused by the concurring negligence of the defendant and a bailee in possession of the car at the time of the injury.[12]

It has been held that a person riding in a hired automobile as a guest of the other passengers may recover against the owner for injuries caused by the chauffeur's negligence in driving at an unsafe rate of speed, although his fellow passengers demanded a high rate of speed, as he is not bound by the acts and language of others in the automobile.[13]

§ 493. Imputing Bailee's Negligence to Bailor.—In accord with the modern rule that a bailee's contributory negligence is not imputable to the bailor in the latter's action for an injury to, or destruction of, the subject of bailment,[14] the contributory negligence of one to whom an automobile is loaned by its owner and who is using it for his own pleasure or benefit is not imputable to the owner so as to prevent the latter's holding another liable for negligently injuring the car,[15] unless the owner retains some direction or control over the action of the bailee.[16] The fact that the bailee may be the bailor's employee is not sufficient to preclude a recovery by the bailor unless the bailee was acting within the scope of his employment at the time of the injury.[17] An employee's negligence contributing to an injury to his employer's car is not imputable to the employer where the employee, as permitted by the employer, is using the car for his own pleasure.[18] Where, however, a statute makes the owner liable for any damage done by reason of the negligence of one who is driving it with his consent,[19] the contributory negligence of the borrower of an automobile in case the car is injured by a third person is imputable to the owner.[20]

§ 494. Imputing Driver's Negligence to Other Occupant.—Modern authorities have, with few exceptions, adopted the rule that the contributory negligence of the driver of a vehicle is not imputable to another occupant of the vehicle who has no control or authority over the driver so as to prevent the former, when injured by the concurrent negligence of the driver and another person, from recovering from the third person.[1] In accord with this rule, it is well established that the contributory negligence of the driver of an automobile cannot be imputed to a guest or passenger riding therein who has no control or authority over the driver or over the operation of the car; a guest having no such control or authority over the driver or the automobile is not precluded from recovering from a third party for injuries received in a collision due to the concurring negligence of such third party and the driver [2] in

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St. Louis & S. F. R. Co. v. Bell, 58 Okla. 84, 159 P. 336, L.R.A.1917A, 543.
Annotation: 90 A.L.R. 631.

[12] See supra, § 356.

[13] Annotation: 9 Ann. Cas. 408.

[14] See BAILMENTS [Also 3 R. C. L. p. 146, § 70].

[15] Morgan County v. Payne, 207 Ala. 674 93 So. 628, 30 A.L.R. 1243; Cain v. Wickens, 81 N. H. 99, 122 A. 800, 30 A.L.R. 1246; Gibson v. Bessemer & L. E. R. Co. 226 Pa. 198, 75 A. 194, 27 L.R.A.(N.S.) 689, 18 Ann. Cas. 535; Lloyd v. Northern P. R. Co. 107 Wash. 57, 181 P. 29, 6 A.L.R. 307.
Annotation: 6 A.L.R. 316, s. 30 A.L.R. 1248.

[16] Morgan County v. Payne, 207 Ala. 674, 93 So. 628, 30 A.L.R. 1243.

[17] Cain v. Wickens, 81 N. H. 99, 122 A. 800, 30 A.L.R. 1246.

[18] Lloyd v. Northern P. R. Co. 107 Wash. 57, 181 P. 29, 6 A.L.R. 307.

[19] See supra, §§ 397 et seq.

[20] Secured Finance Co. v. Chicago, R. I. & P. R. Co. 207 Iowa, 1105, 224 N. W. 88, 61 A.L.R. 855.
Annotation: 61 A.L.R. 878.

[1] See NEGLIGENCE [Also 20 R. C. L. p. 158, § 132].

[2] Central of Georgia R. Co. v. Watkins (C. C. A. 5th) 37 F. (2d) 710, citing R. C.

which the guest does not participate.[3] Moreover, it does not make any difference that the injured person was riding uninvited and without the knowledge of the driver of the vehicle.[4] Under the rule stated, the contributory negligence of a chauffeur cannot be imputed to one who is traveling in the vehicle with him by invitation of the owner of the car.[5] Generally speaking, the negligence of the driver of an automobile can be imputed to a passenger only when the passenger has authority to direct the driver or has charge of the car,[6] when the driver is under the control or authority of the occupant,[7] or when the passenger is shown to have co-operated in running the car.[8] The test is whether the passenger had a right to control or to share in the control of the operator of the vehicle.[9] Generally, negligence of the driver

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L.; Winona v. Botzet (C. C. A. 8th) 169 F. 321, 23 L.R.A.(N.S.) 204; Perkins v. Galloway, 194 Ala. 265, 69 So. 875, L.R.A. 1916E, 1190, second appeal in 198 Ala. 658, 73 So. 956; Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A.L.R. 1327; Lynn v. Goodwin, 170 Cal. 112, 148 P. 927, L.R.A.1915E, 588; Campion v. Ekle, 79 Colo. 320, 246 P. 280, 47 A.L.R. 289; St. Mary's Academy v. Solomon, 77 Colo. 463, 238 P. 22, 42 A.L.R. 964; Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035, 1 L.R.A.(N.S) 215, 108 Am. St. Rep. 196, 3 Ann. Cas 487; Crowley v. Chicago B. & Q. R. Co. 204 Iowa, 1385, 213 N. W. 403, 53 A.L.R. 964 (gratuitous guest); Hubbard v. Bartholomew, 163 Iowa, 58, 144 N. W. 13, 49 L.R.A. (N.S.) 443; Burizo v. Joplin & P. R. Co. 102 Kan. 287, 171 P. 351, L.R.A.1918C, 997; Corley v. Atchison, T. & S. F. R. Co. 90 Kan. 70, 133 P. 555, Ann. Cas. 1915B, 764; Drury v. Franke, 247 Ky. 758, 57 S. W. (2d) 969, 88 A.L.R. 917; Beard v. Klusmeier, 158 Ky. 153, 164 S. W. 319, 50 L.R.A.(N.S.) 1100, Ann. Cas. 1915D, 342; Vitale v. Checker Cab Co. 166 La. 527, 117 So. 579, 59 A.L.R. 148; Jacobs v. Jacobs, 141 La. 272, 74 So. 992, L.R.A.1917F, 253; Chesapeake & P. Teleph. Co. v. Merriken, 147 Md. 572, 128 A. 277, 41 A.L.R. 763; Shultz v. Old Colony Street R. Co. 193 Mass. 309, 79 N. E. 873, 8 L.R.A.(N.S.) 597, 118 Am. St. Rep. 502, 9 Ann. Cas. 402; Reader v. Ottis, 147 Minn. 335, 180 N. W. 117, 16 A.L.R. 463; Carson v. Turrish, 140 Minn. 445, 168 N. W. 349, L.R.A. 1918F, 154; Kokesh v. Price, 136 Minn. 304, 161 N. W. 715, 23 A.L.R. 643; Hines v. McCulliers, 121 Miss. 666, 83 So. 734, citing R. C. L.; Applebee v. Ross, — Mo. —, 48 S. W. (2d) 900, 82 A.L.R. 288; Laird v. Berthelote, 63 Mont. 122, 206 P. 445, citing R. C. L.; Mick v. Oberle, 124 Neb. 433, 246 N. W. 869, citing R. C. L.; Jessup v. Davis, 115 Neb. 1, 211 N. W. 190, 56 A.L.R. 1403, writ of error dismissed in 276 U. S. 593, 72 L. ed. 722, 48 S. Ct. 300; Smith v. Atlantic & Y. R. Co. 200 N. C. 177, 156 S. E. 508, citing R. C. L.; Odom v. Atlantic Coast Line R. Co. 193 N. C. 442, 137 S. E. 313, citing R. C. L.; Parker v. Seaboard Air Line R. Co. 181 N. C. 95, 106 S. E. 755, citing R. C. L.; Chambers v. Minneapolis, St. P. & S. Ste. M. R. Co. 37 N. D. 377, 163 N. W. 824, Ann. Cas. 1918C, 954; St. Louis & S. F. R. Co. v. Bell, 58 Okla. 84, 159 P. 336, L.R.A.1917A, 543; Alio v. Pennsylvania R. Co. 312 Pa. 453, 167 A. 326, 90 A.L.R. 980; Richards v. Warner Co. 311 Pa. 50, 166 A. 496, 87 A.L.R. 1159; Minnich v. Easton Transit Co. 267 Pa. 200, 110 A. 273, 18 A.L.R. 296; Riccio v. Ginsberg, 49 R. I. 32, 139 A. 652, 62 A.L.R. 967; Schwartz v. Johnson, 152 Tenn. 586, 280 S. W. 32, 47 A.L.R. 323; Dallas v. Maxwell (Tex.) 248 S. W. 667, 27 A.L.R. 927; Leclair v. Boudreau, 101 Vt. 270, 143 A. 401, 63 A.L.R. 1427; Reiter v. Grober, 173 Wis. 493, 181 N. W. 739, 18 A.L.R. 362; O'Malley v. Eagan, 43 Wyo. 233, 2 P. (2d) 1063, 77 A.L.R. 582, rehearing denied in 43 Wyo. 550, 5 P. (2d) 276, 77 A.L.R. 597.

Annotation: 90 A.L.R. 631; 1 B. R. C. 597.

In the absence of facts establishing a relationship other than that of host and guest between the driver and the occupants of an automobile, the negligence of the driver is not imputable to the occupants. Walker v. Kroger Grocery & Baking Co. 214 Wis. 519, 252 N. W. 721, 92 A.L.R. 680.

The negligence of the driver of an automobile in failing to yield the right of way to a car on his right at a street intersection cannot be imputed to his guest. Campion v. Ekle, 79 Colo. 320, 246 P. 280, 47 A.L.R. 289.

One who voluntarily becomes a passenger in a conveyance does not thereby so far identity himself with the driver that he cannot recover for an injury negligently inflicted by a third person if the driver's negligence was a contributing cause. Anthony v. Kiefner, 96 Kan. 194, 150 P. 524, L.R.A.1915F, 876, Ann. Cas. 1916E, 264.

[3] Bresee v. Angeles Traction Co. 149 Cal. 131, 85 P. 152, 5 L.R.A.(N.S.) 1059.

[4] See Negligence [Also 20 R. C. L. p. 163, § 137].

[5] St. Louis & S. F. R. Co. v. Bell, 58 Okla. 84, 159 P. 336, L.R.A.1917A, 543.

[6] Applebee v. Ross, — Mo. —, 48 S. W. (2d) 900, 82 A.L.R. 288; Odom v. Atlantic Coast Line R. Co. 193 N. C. 442, 137 S. E. 313, citing R. C. L.

[7] Schwartz v. Johnson, 152 Tenn. 586, 280 S. W. 32, 47 A.L.R. 323.

[8] Chambers v. Minneapolis, St. P. & S. Ste. M. R. Co. 37 N. D. 377, 163 N. W. 824, Ann. Cas. 1918C, 954.

[9] Rodgers v. Saxton, 305 Pa. 479, 158 A. 166, 80 A.L.R. 280.

Operation, ownership, and control are essential elements in the doctrine of imputing negligence of a driver to guest in an automobile. Chesapeake & P. Teleph. Co. v. Merriken, 147 Md. 572, 128 A. 277, 41 A.L.R. 763.

Negligence of the driver of an automobile cannot be imputed to one merely riding with him; but where the driver is in an enterprise of any kind for the benefit of the of an automobile is imputable to a passenger only where the driver is the agent or servant of the passenger at the time of the negligent act and the act is committed in the scope of the agent's or servant's employment,[10] or when the driver and passenger are business partners or engaged in a joint enterprise and the operation of the vehicle is in furtherance of the business.[11] In at least one jurisdiction, however, the negligence of the driver of an automobile is imputable to an adult riding with him as a guest or ordinary passenger.[12]

The question whether the negligence of the driver is imputable to one riding with him is distinct from the question of the care required of one riding in an automobile driven by another as affecting his right to recover against a third person. Persons riding in an automobile driven by another, even though not chargeable with the driver's negligence, are not absolved from all personal care for their own safety, but are under the duty of exercising reasonable or ordinary care to avoid injury.[13]

§ 495. —To Passenger for Hire.—It is universally conceded that the negligence of the driver of an automobile for hire is not attributable to a passenger having no control over the driver further than to indicate the route to be followed or the place to which the car is to be driven.[14] Even courts which adopt the minority view imputing the contributory negligence of the driver of an automobile to passengers in the automobile have refused to extend this rule to private carriers for hire.[15]

§ 496. —Effect of Owner's Presence.—The owner's presence in his car at the time an injury occurs while it is being operated by another will not of itself preclude his right to recover for injury or damage.[16] Such presence, however, is an element tending to show that the car was being driven by his

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party riding with him, is his employee or under his control, or where the automobile is under his control and direction and owned by him and he has a right to control and direct it, whether he assumes such right or not, he is held for the negligence of the driver. Crawford v. McElhinney, 171 Iowa, 606, 154 N. W. 310, Ann. Cas. 1917E, 221.

[10] See infra, § 499.

[11] See infra, § 500.

[12] Ruth v. Vroom, 245 Mich. 88, 222 N. W. 155, 62 A.L.R. 1528; Granger v. Farrant, 179 Mich. 19, 146 N. W. 218, 51 L.R.A.(N.S.) 453.

Annotation: 90 A.L.R. 632; 11 B. R. C. 611.

The Wisconsin court, which formerly applied the doctrine of imputed negligence to occupants of an automobile (Puhr v. Chicago & N. W. R. Co. 171 Wis. 154, 176 N. W. 767, 14 A.L.R. 1334; Lauson v. Fond du Lac, 141 Wis. 57, 123 N. W. 629, 25 L.R.A.(N.S.) 40, 135 Am. St. Rep. 30) has since repudiated that doctrine and now follows the general rule that a mere guest is not chargeable with the negligence of the driver of an automobile (Reiter v. Groher, 173 Wis. 493, 181 N. W. 739, 18 A.L.R. 362. Annotation: 90 A.L.R. 933; 11 B. R. C. 611).

[13] See supra, § 475.

[14] Dale v. Denver City Tramway Co. (C. C. A. 8th) 173 F. 787, 19 Ann. Cas. 1223; Perkins v. Galloway, 194 Ala. 265, 69 So. 875, L.R.A.1916E, 1190; Roby v. Kansas City S. R. Co. 130 La. 88, 58 So. 696, 41 L.R.A.(N.S.) 355; Meyers v. Tri-State Auto. Co. 121 Minn. 68, 140 N. W. 184, 44 L.R.A.(N.S.) 113; Odom v. Atlantic Coast Line R. Co. 193 N. C. 442, 137 S. E. 313, citing R. C. L.; Hardie v. Barrett, 257 Pa. 42, 101 A. 75, L.R.A.1917F, 444; Wachsmith v. Baltimore & O. R. Co. 233 Pa. 465, 82 A. 755, Ann. Cas. 1913B, 679; Wilson v. Puget Sound Electric R. Co. 52 Wash. 522, 101 P. 50, 132 Am. St. Rep. 1044; Godfrey v. Cooper, 46 Ont. L. Rep. 565, 51 D. L. R. 455, 10 B. R. C. 134.

Annotation: 90 A.L.R. 633.

[15] Lachow v. Kimmick, 263 Mich. 1, 248 N. W. 531, 90 A.L.R. 626.

One who, without protest, permits the chauffeur of a hired automobile to drive at a manifestly dangerous speed on the wrong side of the road cannot hold the owner of a vehicle with which the car comes into collision liable for the resulting injury to himself. Hardie v. Barrett, 257 Pa. 42, 101 A. 75, L.R.A.1917F, 444.

[16] Annotation: 80 A.L.R. 291.

In Virginia R. & Power Co. v. Gorsuch, 120 Va. 655, 91 S. E. 632, Ann. Cas. 1918B, 838, it was held that the negligence of the plaintiff's husband in operating her automobile could not be imputed to her where she had loaned the car to her husband for a week to use in his work in another place and she was riding with him in the car while she was visiting him at the time she was injured in a collision between the automobile and a street car.

servant or agent or that its operation was under his control, so that the negligence of the driver is imputable to him; and if the owner and the driver are engaged in a joint enterprise, the negligence of the driver is imputable to the owner;[17] where the owner of a truck who is its regular driver, permits an unlicensed driver to operate it while he, the owner, sits on the seat beside him, he is chargeable with the acts of the driver; and if the driver is guilty of contributory negligence, the owner cannot recover against a third person.[18]

§ 497. —To Infant.—In accord with the rule of the majority of the jurisdictions that in an action by, or on behalf of, an infant for personal injury, the fault or contributory negligence of the parent or custodian cannot be imputed to the child,[19] the negligence of a parent, a guardian, or a custodian of an infant child in driving an automobile in which the child is riding will not be imputed to the child to prevent a recovery by it for injuries inflicted by the negligence of a third person.[20] Nor is the negligence of a parent in permitting a child to be upon the street without adequate attendance imputed to the child in an action by it for injuries inflicted upon it by the negligent operation of an automobile in the street.[1] However, in several jurisdictions the view is taken that the negligence of the parent or custodian contributing to the injury of a child should be imputed to it so as to bar a recovery by or on behalf of the child if the child itself is not capable of exercising the ordinary care of an adult.[2] In these jurisdictions, in an action on behalf of such an infant for injuries sustained in an automobile accident, the negligence of its parent in operating the automobile in which the child was riding will be imputed to the child.[3]

§ 498. —To Husband, Wife, or Other Relative.—The general rule that as between the driver of an automobile and a passenger therein, the negligence of the former is not imputable to the latter so as to bar recovery against a third person whose concurrent negligence caused an injury to the occupant,[4] is not changed by the fact that the occupants of the automobile are husband and wife.[5] In the absence of some control or authority over the operation of the car by the wife, the negligence of a husband in driving a motor vehicle is not imputable to his wife, who is riding with him as a passenger[6] and will not, where damages for personal injuries to a wife are her own separate property and are recoverable by her without joining her husband in the action,[7] prevent her from holding a third person liable for injuries incurred by reason of the concurring negligence of her husband and such third person.[8] A wife, when traveling in an automobile driven by and under the control of her husband, is in no different position from that which she would occupy if the driver of the vehicle had been a person other than her husband.[9] The husband's contributory negligence is not imputable to her when she is riding with him by virtue of the marital relationship or of the fact that she is the owner of the automobile.[10] It is only when the husband is acting as agent for the wife in the matter at hand[11] or when they are engaged in a joint or common enterprise and participate jointly in the operation of the automobile that the negligence of the one driving the automobile becomes contributory negligence on the part of the other and defeats recovery against a third person.[12]

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[17] Annotation: 80 A.L.R. 291, 292.

[18] Zandras v. Moffett, 286 Pa. 477, 133 A. 817, 47 A.L.R. 699.

[19] See Negligence [Also 20 R. C. L. p. 155, § 129].

[20] Burzio v. Joplin & P. R. Co. 102 Kan. 287, 171 P. 351, L.R.A.1918C, 997; Northern Texas Traction Co. v. Thetford (Tex. Civ. App.) 28 S. W. (2d) 906 (modified on other grounds in (Tex.) 44 S. W. (2d) 902), citing R. C. L.; Southwestern Bell Teleph. Co. v. Dodd (Tex. Civ. App.) 1 S. W. (2d) 501, citing R. C. L.; Gulesserian v. Madison R. Co. 172 Wis. 400, 179 N. W. 573, 15 A.L.R. 406.

Annotation: 15 A.L.R. 414; 90 A.L.R. 630.

Even under the rule adopted in Michigan, holding that the negligence of a driver of an automobile is attributable to a passenger riding therein (see supra, § 494), reasoning on the facts that the law of imputed negligence is based on the theory of a fiction of a relationship of principal and agent, and that such relationship cannot exist as to an infant, it has been held that the negligence of the driver of an automobile cannot be imputed to an infant who was riding in the car as a guest. Annotation: 90 A.L.R. 633.

[1] Zarzana v. Neve Drug Co. 180 Cal. 32, 179 P. 203, 15 A.L.R. 401.

[2] See Negligence [Also 20 R. C. L. p. 153, § 128].

[3] Gallagher v. Johnson, 237 Mass. 455, 130 N. E. 174, 15 A.L.R. 411.

Annotation: 15 A.L.R. 423.

[4] See supra, § 494.

[5] Kokesh v. Price, 136 Minn. 304, 161 N. W. 715, 23 A.L.R. 643.

[6] Southern R. Co. v. King, 128 Ga. 383, 57 S. E. 687, 11 L.R.A.(N.S.) 829, 119 Am. St. Rep. 390; Hazel v. Hoopeston-Danville Motor Bus Co. 310 Ill. 38, 141 N. E. 392, 30 A.L.R. 491; Denton v. Missouri, K. & T. R. Co. 90 Kan. 51, 133 P. 558, 47 L.R.A. (N.S.) 820, Ann. Cas. 1915B, 639 (second appeal 97 Kan. 498, 155 P. 812); Kokesh v. Price, 136 Minn. 304, 161 N. W. 715, 23 A.L.R. 643; Marshall v. Olson, 102 Or. 502, 202 P. 736, citing R. C. L.; Rodgers v. Saxton, 305 Pa. 479, 158 A. 166, 80 A.L.R. 280; Knoxville R. & Light Co. v. Vangilder, 132 Tenn. 487, 178 S. W. 1117, L.R.A.1916A,

The mere fact that the automobile in which the plaintiff was riding when injured was being driven by a relative does not take the case out of the general rule that the driver's negligence is not attributable to a passenger.[13]

§ 499. —To Employer or to Fellow Employee.—Where a relation of principal and agent or master and servant exists between the driver and an occupant of an automobile, the rule is too well settled to need support of authority that the negligence of the agent or the servant is imputable to the principal or master and will prevent his recovery against a third person.[14]

1111; Virginia R. & Power Co. v. Gorsuch, 120 Va. 655, 91 S. E. 632, Ann. Cas. 1918B, 838; Brubaker v. Iowa County, 174 Wis. 574, 183 N. W. 690, 18 A.L.R. 303.

Annotation: 90 A.L.R. 634; 11 B. R. C. 613.

The negligence of a man is not imputed to his wife riding with him in an automobile from the mere fact of the marital relationship between them. Brubaker v. Iowa County, 174 Wis. 574, 183 N. W. 690, 18 A.L.R. 303.

[7] See HUSBAND AND WIFE [Also 13 R. C. L. p. 966].

[8] Hazel v. Hoopeston-Danville Motor Bus Co. 310 Ill. 38, 141 N. E. 392, 30 A.L.R. 491; Denton v. Missouri, K. & T. R. Co. 90 Kan. 51, 133 P. 558, 47 L.R.A.(N.S.) 820, Ann. Cas. 1915B, 639; Vitale v. Checker Cab Co. 166 La. 527, 117 So. 579, 59 A.L.R. 148; Knoxville R. & Light Co. v. Vangilder, 132 Tenn. 487, 178 S. W. 1117, L.R.A.1916A, 1111.

Annotation: 59 A.L.R. 153.

Where a wife may sue in her own name to recover damages for injuries to her person and her husband has no interest in the recovery, his negligence as driver of the conveyance in which she was riding at the time of the injury will not be imputed to her so as to preclude her recovering against the other negligent person where, in the particular instance, the relationship of principal and agent or master and servant did not exist between them. Louisville R. Co. v. McCarthy, 129 Ky. 814, 112 S. W. 925, 19 L.R.A.(N.S.) 230, 130 Am. St. Rep. 494.

Except as to those jurisdictions in which damages recoverable by the wife are community property and subject to the control and disposition of the husband, it is generally held that the negligence of the husband will not, because of the marital relation, be imputed to the wife in an action brought to recover for personal injuries sustained by her. Annotation: 59 A.L.R. 154.

[9] Vitale v. Checker Cab Co. 166 La. 527, 117 So. 579, 59 A.L.R. 148.

[10] Rodgers v. Saxton, 305 Pa. 479, 158 A. 166, 80 A.L.R. 280.

[11] See NEGLIGENCE [Also 20 R. C. L. p. 151].

The relationship of principal and agent or that of master and servant does not necessarily arise from the fact that the wife owns the car which the husband is driving in which she is a passenger; she is not, in such case, prima facie chargeable with the husband's negligence in driving the car. Rodgers v. Saxton, 305 Pa. 479, 158 A. 166, 80 A.L.R. 280.

[12] Lindquist v. Thierman, 216 Iowa, 170, 248 N. W. 504, 87 A.L.R. 893.

[13] Burzio v. Joplin & P. R. Co. 102 Kan. 287, 171 P. 351, L.R.A. 1918C, 997; Anthony v. Kiefner, 96 Kan. 194, 150 P. 524, L.R.A. 1915F, 876, Ann. Cas. 1916E, 264; Southwestern Bell Teleph. Co. v. Doell (Tex. Civ. App.) 1 S. W. (2d) 501, citing R. C. L.

Annotation: 90 A.L.R. 636; 11 B. R. C. 617.

[14] Secured Finance Co. v. Chicago, R. I. & P. R. Co. 207 Iowa, 1105, 224 N. W. 88, 61 A.L.R. 855; Crawford v. McElhinney, 171 Iowa, 606, 154 N. W. 310, Ann. Cas. 1917E, 221; Kokesh v. Price, 136 Minn. 304, 161 N. W. 715, 23 A.L.R. 643; Rodgers v. Saxton, 305 Pa. 479, 158 A. 166, 80 A.L.R. 280.

Annotation: 11 B. R. C. 629–631.

The negligence of an employee in driving a motor vehicle is held to be attributable to his employer riding with him, since the latter has control or authority over his servant's acts.

Where two employees of the same employer are riding in a vehicle, the contributory negligence of the one who drives cannot ordinarily be imputed to the other who has no control over the management of the vehicle.[15] Thus, the negligence of the driver of a motor vehicle is not imputable to a fellow servant who was riding therein when an accident occurred who had no control in driving the automobile.[16] The driver of a motor truck in the business of his employer and a helper riding on the truck to assist in unloading it are not engaged in a joint enterprise within the rule that negligence on the part of the operator is imputable to others accompanying him in the prosecution of the joint enterprise.[17]

§ 500. —To Member of Joint Enterprise.—If two or more persons unite in the joint prosecution of a common purpose under such circumstances that each has authority, express or implied, to act for all in respect of the control of the means or agencies employed to execute such common purpose, the negligence of one in the management thereof will be imputed to the others.[18] Accordingly, if an occupant of an automobile is engaged in a joint enterprise with the driver and is injured by reason of the concurrent negligence of the driver and a third person, the driver's contributory negligence will be imputed to such occupant and will bar a recovery by him against the third person.[19]

§ 501. —Test of Joint Enterprise.—The test of a joint enterprise between the driver of an automobile and another occupant is whether they were jointly operating and controlling the movements of the vehicle.[20] In order to constitute a joint enterprise so that the negligence of the driver of an automobile may be imputed to an occupant of the car, it is generally held that there must be a common purpose and a community of interest in the object of the enterprise and an equal right to direct and control the conduct of each other with respect thereto.[21] In other words, the passenger, as well as the driver, must be entitled to a voice in the control and direction of the vehicle.[1] There must be a community in the object and purpose of the undertaking and an equal right to direct and govern the movements and conduct of each other in respect thereof.[2] Each must have the control of the means or agencies employed to prosecute the common purpose.[3] The use of an automobile for the mutual benefit of co-owners is such a joint control that either one is the agent of the other in the conduct of their common undertaking, so as to render one chargeable with the contributory negligence of the other.[4]

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[15] See NEGLIGENCE [Also 20 R. C. L. p. 160, §§ 134, 135].

[16] Annotation: 90 A.L.R. 637; 11 B. R. C. 631.

A salesman employed by an ice cream manufacturer to deliver the cream upon a truck is not chargeable with the negligence of the driver of the truck who is employed by the common employer and over whom the salesman has no control in driving the truck into collision with a street car. Stoker v. Tri-City R. Co. 182 Iowa, 1090, 165 N. W. 30, L.R.A.1918F, 515.

[17] Anderson v. Asphalt Distributing Co. — Mo. —, 55 S. W. (2d) 688, 86 A.L.R. 1033.

[18] See NEGLIGENCE [Also 20 R. C. L. p. 149, § 122].

[19] Union Traction Co. v. Gaunt, 193 Ind. 109, 135 N. E. 486, 23 A.L.R. 649; Lindquist v. Thierman, 216 Iowa, 170, 248 N. W. 504, 87 A.L.R. 893; Wiley v. Dobbins, 204 Iowa, 174, 214 N. W. 529, 62 A.L.R. 432; Crawford v. McElhinney, 171 Iowa, 606, 154 N. W. 310, Ann. Cas. 1917E, 221; Sharp v. Sproat, 111 Kan. 735, 208 P. 613, 26 A.L.R. 1421; Jacobs v. Jacobs, 141 La. 272, 74 So. 992, L.R.A. 1917F, 253; Beaucage v. Mercer, 206 Mass. 492, 92 N. E. 774, 138 Am. St. Rep. 401; Kokesh v. Price, 136 Minn. 304, 161 N. W. 715, 23 A.L.R. 643; Anderson v. Asphalt Distributing Co. — Mo. —, 55 S. W. (2d) 688, 86 A.L.R. 1033; Mick v. Oberle, 124 Neb. 433, 246 N. W. 869, citing R. C. L.; Harber v. Graham, 105 N. J. L. 213, 143 A. 340, 61 A.L.R. 1232; Christopherson v. Minneapolis, St. P. & S. Ste. M. R. Co. 28 N. D. 128, 147 N. W. 791, Ann. Cas. 1916E, 683; Rodgers v. Saxton, 305 Pa. 479, 158 A. 166, 80 A.L.R. 280 (dictum); Lucey v. John Hope & Sons Engraving & Mfg. Co. 45 R. I. 103, 120 A. 62, citing R. C. L.; O'Brien v. Woldson, 149 Wash. 192, 270 P. 304, 62 A.L.R. 436; Brubaker v. Iowa County, 174 Wis. 574, 183 N. W. 690, 18 A.L.R. 303.

Annotation: 62 A.L.R. 441, s. 85 A.L.R. 630; 8 L.R.A.(N.S.) 628; 11 B. R. C. 620.

This rule is founded on a theory of partnership or a relationship akin to partnership. Kokesh v. Price, 136 Minn. 304, 161 N. W. 715, 23 A.L.R. 643.

[20] Kokesh v. Price, 136 Minn. 304, 161 N. W. 715, 23 A.L.R. 643; Schwartz v. Johnson, 152 Tenn. 586, 280 S. W. 32, 47 A.L.R. 323.

[21] Campbell v. Campbell, 104 Vt. 468, 162 A. 379, 85 A.L.R. 626.

In recent years there have been many attempts to charge passengers riding as guests of an automobile owner or driver with the negligence of the driver on the theory of a joint enterprise, but the courts have uniformly held that one who is merely a passenger cannot be deemed to be engaged in a joint enterprise with the driver for the purpose of imputing to him the negligence of the latter.[5] Clearly, a mere guest having no voice in directing and governing the movements of the automobile cannot be said to be engaged in a joint adventure with the driver within the meaning of the law of negligence so as to bar recovery from a third party for injuries sustained on account of the latter's negligence, even though the one with whom the guest was riding was guilty of contributory negligence.[6] It is not sufficient that the passenger indicates the route or that both parties have certain plans in common, such as a "joy ride;" the community of interest must be such that the passenger is entitled to be heard in the control and management of the vehicle—such as practically to amount to joint or common possession thereof.[7] Nor does the fact that the guest agreed to pay the expenses of a trip necessarily establish a joint enterprise.[8] However, under the particular circumstances of the case, the jury may find that an agreement between the owner of an automobile and another to take a trip and to share the expenses equally creates a joint enterprise within the meaning of the law of negligence.[9] This is so where each has control and authority as to the manner of driving.[10] Again, where all the occupants of an automobile are engaged in the common purpose of a pleasure drive and each might direct the movement or operation of the car, the negligence of the driver is imputed to them in an action to recover damages for injuries against the owner of another car which collided with the one in which they were riding.[11]

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[1] Union Traction Co. v. Gaunt, 193 Ind. 109, 135 N. E. 486, 23 A.L.R. 649; Mick v. Oberle, 124 Neb. 433, 246 N. W. 869, citing R. C. L.

Annotation: 48 A.L.R. 1079, 1080, s. 63 A.L.R. 921, 80 A.L.R. 312, and 95 A.L.R. 857.

[2] Jessup v. Davis, 115 Neb. 1, 211 N. W. 190, 56 A.L.R. 1403, writ of error dismissed in 276 U. S. 593, 72 L. ed. 722, 48 S. Ct. 300.

[3] Schwartz v. Johnson, 152 Tenn. 586, 280 S. W. 32, 47 A.L.R. 323; Campbell v. Campbell, 104 Vt. 468, 162 A. 379, 85 A.L.R. 626.

[4] Clark v. Hampton, 83 N. H. 524, 145 A. 265, 61 A.L.R. 1171.

[5] Annotation: 48 A.L.R. 1078, s. 63 A.L.R. 921, 80 A.L.R. 312, and 95 A.L.R. 857; 11 B. R. C. 620.

[6] Bushnell v. Bushnell, 103 Conn. 583, 131 A. 432, 44 A.L.R. 785; Corley v. Atchison, T. & S. F. R. Co. 90 Kan. 70, 133 P. 555, Ann. Cas. 1915B, 764; Jacobs v. Jacobs, 141 La. 272, 74 So. 992, L.R.A.1917F, 253; Cotton v. Willmar & S. F. R. Co. 99 Minn. 366, 109 N. W. 835, 8 L.R.A.(N.S.) 643, 116 Am. St. Rep. 422, 9 Ann. Cas. 935; Jessup v. Davis, 115 Neb. 1, 211 N. W. 190, 56 A.L.R. 1403, writ of error dismissed in 276 U. S. 593, 72 L. ed. 722, 48 S. Ct. 300; Schwartz v. Johnson, 152 Tenn. 586, 280 S. W. 32, 47 A.L.R. 323; West v. Bruns (Tex. Civ. App.) 294 S. W. 235, citing R. C. L.; Brubaker v. Iowa County, 174 Wis. 574, 183 N. W. 690, 18 A.L.R. 303; Reiter v. Grober, 173 Wis. 493, 181 N. W. 739, 18 A.L.R. 362.

Annotation: 48 A.L.R. 1078, 1079, s. 63 A.L.R. 921, 80 A.L.R. 315, and 95 A.L.R. 857; 11 B. R. C. 620.

One accepting an invitation to ride in an automobile does not thereby engage in such a common enterprise or joint venture with the driver that neither would be liable to the other for an act of negligence. Jacobs v. Jacobs, 141 La. 272, 74 So. 992, L.R.A.1917F, 253.

A mother who, desiring to visit other children, has procured a son to take her in his automobile to their place of residence, cannot be deemd to have been engaged with him in a joint enterprise, where the evidence fails to show that she had the right to direct his movements and conduct in any particular, and did show that she had agreed to pay the expenses of the trip. Campbell v. Campbell, 104 Vt. 468, 162 A. 379, 85 A.L.R. 626.

The mere request of a mother who is riding in an automobile belonging to, and operated by, her son at his invitation that sometime during the ride he should call at a certain house and obtain a cake that a friend had promised to make for her does not make the trip a joint enterprise or make her responsible for the negligence of her son or for injuries to which she did not personally contribute. Anthony v. Kiefner, 96 Kan. 194, 150 P. 524, L.R.A.1915F, 876.

[7] Annotation: 48 A.L.R. 1080, s. 63 A.L.R. 921, 80 A.L.R. 312, and 95 A.L.R. 857; 11 B. R. C. 620.

[8] Annotation: 48 A.L.R. 1081, s. 63 A.L.R. 921, 80 A.L.R. 312, and 95 A.LL.R 857; 11 B. R. C. 620.

A wife, when riding with her husband, is not ordinarily to be deemed to be engaged in a joint enterprise with her husband within the law of negligence.[12] The test for determining whether the husband and wife are engaged in a joint enterprise is whether they are jointly operating or controlling the movements of the vehicle in which they are riding.[13] A husband and wife who jointly own an automobile in which one or the other indifferently acts as driver are, in using it, engaged in a joint adventure, so as to make the contributory negligence of one in operating it imputable to the other.[14]

§ 502. —To Prevent Recovery against Driver.—The doctrine that the negligence of a member of a joint or common enterprise in the operation of an automobile is imputable to other members riding with him is applicable only as regards third persons, not as to parties to such enterprise.[15] When one member of a joint enterprise or common adventure is injured by the negligent operation of an automobile by another member while operating it within the scope of the enterprise and an action is brought against the driver, the doctrine of imputed negligence is inapplicable and will not bar a recovery.[16] In other words, the fact that both occupants of an automobile are engaged in a joint enterprise does not preclude one of them from recovering damages from the other for injuries sustained through the latter's negligent driving.[17] Accordingly, where the rule prevails that one spouse may maintain an action against the other for personal injuries,[18] the doctrine of joint enterprise does not prevent a woman from holding her husband liable for personal injuries inflicted upon her by his negligence in the operation of an automobile in which both were returning to their home from the performance of an errand.[19]

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[9] Beaucage v. Mercer, 206 Mass. 492, 92 N. E. 774, 138 Am. St. Rep. 401; O'Brien v. Woldson, 149 Wash. 192, 270 P. 304, 62 A.L.R. 436.

[10] Christopherson v. Minneapolis, St. P. & S. Ste. M. R. Co. 28 N. D. 128, 147 N. W. 791, L.R.A.1915A, 761.

[11] Wiley v. Dobbins, 204 Iowa, 174, 214 N. W. 529, 62 A.L.R. 432.

[12] Kokesh v. Price, 136 Minn. 304, 161 N. W. 715, 23 A.L.R. 643; Rodgers v. Saxton, 305 Pa. 479, 158 A. 166, 80 A.L.R. 280; Brubaker v. Iowa County, 174 Wis. 574, 183 N. W. 690, 18 A.L.R. 303.

Annotation: 48 A.L.R. 1082, s. 63 A.L.R. 921, 80 A.L.R. 315, and 95 A.L.R. 857.

The mere fact that a man and his wife are journeying together in a motor car from one city to another for the purpose of changing their abode, with the intention on his part of teaching and on her part of preparing for and taking a business position does not constitute their journey a joint enterprise so as to impute to her his negligence in handling the car. Brubaker v. Iowa County, 174 Wis. 574, 183 N. W. 690, 18 A.L.R. 303.

[13] Kokesh v. Price, 136 Minn. 304, 161 N. W. 715, 23 A.L.R. 643.

[14] Lindquist v. Thierman, 216 Iowa, 170, 248 N. W. 504, 87 A.L.R. 893; Archer v. Chicago, M., St. P. & P. R. Co. 215 Wis. 509, 255 N. W. 67, 95 A.L.R. 851.

[15] Harber v. Graham, 105 N. J. L. 213, 143 A. 340, 61 A.L.R. 1232.

[16] Pepper v. Morrill (C. C. A. 1st) 24 F. (2d) 320, 57 A.L.R. 750; Bushnell v. Bushnell, 103 Conn. 583, 131 A. 432, 44 A.L.R. 785; Harber v. Graham, 105 N. J. L. 213, 143 A. 340, 61 A.L.R. 1232; Campbell v. Campbell, 104 Vt. 468, 162 A. 379, 85 A.L.R. 626.

Annotation: 62 A.L.R. 442, s. 85 A.L.R. 632.

[17] Harber v. Graham, 105 N. J. L. 213, 143 A. 340, 61 A.L.R. 1232; O'Brien v. Woldson, 149 Wash. 192, 270 P. 304, 62 A.L.R. 436.

[18] See HUSBAND AND WIFE [Also 13 R. C. L. p. 966].

[19] Bushnell v. Bushnell, 103 Conn. 583, 131

F. Comparative Negligence

§ 503. Generally.—In the vast majority of jurisdictions the doctrine of comparative negligence has been expressly repudiated,[20] so that where a person injured by a motor vehicle is contributorily negligent, he will be barred from recovery therefor, irrespective of the relative degrees of negligence of those participating in the accident,[1] and notwithstanding how slight or disproportionate to the accident his own contributory negligence may have been, provided the same proximately contributed to its occurrence.[2] In some jurisdictions local statutes expressly preserve certain phases of the comparative negligence doctrine[3] and measure the plaintiff's right to recovery by the extent and degree of his contributory negligence.[4]

VIII. INSURANCE

A. In General

§ 504. Generally.—A policy of insurance is an agreement by which one person, for a consideration, promises to pay money or its equivalent, or to do some act of value to another, on the destruction or injury of something by specified perils.[1] A modern branch of insurance which bids fair to contribute largely to the bulk of the insurance law is found in policies, which have become common, covering automobiles, and those indemnifying against liability for injuries thereby.

It is hardly necessary to say that automobile insurance is a comparatively new branch of the insurance business. However, as a result of the extensive use of automobiles in recent years, many questions arising in connection with automobile insurance contracts have already been passed on by the courts. The subject has also been dealt with by the legislatures of some jurisdictions wherein statutes have been enacted authorizing automobile insurance.[2]

§ 505. Nature.—Insurance on automobiles is similar to other insurance and does not present any peculiar question except in so far as the nature of the thing insured and the liabilities that may arise thereby are concerned. Statutes relating to automobile insurance contemplate insurance against all recognized hazards to which automobiles are subject, and, accordingly, cases have

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A. 432, 44 A.L.R. 785; Archer v. Chicago, M. St. P. & P. R. Co. 215 Wis. 509, 255 N. W. 67, 95 A.L.R. 851.

[20] New Jersey Exp. Co. v. Nichols, 33 N. J. L. 434, 97 Am. Dec. 722; McLean v. Atlantic Coast Line R. Co. 81 S. C. 100, 61 S. E. 900, 1071, 18 L.R.A.(N.S.) 763, 128 Am. St. Rep. 892; Wittstruck v. Lee, 62 S. D. 290, 252 N. W. 874, 92 A.L.R. 1361; McDonald v. International & G. N. R. Co. 86 Tex. 1, 22 S. W. 939, 40 Am. St. Rep. 803; Smith v. Union Trunk Line, 18 Wash. 351, 51 P. 400, 45 L.R.A. 169.

For more detailed treatment of subject of comparative negligence, see Negligence [Also 20 R. C. L. p. 145, §§ 119, 120].

[1] New Jersey Exp. Co. v. Nichols, 33 N. J. L. 434, 97 Am. Dec. 722; Merrihew v. Goodspeed, 102 Vt. 206, 147 A. 346, 66 A.L.R. 1109.

If the negligence of the person injured contributed to the accident in the least degree, there can be no recovery.

[2] See Negligence [Also 20 R. C. L. p. 1].

[3] Annotation: 92 A.L.R. 692, holding that if both the plaintiff and the defendant were at fault, the former could still recover, provided he was not lacking in ordinary care, but that his damages would be diminished in proportion to the amount of fault attributable to him.

[4] Walker v. Kroger Grocery & Baking Co. 214 Wis. 519, 252 N. W. 721, 92 A.L.R. 680.

A statute which provides that negligence of the plaintiff shall not bar recovery if such negligence was not so great as that of the defendant, but that the damages shall be diminished in proportion to the amount of negligence attributable to the plaintiff, contemplates that the causal negligence of all the other participants in the transaction, whether made parties defendant or not, shall constitute the other term of the proportion. Ibid.

[1] See Insurance [Also 14 R. C. L. p. 839, § 2].

[2] Annotation: Ann. Cas. 1915A, 627.

arisen involving liability,[3] collision,[4] fire,[5] and theft,[6] which classes of insurance will be considered separately in the following sections.

§ 506. **Definitions.**—In connection with automobile insurance, statutes in some states contain a comprehensive series of definitions applicable to motor vehicles, such as "vehicle," "motor vehicle," "owner," "pneumatic tires," "operator," etc. While some of these or other such terms have been defined by courts, the reader is advised to consult the statutes in his jurisdiction as to such definitions.

The word "operate," as used in automobile policies, is held to mean to regulate and control the management or operation of the car, that is, to have charge of it as the driver.[7] Thus, the owner of an automobile does not "operate" it within the meaning of an automobile indemnity policy applying only when the machine is being "operated" by the owner, where he is merely present in the car, directing its operation by another.[8] The word "operated," in a clause of a fire policy involved, which provided that the insurer should not be liable if the car was "operated" by the insured's son, meant having charge of it as driver, putting it in motion, and supervising its working, and the son was not, at the time of the accident, regulating and controlling the management of the machine as a machine, even though he had, from the back seat, full control over the choice of the route.[9] In some cases where the policies involved have used the term "drive," or "driving," this also seems to have been construed as meaning the actual mechanical control of the car.[10]

§ 507. **Construction.**—The general principle that an insurance policy which contains language reasonably susceptible of different interpretations will be given the construction most favorable to the assured is applied to cases of automobile insurance.[11] It has been said that these insurance policies, which are prepared by the insurance companies, are to be most strongly construed against them and in favor of the assured.[12]

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[3] See infra, §§ 516 et seq.

[4] See infra, §§ 554 et seq.

[5] See infra, §§ 558 et seq.

[6] See infra, §§ 567 et seq.

[7] Witherstine v. Employers' Liability Assur. Corp. 235 N. Y. 168, 139 N. E. 229, 28 A.L.R. 1298; O'Connell v. New Jersey Fidelity & P. G. Ins. Co. 201 App. Div. 117, 193 N. Y. S. 911, affirmed in 235 N. Y. 583, 139 N. E. 744; O'Reilly v. Canada Acci. & F. Assur. Co. 63 Ont. L. Rep. 413, [1929] 2 D. L. R. 70, 16 B. R. C. 298.

Annotation: 16 B. R. C. 303.

[8] Winterstine v. Employers' Liability Assur. Corp. 235 N. Y. 168, 139 N. E. 229, 28 A.L.R. 1298.

Annotation: 16 B. R. C. 303.

[9] O'Reilly v. Canada Acci. & F. Assur. Co. 63 Ont. L. Rep. 413, [1929] 2 D. L. R. 70, 16 B. R. C. 298.

Annotation: 16 B. R. C. 304.

[10] Annotation: 16 B. R. C. 304.

In Williams v. Nelson, 228 Mass. 191, 117 N. E. 189, Ann. Cas. 1918D, 538, where a liability policy provided that it did not cover loss from liability for, or any suit based on, injuries caused by any automobile while driven or manipulated by any person under the age of sixteen years in any event, a finding was held supported by the evidence that prior to an accident causing an injury, a son of the insured, under sixteen years of age, had been driving the insured's automobile, but that shortly before the machine struck the person injured, the insured had suddenly leaned over and taken the wheel from his son, and that, although he was not in a position readily to prevent the accident by manipulating the pedals or levers for stopping the machine, yet he was driving, and his was the dominating mind in control of the car, and it was therefore held that a recovery might be had under the policy. Annotation: 16 B. R. C. 304.

[11] St. Paul F. & M. Ins. Co. v. American Compounding Co. 211 Ala. 593, 100 So. 904, 35 A.L.R. 1018; Illinois Auto. Ins. Exch. v. Southern Motor Sales Co. 207 Ala. 265, 92 So. 429, 24 A.L.R. 734; Dickinson v. Maryland Casualty Co. 101 Conn. 369, 125 A. 866, 41 A.L.R. 500; Ætna Casualty & Surety Co. v. Cartmel, 87 Fla. 495, 100 So. 802, 35 A.L.R. 1013; Great American Mut. Indem. Co. v. Jones, 111 Ohio St. 84, 144 N. E. 596, 35 A.L.R. 1023, 23 N. C. C. A. 647.

Annotation: 35 A.L.R. 1031, s. 40 A.L.R. 999, 42 A.L.R. 1130, and 54 A.L.R. 1445.

[12] Fireman's Fund Ins. Co. v. Haley, 129 Miss. 525, 92 So. 635, 23 A.L.R. 1470.

§ 508. Representations and Warranties.—The general rules as to fraud, misrepresentation, and affirmative warranties, as affecting insurance policies generally, considered in another article,[13] are applicable to insurance on automobiles. It will be sufficient to state here, therefore, that there can be no doubt that a material false representation is a ground for the avoidance of an insurance policy, the same as any other contract.[14] As to warranties, any statement or description, or any undertaking on the part of the insured, on the face of the policy or in another instrument properly incorporated in the policy, which relates to the risk, is a warranty.[15] The distinction between a representation and a warranty in an insurance contract is that the former precedes and is not part of the contract and need be only materially true, while the latter is part of the contract and must be strictly fulfilled or the policy is void. Another difference between a warranty and a representation is that a warranty must be strictly true,—a representation need only be substantially true.[16]

These matters often depend, however, upon the provisions of the policies and statutory provisions of the particular jurisdiction. A breach of a condition as to the use of a car in an automobile insurance policy, not printed in the form required by statute, is not available to the insurer.[17]

To avoid the policy, misrepresentations must be material and their falsity unknown to the insurer. An applicant for automobile insurance is not guilty of omitting to disclose a circumstance material to the risk, in stating that the car was paid for, when he had given a note which was still current for part of the price.[18] And a misstatement in a proposal for insurance as to the place where the insured motor vehicle is to be garaged is not material within the meaning of a condition on the back of the policy that "material misstatement or concealment of any circumstance by the insured, material to assessing the premium herein, or in connection with any claim, shall render the policy void."[19] Nor is the validity of an automobile liability insurance policy affected by the falsity of a representation or warranty as to the ownership of the vehicle, if such falsity was known to the insurer at the time the policy was issued.[20]

§ 509. Provisions as to Uses of Car.—Usually an automobile liability policy contains a clause whereby the insurer is not to be liable for any loss incurred while the automobile is being operated by, or is in charge of, any person not meeting certain requirements as to age.[1] Quite often an automobile policy covering injury to the car by collision, etc., contains a clause of the same general character.[2] Ordinarily sixteen years is fixed as a minimum age limit in any event.[3] An exclusion clause of this character, where not prohibited by law, inserted in an automobile insurance policy, is valid.[4] It will not be questioned that the parties can make any contract not prohibited by law, and there appears to be good reason why an indemnity company would not be willing to assume the risk for damages resulting from cars being driven by persons under sixteen years of age.[5]

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[13] See INSURANCE [Also 14 R. C. L. p. 1021, §§ 202 et seq.].

[14] See INSURANCE [Also 14 R. C. L. p. 1021, § 202].

[15] See INSURANCE [Also 14 R. C. L. p. 1026, § 206].

[16] See INSURANCE [Also 14 R. C. L. p. 1027, § 207].

[17] Western Assur. Co. v. Caplan [1924] (Can.) S. C. R. 227, [1924] 2 D. L. R. 935, 14 B. R. C. 275.

[18] Western Assur. Co. v. Caplan [1924] (Can.) S. C. R. 227, [1924] 2 D. L. R. 935, 14 B. R. C. 275.
Annotation: 14 B. R. C. 284.

[19] Dawsons v. Bonnin, [1922] 2 A. C. (Eng.) 413, 11 B. R. C. 441.

[20] Commonwealth Casualty Co. v. Arrigo, 160 Md. 595, 154 A. 136, 77 A.L.R. 1250.
Knowledge of a soliciting agent of an automobile liability insurer, of the fact that the person in whose name the policy was issued, while the nominal owner, was not the real owner of the vehicle, is imputable to the insurer. Ibid.

[1] Annotation: 72 A.L.R. 1071.
The words "fixed by law," as used in an insurance policy, exempting the insurer from liability where the car is driven by one under the age fixed by law, are intended to apply to valid municipal ordinances as well as statutes. United States Fidelity & G. Co. v. Guenther, 281 U. S. 34, 74 L. ed. 683, 50 S. Ct. 165, 72 A.L.R. 1064.
Annotation: 72 A.L.R. 1082.
An ordinance which, while not purporting to fix an age limit for operators of automobiles, makes it unlawful for any owner or custodian of a motor vehicle to permit a minor under eighteen years of age to operate it upon the streets of the city may properly be regarded as fixing an

§ 510. Provisions as to Carrying Passengers.—Policies of automobile insurance, such as those insuring against collision, fire, liability, property damage, and theft, frequently contain provisions exempting the insurer from liability, or terminating the policy, if the insured automobile is used for the carrying of passengers for hire or compensation.[6] There is no serious doubt that such provisions are valid.[7] Such a restriction of use is held to violate no rule of public policy, on the theory that insurance companies have the right to insert in their policies reasonable conditions as to use.[8] Furthermore, a breach of a provision against carrying passengers for hire, constituting, as it often does, a warranty or condition subsequent, avoids the policy, in the absence of any waiver or estoppel.[9]

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age limit. United States Fidelity & G. Co. v. Guenther, 281 U. S. 34, 74 L. ed. 683, 50 S. Ct. 165, 72 A.L.R. 1064.

Where it appeared that the insured was driving with his son who was under the minimum age, that the son was operating the car, and that just before the accident the insured leaned over and took the wheel and had driven the car about fifty feet when the accident occurred, it was held that the car was not being driven by a person under sixteen at the time of the accident, within the meaning of the policy, though a dangerous situation had been produced while it was so driven, and though the insured was at a disadvantage in operating the car because he was not in the driver's seat. Williams v. Nelson, 228 Mass. 191, 117 N. E. 189, Ann. Cas. 1918D, 538. Annotation: Ann. Cas. 1918D, 540.

[2] Annotation: 72 A.L.R. 1071.

That an eleven-year-old boy, left in charge of a truck while the regularly employed competent driver enters a building on business, attempts to move it by command of a stranger does not deprive the owner of the benefit of insurance against injury by operation of the truck, although the policy provides that the insurer shall not be liable for losses occasioned by the truck being operated by any person under the age of sixteen years. Ætna Casualty & Surety Co. v. Etoch, 174 Ark. 409, 295 S. W. 376, 72 A.L.R. 1068.

[3] Annotation: 72 A.L.R. 1071.

Use of Car by Member of Family over Sixteen.—the insertion in a policy of automobile liability insurance of an exclusion clause exempting insurer from liability in respect of any accident occurring while the car is being driven by any person under sixteen years of age is indicative of an understanding on the part of the insured that it shall be liable to the assured in respect of accidents occurring while the car is being driven by any member of his family over that age. Fullerton v. United States Casualty Co. 184 Iowa, 219, 167 N. W. 700, 6 A.L.R. 367. Annotation: 72 A.L.R. 1071.

[4] Annotation: 72 A.L.R. 1071.

[5] Ætna Casualty & Surety Co. v. Etoch, 174 Ark. 409, 295 S. W. 376, 72 A.L.R. 1068. Annotation: 72 A.L.R. 1071.

[6] Crowell v. Maryland Motor Car Ins. Co. 169 N. C. 35, 85 S. E. 37, Ann. Cas. 1917D, 50; Gross v. Kubel, 315 Pa. 396, 172 A. 649, 95 A.L.R. 146.

Annotation: 95 A.L.R. 150.

Regarding provisions as to renting or use for hire in automobile insurance policies, see infra, § 561.

[7] Annotation: 95 A.L.R. 151.

[8] Crowell v. Maryland Motor Car Ins. Co. 169 N. C. 35, 85 S. E. 37, Ann. Cas. 1917D, 50.

[9] Annotation: 95 A.L.R. 151.

In Crowell v. Maryland Motor Car Ins. Co. 169 N. C. 35, 85 S. E. 37, Ann. Cas. 1917D, 50, it was held that a stipulation that the insured car "will not be rented or used for passenger service of any kind for hire" implied more than a single act of renting or using, and referred to the business of carrying passengers for hire, so that it was not breached by the use of the car by the owner's chauffeur, without his knowledge, on a single occasion, to carry passengers for hire, and consequently, that the insurer against fire was liable, although the car burned while it was being returned to the garage after having been so used.

In Western Assur. Co. v. Caplan [1924] (Can.) S. C. R. 227, [1924] 2 D. L. R. 935, 14 B. R. C. 275, it was held that the evidence showed no proof of payment for the carriage of passengers for hire, as against a mere explainable affirmative inference or suspicion was the sworn statement of the insured that the car had not been used to carry passengers for hire.

A member of a basketball team transporting other members in his automobile

Of course, if the insurer is liable under its policy, it may be liable to injured persons.[10] However, the rights of an injured person against a liability insurer cannot rise higher than those of the insured, and if the latter is not entitled to recover because of a breach of a condition against carrying passengers for hire, persons injured by the insured car cannot hold the insurer liable.[11] Moreover, if the policy excludes liability for injuries occurring while the insured car is being used to carry passengers for hire, no liability can arise while the car is carrying paying passengers, either as to a paying passenger or as to another passenger or guest who is riding free.[12]

B. Insurable Interest

§ 511. Generally.—The general principles relating to insurable interest generally are considered in another article.[13] As a general rule, and in whatever form the insurance, some form of an interest in the subject of insurance is essential. In practically all jurisdictions, however, the necessity and nature and extent of such interest are regulated by statutes which must be consulted by the reader for the rule in any particular jurisdiction. The application of these general rules to insurance on automobiles is the subject of the following sections.

§ 512. Necessity.—As stated in the section immediately preceding,[14] an interest in the subject of insurance is essential. Automobile liability[15] or theft[16] insurance, like other forms of insurance, must be supported by an insurable interest in the insured. This interest need not, however, be absolute. The nature and extent of the insurable interest necessary will be considered in the section immediately following.[17]

§ 513. Nature and Extent.—As a general rule, anyone has an insurable interest in property who derives a benefit from its existence or would suffer loss from its destruction. It is not necessary, to constitute an insurable interest, that the interest be such that the event insured against would necessarily subject the insured to loss; it is sufficient that it might do so and that

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to a place where they were to play a game, for which transportation he received the cost of oil and gasoline and a small amount in addition for the use of the car, may properly be found to have been operating the automobile "for carrying passengers for hire," within the exception clause of a liability policy. Gross v. Kubel, 315 Pa. 396, 172 A. 649, 95 A.L.R. 146.

Waiver of Right to Disclaim Liability.—An automobile liability insurer will not be regarded as having waived the right to disclaim liability on the ground that the accident was not within the coverage of the policy because the automobile was being used for carrying passengers for hire, by causing its attorney to enter appearance for insured in actions brought by occupants of the car, where the insured, in notifying the insurer of the accident, did not inform it that he was carrying passengers for hire at the time, divulging the fact only when the attorney began to prepare one of the cases for trial, whereupon the insurer promptly disclaimed liability and withdrew from the defense. Ibid.

A delay of seven months on the part of an automobile liability insurer after undertaking the defense of actions against the insured, in disclaiming liability on the ground that as the automobile was being used for carrying passengers for hire, the accident was not within the coverage of the policy, is not unreasonable where, in causing its attorney to appear for defendant in such actions, it relied on the insured's report, which did not disclose that he was carrying passengers for hire at the time, and made disclaimer as soon as it learned of the fact, and a year and a half elapsed before the case came on for trial, so that insured had ample time to prepare his own defense. Ibid.

[10] Annotation: 95 A.L.R. 156.

[11] Gross v. Kubel, 315 Pa. 396, 172 A. 649, 95 A.L.R. 146.
Annotation: 95 A.L.R. 157.

[12] Gross v. Kubel, 315 Pa. 396, 172 A. 649, 95 A.L.R. 146.
Annotation: 95 A.L.R. 157.

[13] See Insurance [Also 14 R. C. L. p. 905, §§ 84 et seq.].

[14] See supra, § 511.

[15] Annotation: 77 A.L.R. 1256.

[16] Hessen v. Iowa Auto. Mut. Ins. Co. 195 Iowa, 141, 190 N. W. 150, 30 A.L.R. 657.

[17] See infra, § 513.

pecuniary injury would be the natural consequence, and the courts of this country, as well as of England, are well disposed to maintain policies where it is clear that the party assured had an interest which would be injured in the event that the peril insured against should happen.[18] For instance, as regards automobile liability insurance, if the assured has such abiding interest in the use of the automobile in his business that he may become legally liable to others for injuries resulting from its operation, he has a beneficial interest, an insurable interest.[19] The right to recover does not depend upon the insured's being the holder, in fact, of either a legal or equitable title in the automobile, but upon whether he is primarily charged at law or in equity with an obligation for which he is liable.[1] A policy issued to one in whose name title to a truck stood is not invalid for want of insurable interest, though another was the real owner.[2]

On the other hand, a person has no insurable interest where his only right to a car arises under a contract which is void or unenforceable, either at law or in equity.[3] In some instances, failure to comply with statutory provisions as to sales of automobiles deprives the purchaser of an automobile from acquiring an insurable interest in such automobile.[4]

§ 514. Sole and Unconditional Ownership.—Automobile insurance policies frequently contain provisions to the effect that the policies shall be void if the interest of the assured is other than that of an unconditional and sole owner.[5] A purchaser of a stolen car does not have sole and unconditional

[18] See INSURANCE [Also 14 R. C. L. p. 910, § 87].

[19] Annotation: 77 A.L.R. 1257.

[1] Commonwealth Casualty Co. v. Arrigo, 160 Md. 595, 154 A. 136, 77 A.L.R. 1250.
Annotation: 77 A.L.R. 1256.

[2] Commonwealth Casualty Co. v. Arrigo, 160 Md. 595, 154 A. 136, 77 A.L.R. 1250.

[3] Hessen v. Iowa Auto. Mut. Ins. Co. 195 Iowa, 141, 190 N. W. 150, 30 A.L.R. 657.

Annotation: 30 A.L.R. 662, s. 38 A.L.R. 1123, 46 A.L.R. 536, 54 A.L.R. 1344, and 89 A.L.R. 465.

[4] **A purchaser of an automobile who does not receive the assignment required by a** mandatory provision of the statute acquires no title, and therefore has no insurable interest in the car which will enable him to recover from the insurer upon a fire insurance policy upon the automobile. State v. Cox, 306 Mo. 537, 268 S. W. 87, 37 A.L.R. 1456.

One who buys an automobile from any person other than a regular dealer having an established place of business, without requiring the seller to be identified by two persons of the buyer's acquaintance, and without requiring a bill of sale to be executed by the seller, with his name and address, and giving an accurate and comprehensive description of the car, and particularly its correct engine number, and containing also the signatures and addresses of the identifying witnesses, has no insurable interest in such automobile against its theft. Morris v. Firemen's Ins. Co. 121 Kan. 482, 247 P. 852, 52 A.L.R. 696.

The owner of an automobile, living in Missouri, undertook to sell it to a resident of Kansas, receiving the agreed price and delivering the car to the buyer, who brought it to Kansas. None of the requirements of the Missouri statute as to sale of automobiles was complied with. Just after the expiration of the five days allowed by the statute for a record of the sale with the secretary of state, the seller asserted that the car had been stolen, and later collected its value from an insurance company. The car having been seized as a stolen one, the purchaser brought replevin for it, making the insurance company which held an assignment of the rights of the insured one of the defendants. It was held that the insurance company could invoke the protection of the statute referred to, inasmuch as the deceit practised upon it was facilitated by the plaintiff's failure to obey the law. Miller v. Colonial Underwriters Ins. Co. 117 Kan. 240, 230 P. 1030, 38 A.L.R. 1113.

There are, however, cases holding to the contrary, to the effect that the buyer does obtain an insurable interest. Hennessy v. Automobile Owners' Ins. Asso. (Tex.) 282 S. W. 791, 46 A.L.R. 521.

This question depends upon the broader question as to the effect upon the passing of title, of the failure to comply with statutes requiring sales of automobiles to be evidenced in a certain way. This question is discussed in the article on Sales.

[5] Hessen v. Iowa Auto. Mut. Ins. Co. 195 Iowa, 141, 190 N. W. 150, 30 A.L.R. 657; Ohio Farmers' Ins. Co. v. Todino, 111 Ohio St. 274, 145 N. E. 25, 38 A.L.R. 1118, overruled upon other grounds in Commercial Credit Co. v. Schreyer, 120 Ohio St. 568, 166 N. E. 808, 63 A.L.R. 674; Barnett v. London Assur. Corp. 138 Wash. 673, 245 P. 3, 46 A.L.R. 526.

Annotation: 30 A.L.R. 665, s. 38 A.L.R. 1123, 46 A.L.R. 534, 54 A.L.R. 1344, and 89 A.L.R. 465.

ownership.[6] The question whether the ownership of a chattel mortgagor or mortgagee, or conditional buyer or seller, is sole and unconditional is discussed at another point.[7]

§ 515. Change of Ownership.—Some policies provide that the policy shall be void "in case of transfer or termination of any interest of the insured other than by the death of an insured, or any change in the nature of the insurable interest of the insured in the property described herein, either by sale or otherwise."[8] Under a policy with such a provision, the change of ownership or interest in the automobile by award thereof to the insured's wife in a divorce decree was held to avoid the policy.[9]

C. Liability Insurance

1. In General

§ 516. Generally.—Since the advent of the automobile, policies insuring owners of automobiles against loss sustained on account of having to pay damages for injuries inflicted by their machines have become very common. Because of the beneficial nature of such insurance, some states have enacted laws making it compulsory.

§ 517. Power to Issue Policy.—The liability of automobile owners for injuries to persons or property resulting from the ownership, maintenance, or use of their automobiles, while a recognized subject of insurance, is not a risk which may be taken by all concerns authorized to write insurance against accidents, etc.; authority therefor must be found in some charter provision or provision of the insurance law. This question of authority has been considered in several cases,[10] and the right to issue such policies has been denied under certain statutes.[11]

§ 518. Validity.—The validity of policies insuring against liability for injuries resulting from the operation of an automobile is generally sustained.[12] Such policies are not contrary to public policy.[13] And the fact that the insured was violating the law at the time of the accident or that a policy did not contain an exemption from liability arising while the insured was violating the law, such as while driving at excessive speed, does not render such policies invalid as contrary to public policy.[14] Nor is one operating an automobile on a public highway without a license, which act is a statutory crime, precluded by public policy from enforcing a policy indemnifying him against liability for bodily injuries inflicted by use of the automobile.[15] Such insurance is not restricted to cases where there has been no violation of criminal law or ordinance.[16] To restrict insurance to cases where liability is incurred without fault of the insured would reduce indemnity to a shadow.[17] Where, however, injury is caused intentionally, as where the insured runs down a man and kills him intentionally, the insurer would be absolved of any liability.[18]

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[6] **Purchase of Stolen Car.**—Where the automobile, when purchased and when the policy of theft insurance was obtained by the plaintiff, was a stolen car, the policy, which provided that it should be void if the interest of the insured in the property was other than "unconditional and sole ownership," was held void, since the plaintiff acquired no title to the stolen car, had no insurable interest therein, and was not the unconditional and sole owner. Hessen v. Iowa Auto. Mut. Ins. Co. 195 Iowa, 141, 190 N. W. 150, 30 A.L.R. 657. Annotation: 24 A.L.R. 740, s. 30 A.L.R. 662, 38 A.L.R. 1123, 46 A.L.R. 534, 54 A.L.R. 1344, and 89 A.L.R. 465.

Purchase of Stolen Car in Good Faith.—On the other hand, a policy with such provision was not avoided where the insured, a purchaser in good faith, had the right to the car as against everyone except the one from whom it was originally stolen, who was making no claim to it. Barnett v. London Assur. Corp. 138 Wash. 673, 245 P. 3, 46 A.L.R. 526.

[7] See Insurance [Also 14 R. C. L. pp. 1057, 1058].

The insurable interest of these parties is likewise discussed in Insurance. See also 14 R. C. L. pp. 915, 916.

[8] Coffin v. Northwestern Mut. F. Asso. 43 Idaho, 1, 249 P. 89, 48 A.L.R. 1225.

[9] Ibid.

[10] Annotation: 6 A.L.R. 376, s. 13 A.L.R. 135, 19 A.L.R. 879, 23 A.L.R. 1472, 28 A.L.R. 1301, and 41 A.L.R. 507.

[11] Annotation: 44 L.R.A.(N.S.) 73.

[12] Annotation: 11 B. R. C. 265.

[13] McMahon v. Pearlman, 242 Mass. 367, 136 N. E. 154, 23 A.L.R. 1467; Fireman's Fund Ins. Co. v. Haley, 129 Miss. 525, 92 So. 635, 23 A.L.R. 1470.

2. Compulsory Insurance

§ 519. Generally.—Because of the increased use of cars of little value by persons financially incapable of responding in damages for the greatly increasing number of injuries inflicted by the negligent operation of their cars, there has been considerable public agitation in favor of legislation requiring liability insurance as a condition of the private use of automobiles not operated for hire. There has been no judicial holding as to the validity of such legislation other than that contained in the advisory opinions as to proposed laws, rendered by the supreme courts of a few states in answer to the request of the legislature.[19] According to these opinions, it would seem that under its authority over public highways and its power to provide for the public safety by the reasonable regulation of undertakings that are inherently dangerous, a state legislature may require persons seeking to operate motor vehicles upon the public highways to provide indemnity insurance.[20]

§ 520. Validity.—The validity of legislation requiring liability insurance as a condition of private use of automobiles depends, of course, upon the nature and character of the particular legislation. A general requirement that a motor vehicle may be operated upon the public highways only when adequate provision has been made for compensation to persons injured because

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Tinline v. White Cross Ins. Asso. [1921] 3 K. B. (Eng.) 327, 11 B. R. C. 260.

Annotation: 6 A.L.R. 376, s. 13 A.L.R. 135, 19 A.L.R. 879, 23 A.L.R. 1472, 28 A.L.R. 1301, and 41 A.L.R. 507.

[14] Fireman's Fund Ins. Co. v. Haley, 129 Miss. 525, 92 So. 635, 23 A.L.R. 1470.

Annotation: 11 B. R. C. 266.

In Messersmith v. American Fidelity Co. 232 N. Y. 161, 133 N. E. 432, 19 A.L.R. 876, 21 N. C. C. A. 500, affirming 187 App. Div. 35, 175 N. Y. S. 169, a policy covering liability for injury caused by the use of an automobile by one under the age permitted by statute to operate a car on the highway was held not against public policy where a statute authorized insurance companies to insure against liability for loss or damage through the use and maintenance of automobiles.

Manslaughter by Reason of Driving at Excessive Speed.—A policy undertaking to indemnify an automobile owner against liability to third persons for personal injury through the operation of the car covers a case where a person was killed and the insured was convicted of manslaughter by reason of driving at an excessive speed, and such policy is not void on the ground that it is against public policy. Tinline v. White Cross Ins. Asso. [1921] 3 K. B. (Eng.) 327, 11 B. R. C. 260. Annotation: 11 B. R. C. 265.

[15] McMahon v. Pearlman, 242 Mass. 367, 136 N. E. 154, 23 A.L.R. 1467.

[16] Ibid.

[17] Annotation: 11 B. R. C. 267.

[18] Tinline v. White Cross Ins. Asso. [1921] 3 K. B. (Eng.) 327, 11 B. R. C. 260 (dictum).

Annotation: 11 B. R. C. 265.

[19] Annotation: 39 A.L.R. 1029, s. 69 A.L.R. 397.

[20] Re Opinion of Justices, 81 N. H. 566, 129 A. 117, 39 A.L.R. 1023.

Annotation: 39 A.L.R. 1028, s. 69 A.L.R. 397.

of fault in such operation is a valid law.[1] Such provision is not an invalid interference with interstate commerce.[2] Moreover, requiring persons not pecuniarily able to satisfy claims for injury caused by operation of a motor vehicle upon the highway to furnish indemnity insurance to the exclusion of indemnity bonds does not render the statute invalid.[3]

A statute requiring provision for indemnity from those operating motor vehicles upon the highways must apply to those operating under short-term regulations and zone privileges, as well as to those having unlimited licenses to operate on the highways generally.[4]

Power of the legislature respecting the control of travel on the highways and regulation of business of insurance do not extend far enough, however, to compel every owner of a motor vehicle, before using it upon the highway, to contribute to a private or quasi public corporation designated as the "State Motor Vehicle Insurance Fund," as in practical effect it would create a substantial monopoly in the field of competitive insurance business.[5] The creation of such a corporation, which is not a public corporation in the sense that it is established as an instrumentality of government, cannot be justified as an exercise of the police power.[6]

Exempting a property owner from the necessity of securing indemnity insurance before operating motor vehicles upon the highway if the commissioner is satisfied of the collectability of any judgment which might be secured for injuries negligently caused by such operation does not render the statute void for discrimination.[7] But it has been held that permitting property owners to operate motor vehicles on the highway without securing indemnity insurance, while denying others the right to furnish indemnity bonds with individual surety, is a discrimination which renders the sustaining of the statute doubtful.[8]

3. Duties and Liabilities of Insurer in General

§ 521. Generally.—The duties and liabilities of the insurer are ordinarily based upon the provisions of the insurance policy issued and upon statutes relating to the particular insurances. The following sections will consider in particular such duties and liabilities arising under particular circumstances.[9]

§ 522. Use of Car by Other than Insured.—Under automobile liability policies, the question has arisen as to whether the insurer is liable for loss resulting to the insured on account of an injury inflicted while his car was being operated by others.[10] The determination of this question depends, of course, upon the provisions of the policy involved. Some automobile indemnity policies are so worded as to apply only where the car is being operated by the owner or by a person connected with a repair shop or garage in connection with repair work, testing, delivering, or calling for said car.[11] For example, the owner of an automobile does not operate it within the meaning of an indemnity policy applying only when the machine is being operated by the owner when he is merely present in the car directing its operation by another person.[12] On the other hand, a policy insuring the owner of an automobile against liability on account of injuries suffered by reason of the ownership, maintenance, or use of the car covers injuries caused by operation of the car by the owner's adult son, who is a member of his family and maintained by him, at least if the policy provides against liability if the car is being driven by any person under sixteen years of age.[13]

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[1] Re Opinion of Justices, 81 N. H. 566, 129 A. 117, 39 A.L.R. 1023.

[2] Ibid.

[3] Ibid.

[4] Ibid.

[5] Ibid.

[6] Ibid.

[7] Ibid.

[8] Ibid.

[9] See infra, §§ 522 et seq.

[10] **"Omnibus" Coverage Clause.**—Oftentimes there appears either within the policy of insurance or by way of a rider or indorsement attached thereto a clause purporting, or the effect of which is, to extend the protection of the policy to any person or persons coming within a defined group. This is the so-called "omnibus" clause, the effect of which, upon the liability of the insurer will be considered elsewhere in this article. See infra, §§ 532 et seq.

Operation by Infant or Other Unauthorized Person.—As to the liability of the insurer where the car was being driven by an infant or other unauthorized person, see infra, § 523.

§ 523. Use of Car by Infant or Other Unauthorized Person.—An interesting question has arisen under automobile liability policies as to the insurer's liability for loss resulting to the insured on account of an injury inflicted while his car was being operated by an infant or unlicensed person in violation of regulations governing the issuing of licenses to persons for driving such machines.[14] Liability under such circumstances depends upon the provisions of statutes, ordinances, and insurance policies. Legislative permission to insure against liability for loss or damage through the use and maintenance of automobiles authorizes a policy covering liability for injury caused by the use on the highway of an automobile by an infant under the age permitted by statute.[15]

§ 524. Provisions as to Determination of Insurer's Liability in Payment of Claim.—The provisions in some liability policies are such as to render the contract one of liability—that is, such as to enable the insured to recover where he is liable for an injury, although he has not actually paid the injured person.[16] Other policies, however, provide that no action shall lie against the insurer unless brought by the insured for loss or expense actually sustained and paid in money after trial of the issues.[17] The provisions of other policies bind the insurer to pay only after payment of a final judgment against the insured.[18] It is thus clear that the liability of the insurer is determined by the provisions of the policies or the construction of such provisions by the court—that is, whether the policies constitute contracts of indemnity against liability or against actual loss.[19]

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[11] Witherstine v. Employers' Liability Assur. Corp. 235 N. Y. 168, 139 N. E. 229, 28 A.L.R. 1298.

[12] Ibid.

[13] Fullerton v. United States Casualty Co. 184 Iowa, 219, 167 N. W. 700, 6 A.L.R. 367.

Reformation of Policy to Cover Members of Family.—A policy insuring the owner of an automobile kept for business calls and pleasure against loss by injuries caused by operation of the car may be reformed so as to cover injuries while the car is being driven by members of the owner's family, where he understood that the policy would so cover, the agent knew that he did not drive the car himself, and the insurer, upon notice of the accident, settled part of the claims and attempted to settle others. Fullerton v. United States Casualty Co. 184 Iowa, 219, 167 N. W. 700, 6 A.L.R. 367.

The fact that a son driving an automobile at the time it inflicted injury was of legal age does not take the accident out of the operation of an indemnity insurance policy against liability on account of injuries suffered by reason of the ownership, maintenance, and use of the car if he was just out of school living at home as a member of his father's family and dependent upon his father for support. Ibid.

[14] Annotation: 6 A.L.R. 378, s. 13 A.L.R. 135, 19 A.L.R. 879, 23 A.L.R. 1472, 28 A.L.R. 1301, and 41 A.L.R. 507.

[15] Messersmith v. American Fidelity Co. 232 N. Y. 161, 133 N. E. 432, 19 A.L.R. 876.

Annotation: 19 A.L.R. 879.

[16] Merchants Mut. Auto. Liability Ins. Co. v. Swart, 267 U. S. 126, 69 L. ed. 538, 45 S. Ct. 320; Dickinson v. Maryland Casualty Co. 101 Conn. 369, 125 A. 866, 41 A.L.R. 500.

Annotation: 6 A.L.R. 380, s. 13 A.L.R. 135, 19 A.L.R. 879, 23 A.L.R. 1472, 28 A.L.R. 1301, and 41 A.L.R. 507.

[17] Annotation: 6 A.L.R. 380, s. 13 A.L.R. 135, 19 A.L.R. 879, 23 A.L.R. 1472, 28 A.L.R. 1301, and 41 A.L.R. 507.

Application of Rule.—It has been held that such a provision applies only in case the company denies liability and refuses to defend. Patterson v. Adan, 119 Minn. 308, 138 N. W. 281, 48 L.R.A.(N.S.) 184.

§ 525. **—Effect of "No Action" Clause.**—The insertion in the policy of a "no action" clause, or provision that no action shall lie upon the policy except for loss actually sustained and paid in satisfaction of a final judgment against the insured automobile owner, ordinarily creates indemnity, as distinguished from liability, insurance, and contemplates that the insured must be liable to the injured person and that this liability must be established by a judgment rendered against the insured and paid by him before the insurance company can be held liable.[20]

§ 526. **—Medical or Surgical Expenses.**—Some automobile liability insurance policies provide for the payment of immediate medical or surgical expense rendered to the injured at the time of the accident. The intent and scope of the undertaking to pay for "such immediate medical or surgical aid as was imperative at the time of the accident" must depend upon the nature and circumstances of the accident.[1] The liability of an insurer under such a policy includes the cost of a surgical operation performed upon a child whose skull was fractured as a result of being struck by the insured's automobile, and of medical attendance and hospital expenses up to the time when it was judged safe to move the child from the hospital, but does not extend to expenses thereafter incurred by the insured in having the child cared for in his own home, although they may have been necessary for the proper treatment of the case.[2]

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[18] Annotation: 6 A.L.R. 380, s. 13 A.L.R. 135, 19 A.L.R. 879, 23 A.L.R. 1472, 28 A.L.R. 1301, and 41 A.L.R. 507.

As a result of such provisions, a distinction is made by the authorities between a simple contract of indemnity against damages and a contract of indemnity against liability for damages: in the former case only does the common-law rule that there is no cause of action until there is actual damage apply; in the latter case it has very generally been held that an action may be brought and recovery had as soon as the liability is legally imposed. Annotation: 41 A.L.R. 509.

[19] **Indemnity against Liability.**—A number of cases have taken the view that the policy under consideration by the court was a contract of indemnity against liability, giving to the insured a right of action upon the policy as soon as final judgment has been rendered against him for an injury covered by the policy, without the necessity of showing actual loss or payment of the judgment by him. Annotation: 41 A.L.R. 509, 510.

Indemnity against Actual Loss.—Other cases have taken the view that the policy under consideration by the court was a contract of indemnity against actual loss, giving to the insured no right to recover against the company the amount of a judgment against him until such judgment has been actually paid by him. Annotation: 41 A.L.R. 511.

[20] Combs v. Hunt, 140 Va. 627, 125 S. E. 661, 37 A.L.R. 621, wherein the agreement was "to indemnify the assured designated in the schedule against loss arising or resulting from claims upon the assured for damages." The court said: "Learned counsel for the plaintiff in error insists that the contract so made is harsh and unfair to the assured. We agree that it is harsh, and but very imperfectly relieves the average automobile owner from the embarrassment caused by a claim and suit for damages against him. But the court cannot read into the written instrument any stipulation it does not contain, nor can we give it a construction plainly in conflict with its expressed purport."

Annotation: 41 A.L.R. 512.

Accepting the minority view, it has been held that where, in an automobile indemnity policy containing a "no action" clause, the insurer agrees to defend any suit brought to enforce a claim for damages thereon, unless it elects to effect a settlement thereof, the insurer, by assuming to defend an action against the insured, is rendered liable for the judgment up to the amount of the policy and the insured is not compelled to pay the judgment in order to recover from the insurer. Annotation: 41 A.L.R. 513, 514.

[1] Laidlaw v. Hartford Acci. & Indem. Co. 254 N. Y. 391, 173 N. E. 557, 77 A.L.R. 1191.

[2] Ibid.

An insurance adjuster has no authority to bind an automobile liability insurer by a promise to reimburse the insured for expenses incurred in caring for an injured person beyond the liability assumed by the insurer in the policy. Ibid.

§ 527. Recovery by Person Injured.—Assuming that an accident is covered by an automobile liability insurance policy,[3] the right of a person injured to recover the insurance depends somewhat on whether the policy is a contract of indemnity against liability or indemnity against actual loss.[4] If the policy is treated as a contract of indemnity against liability, as distinguished from indemnity against actual loss, the company is subject to garnishment by a person who has recovered judgment against the insured for an injury covered by the policy where the company has waived any defense which it might otherwise have urged as against the insured.[5] On the other hand, if the policy is treated as a contract of indemnity against actual loss, as distinguished from indemnity against liability, ordinarily the company is not subject to garnishment by the injured party, since no amount is due to the insured until payment of the judgment by him.[6] In the absence of statute or express provision, this is true regardless of the fact that the insured is insolvent and has no property out of which a judgment may be satisfied.[7] Moreover, according to the

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[3] **There is no basis for a recovery** on the policy by the injured party where the accident was one not covered by the policy. Dickinson v. Maryland Casualty Co. 101 Conn. 369, 125 A. 866, 41 A.L.R. 500; Whitney v. Employers' Indem. Corp. 200 Iowa, 25, 202 N. W. 236, 41 A.L.R. 495.

Annotation: 41 A.L.R. 520.

The fact that a conditional vendor of an automobile included it in his list of machines covered by an indemnity policy which insured against liability for destruction of property by reason of the ownership, maintenance, or use of an automobile covered in the schedule and which inured to the benefit of any person using the machine with the consent of the insured does not give one whose property was injured by the car while in the possession of the conditional vendee a right of action against the insurer where the car was practically paid for and by law the grantee was to be regarded as the owner of it. Whitney v. Employers' Indem. Corp. 200 Iowa, 236, 202 N. W. 236, 41 A.L.R. 495.

[4] Annotation: 6 A.L.R. 381, s. 13 A.L.R. 135, 19 A.L.R. 879, 23 A.L.R. 1472, 28 A.L.R. 1301, and 41 A.L.R. 507.

[5] Annotation: 41 A.L.R. 516.

One injured while riding as a passenger in an automobile of another who carries liability insurance cannot, after recovering judgment against the latter, which is not paid, recover from the insurer unless the assured has complied with the provisions of the policy. Ocean Acci. & G. Corp. v. Lucas (C. C. A. 6th) 74 F. (2d) 115, 98 A.L.R. 1461.

[6] Combs v. Hunt, 140 Va. 627, 125 S. E. 661, 37 A.L.R. 621 (where the policy contained a "no action" clause); Luger v. Windell, 116 Wash. 375, 199 P. 760, 37 A.L.R. 641.

Annotation: 6 A.L.R. 381, s. 13 A.L.R. 135, 19 A.L.R. 879; 23 A.L.R. 1472, 28 A.L.R. 1301, and 41 A.L.R. 507.

Judgment against Insured as Condition Precedent to Action by Injured Person against Insurer.—No action lies against an insurer against liability for injury by an automobile in favor of one so injured before judgment against the insured where the policy provides that no claim against the insurer can arise on behalf of an injured person until execution has been returned unsatisfied against the insured. Small v. Morrison, 185 N. C. 577, 118 S. E. 12, 31 A.L.R. 1135.

Payment of Damages as Condition of Liability.—The automobile accident policy involved insuring against damages for bodily injuries to third persons caused in the operation of the automobile by the insured, the insurer reserving the right to defend against the claim of damages in the name of the insured, and to negotiate settlements without interference by the insured, is held to be a contract of liability rather than of indemnity payable only when the damage actually sustained has been paid by the insured, and the right to recover for the injuries is complete when the liability attaches. Brandon v. St. Paul Mercury Indem. Co. 132 Kan. 68, 294 P. 881, 83 A.L.R. 673, following Blanton v. Kansas City Cotton Mills Co. 103 Kan. 118, 172 P. 987, L.R.A.1918E, 541.

[7] Fidelity & C. Co. v. Martin, 163 Ky. 12, 173 S. W. 307, L.R.A.1917F, 924.

Annotation: 41 A.L.R. 516.

Effect of Statutory Provisions.—Under a statute providing that any bond or policy of insurance covering liability to others by reason of the operation of a motor vehicle shall be deemed to contain a condition making the insurer directly liable to the person injured or suffering loss, the insurer is liable in a direct action by the person injured, whether its insurance is evidenced by an indemnity policy or by a so-called "straight liability" policy. Biller v. Meyer (C. C. A. 7th) 33 F. (2d) 440, 66 A.L.R. 436.

In Williams v. Nelson, 228 Mass. 191, 117 N. E. 189, Ann. Cas. 1918D, 538, where a statute permitted a judgment creditor of one insured by a contract of casualty insurance against loss or damage on account of bodily injury or death by accident of any person, arising from causes for which the insured was responsible, such judgment having been recovered for a cause covered by the contract of insurance, to proceed in equity against both the insured and the insurer, to recover and apply the insurance money to the satisfaction of the judgment, it was held that one who had recovered a judgment against the owner of an automobile for an injury covered by an indemnity policy held by the latter was en-majority rule, this is true even though the company took charge of and defended the action against the insured.[8] But, according to the minority rule, where the company assumes a defense as it agreed to do under the policy, a judgment in the action against the insured becomes, as between the plaintiff, the defendant, and the insurer, a liability or debt owing unconditionally by the insurer to the insured which the injured party may reach by garnishment, notwithstanding the policy contained a "no action" clause.[9]

§ 528. **Settlement with Injured Person.**—Usually, under the express terms of a liability or indemnity policy, the insurer is privileged to settle any claim made against the insured within the coverage of the policy;[10] and the insured himself is denied this privilege of settlement except by the insurer's consent[11] or at his own risk.[12] For example, the owner of an automobile holding a policy indemnifying him against loss resulting from claims upon him by reason of the ownership, maintenance, or use of the machine, which prohibits him from settling any claim without the written consent of the insurer and provides that action will not lie against the insurer except for expenses paid in money after actual trial of the issues, cannot hold the insurer liable for the expenses incurred by him in voluntarily settling a judgment against his daughter for injury caused by her operation of the machine.[13] Furthermore, under such a contract, the fact that the insurer refuses to recognize liability upon a judgment recovered against the daughter of the insured for injury caused by operation of the machine by her does not entitle the insured to make an adjustment of the claim at the expense of the insurer.[14] Furthermore, an in-

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titled to maintain an action against the insurer, although there had been no payment of the judgment. But it was held that the words, "bodily injury . . . of any person," were confined to physical injury, and did not include financial damage to the husband of the person injured, arising from the injury.

Statutory Provision Where Insured Insolvent or Bankrupt.—A statute requiring automobile liability policies to contain a provision that the insolvency or bankruptcy of the insured should not release the company from the payment of damages for injuries sustained during the life of the policy, and that in case execution against the insured should be returned unsatisfied, in an action brought by the injured person, because of such insolvency, then an action might be maintained by the injured person against the company for the amount of the judgment in said action not exceeding the amount of the policy, is within the police power of the state and cannot be said to be unconstitutional as depriving the company of property without due process of law. Merchants Mut. Auto. Liability Ins. Co. v. Smart, 267 U. S. 126, 69 L. ed. 538, 45 S. Ct. 320, affirming 236 N. Y. 577, 142 N. E. 290, which dismissed an appeal from 206 App. Div. 630, 198 N. Y. S. 949. Annotation: 41 A.L.R. 518.

Validity of Statute.—The statute is not invalid as making provision for an unlawful preference under the National Bankruptcy Act, when the insured is bankrupt at the time of the injury. Merchants Mut. Auto. Liability Ins. Co. v. Smart, 267 U. S. 126, 69 L. ed. 538, 45 S. Ct. 320, affirming 236 N. Y. 577, 142 N. E. 290, which dismissed an appeal from 206 App. Div. 630, 198 N. Y. S. 949. Annotation: 41 A.L.R. 518.

Construction of Statute.—In construing a state statute which provides that any bond or policy of insurance covering liability to others by reason of the operation of a motor vehicle shall be deemed to contain a condition that the insurer shall be directly liable to the person injured or suffering loss, the construction placed by the state supreme court upon the words "liability" and "insurer" is binding upon a Federal court. Biller v. Meyer (C. C. A. 7th) 33 F. (2d) 440, 66 A.L.R. 436.

The exception of want of interest in the plaintiff does not lie to an action brought on an automobile liability insurance policy by an injured person by virtue of a provision therein giving such person, in case of the insolvency or bankruptcy of the assured, a right of action against the insurer. Lawrason v. Owners' Auto. Ins. Co. 172 La. 1075, 136 So. 57, 77 A.L.R. 1412.

[8] Combs v. Hunt, 140 Va. 627, 125 S. E. 661, 37 A.L.R. 621.
Annotation: 41 A.L.R. 516.

[9] Patterson v. Adan, 119 Minn. 308, 138 N. W. 281, 48 L.R.A.(N.S.) 184.
Annotation: 41 A.L.R. 516.

[10] Annotation: 79 A.L.R. 1118.
See also generally INSURANCE [Also 14 R. C. L. p. 823].

[11] Thacher v. Ætna Acci. & Liability Co. (C. C. A. 9th) 287 F. 484, 28 A.L.R. 1280.
Annotation: 6 A.L.R. 381, s. 13 A.L.R. 135, 19 A.L.R. 879, 23 A.L.R. 1472, 28 A.L.R. 1301, and 41 A.L.R. 507; 79 A.L.R. 1118.

[12] Annotation: 6 A.L.R. 381, s. 13 A.L.R. 135, 19 A.L.R. 879, 23 A.L.R. 1472, 28 A.L.R. 1301, and 41 A.L.R. 507.

[13] Thacher v. Ætna Acci. & Liability Co. (C. C. A. 9th) 287 F. 484, 28 A.L.R. 1280.

[14] Ibid.

surer, under a contract entitling it to settle claims if it sees fit and prohibiting the insured from doing so without its consent, is not liable, in case it refuses to settle the claim at the suggestion of the insured, for the difference between the amount of the proffered settlement and the amount of the judgment recovered in excess of the face of its policy.[15] And where an insurer has, under its policy, an option to defend or settle any action against its insured by him turned over to it to defend, it is not liable to him in consequence of its consenting to the entry of judgment against him in an action growing out of a collision, by reason of which a verdict in his favor in a counteraction brought by him against the plaintiff therein was set aside on the ground that the consent judgment was conclusive of his negligence, although such course was taken over his protest and with knowledge of the prejudice to him which might result.[16] Where, however, the insurer abandons its obligation to defend a suit against the insured, it cannot defeat a recovery for money paid by the insured in settlement of the claim on the ground that it was paid in compromise without a judgment, whereas the contract provides for recovery only when the payment is in satisfaction of a judgment.[17]

§ 529. Defense of Suit by Insurer.—Practically all automobile liability policies provide in effect that the insurer shall have the right to defend all actions brought against the insured to recover for any injury covered by the policy.[18] And when this right is exercised, it cannot be withdrawn. The insured has the right to expect that the insurer, having undertaken to represent him in an action against him, will continue that representation until some notice is given of its withdrawal or of a change in the capacity in which it is acting in the matter.[19] The insurer cannot, after settling some of the claims growing out of an accident and undertaking the defense of a suit on other claims, withdraw from the defense and cast the burden thereof on the insured on the theory that it had mistaken the nature of its obligation.[20] And the refusal by the insurer to comply with its obligation to defend an action against the insured as required by the policy is a breach of its contract for which the insured may recover.[1]

A policy obligating the insurer to indemnify the assured against loss from the liability imposed by law upon him for damages on account of bodily injuries, including death, accidentally sustained by any person by reason of the maintenance or use of his automobile, and to defend in the name and on behalf of the assured any suits which may at any time be brought against him on account of such injuries, does not bind the insurer to defend a criminal prosecution for manslaughter instituted against the insured.[2] However, the fact that the liability arose by reason of a violation of law has been considered not to excuse the insurer so far as civil liability is concerned.[3]

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[15] Auerbach v. Maryland Casualty Co. 236 N. Y. 247, 140 N. E. 577, 28 A.L.R. 1294.

In Schmidt v. Travelers Ins. Co. 244 Pa. 286, 90 A. 653, 52 L.R.A.(N.S.) 126, it was held that an insurer against loss by reason of the use of the insured's automobile, with liability limited to a certain amount for each claim, did not, by refusing permission to the insured to settle a claim, render itself liable in excess of its undertaking for the amount for which a judgment recovered against the insured exceeded the amount which the claim might have been settled for, where the policy provided that the assured should not voluntarily assume any liability or settle any claim, except at his own cost, or incur any expense, or interfere in any negotiations for settlement, or legal proceeding, without the previous consent of the insurer in writing, and also contained a provision that if any suit should be brought against the insured on account of such injuries as were covered by the policy, the insured should forward the summons and process to the insurer, which would at its own cost defend such suit.

[16] Long v. Union Indem. Co. 277 Mass. 428, 178 N. E. 737, 79 A.L.R. 1116.

[17] Fullerton v. United States Casualty Co. 184 Iowa, 219, 167 N. W. 700, 6 A.L.R. 367.

Annotation: 6 A.L.R. 376.

[18] Annotation: 6 A.L.R. 383, s. 13 A.L.R. 135, 19 A.L.R. 879, 23 A.L.R. 1472, 28 A.L.R. 1301, and 41 A.L.R. 507.

[19] Daly v. Employers' Liability Assur. Corp. 269 Mass. 1, 168 N. E. 111, 72 A.L.R. 1436.

Annotation: 72 A.L.R. 1494.

[20] Fullerton v. United States Casualty Co. 184 Iowa, 219, 167 N. W. 700, 6 A.L.R. 367.

Annotation: 6 A.L.R. 376.

[1] Combs v. Hunt, 140 Va. 627, 125 S. E. 661, 37 A.L.R. 621.

Annotation: 41 A.L.R. 525.

§ 530. **Liability for Depreciation of Injured Machine.**—The question has arisen as to whether one holding a policy insuring him against loss by reason of liability imposed by law upon him for destruction of, or injury to, property of others arising from the use of his automobile, is entitled to recover from the insurer not only the actual cost of repairs to a machine which has been damaged by his car, but also the amount which he is obliged to pay for depreciation in the value of the automobile caused by its having been in a collision; and it has been held that such a recovery can be had, although the policy contains a limitation clause that the insurer's liability "is limited to the actual intrinsic value of the property damaged or destroyed, . . . which shall not be greater than the actual cost of repairs or replacement thereof," it being held that this clause does not limit the liability of the insurer to the actual cost of repairs made, when it appears that they do not, and cannot, make the car as good as it was before the accident.[4]

§ 531. **Effect of Death of Insured.**—An examination of the surprisingly few cases in which the courts appear to have determined the effect of the death of the named insured on a policy discloses a contrariety of conclusion, although this is due largely to the differing phraseology used in the policies and the facts involved in the respective cases.[5] In the absence of some policy provision extending coverage beyond the death of the named insured, it would seem that coverage would terminate with his death, in view of the well-settled general rule that insurance is a personal contract, whatever the subject-matter thereof may be.[6] Furthermore, it has been held that the fact that the premium has been paid upon a policy for a period which extends beyond the death of the named insured does not, on equitable considerations, justify a court in construing a policy so as to extend the coverage during such full term if the terms of the contract are not susceptible of such a construction, since the court cannot make a contract for the parties or impose upon the insurer an obligation not assumed by it in its written contract.[7] Some policies, however, contain provisions under which the coverage extends beyond the death of the insured. Undoubtedly, such is the effect of an express provision that if the death of the insured shall occur within the policy period, the policy, during the unexpired portion of such period, shall cover the legal representatives of the insured.[8] It has been held that a provision that the policy shall be void in case of termination of the interest of the insured other than by his death implies that the obligation of the insurer is not necessarily terminated by the death of the named insured.[9] But even such provision does not apply where no executor or administrator has been appointed.[10] A fortiori, an alternate executor is not entitled to the protection of the policy prior to probate of the will and his appointment as executor.[11] Several attempts to establish coverage as to one other than the named insured also have been premised upon permissive use under a so-called "omnibus" clause, which extended coverage to third persons operating the automobile of the named insured with his permission, or, under some such clauses, with the permission of an adult member of the named insured's household. It has been held, however, that permission given by the named insured in his lifetime terminates with his decease.[12] Nor may an executor, after his appointment, ratify a previous use of the automobile by another so as to create protection as to an accident which occurred subsequent to the death of the named insured, since the rights of the parties must be considered as of the time of the accident, and during the interval between the death of the insured and the appointment of his executors there was no insured within the meaning of the policy, wherefore the risk was suspended.[13]

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[2] Patterson v. Standard Acci. Ins. Co. 178 Mich. 288, 144 N. W. 491, 51 L.R.A.(N.S.) 583, Ann. Cas. 1915A, 632.

[3] Annotation: 51 L.R.A.(N.S.) 584.

[4] Christison v. St. Paul F. & M. Ins. Co. 138 Minn. 51, 163 N. W. 980, L.R.A.1917F, 612.
Annotation: 6 A.L.R. 385, s. 13 A.L.R. 135, 19 A.L.R. 879, 23 A.L.R. 1472, 28 A.L.R. 1301, and 41 A.L.R. 507; L.R.A.1917F, 615.

[5] Annotation: 97 A.L.R. 1241.

[6] See 1 Couch, Ins. § 3.
Annotation: 97 A.L.R. 1241.
Generally as to the termination of a policy by death, see 6 Couch, Ins. § 1351.

[7] Collins v. Northwest Casualty Co. 180 Wash. 347, 39 P. (2d) 986, 97 A.L.R. 1235.

[8] Annotation: 97 A.L.R. 1242.

4. LIABILITY OF INSURER UNDER "OMNIBUS" CLAUSE

§ 532. Generally.—Independently of the general insuring clause in an automobile liability policy, oftentimes there appears, either within the policy or by way of rider or indorsement attached thereto, a clause purporting, or the effect of which is, to extend the protection of the policy to any person or persons coming within a defined group. This is the so-called "omnibus" clause.[14] Sometimes, though not nearly so often, the general insuring clause itself is so framed as to grant this type of coverage, that is, to create liability insurance in favor not only of the named assured, but also of any person or persons coming within a defined group.[15] Policies with such clauses have been held valid.[16]

§ 533. Nature and Effect.—Sometimes, by the general insuring clause in the policy, the insurer agrees to "indemnify" not only the named assured, but also "any licensed personal friend or relative of the insured while driving the car with the insured's general knowledge and consent,"[17] or "any relation or friend driving with the insured's consent,"[18] or "any person responsible for the operation of the named assured's motor vehicle . . . with his express or implied consent,"[19] or "any person or persons while riding in or legally operating any of the automobiles . . . or any person, firm, or corporation legally responsible for the operation thereof, provided such riding, use, or operation is with the permission of the named insured."[20] In the absence of eccentricities of form, such as sometimes occur, it is clear that such a clause creates liability insurance in favor of one other than the named assured answering the description of persons therein contained.[1]

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[9] Collins v. Northwest Casualty Co. 180 Wash. 347, 39 P. (2d) 986, 97 A.L.R. 1235.

[10] Ibid.

[11] Ibid.

[12] Ibid (wherein it was also held that the fact that the extended coverage clause afforded protection to whoever had been given permission by a member of the insured's household to operate the insured car would not make such permission effective subsequent to the death of the named insured, since his "household" did not survive his death and continue to exist as an entity in the sense in which the term is used in such a clause). Annotation: 97 A.L.R. 1242.

[13] Collins v. Northwest Casualty Co. 180 Wash. 347, 39 P. (2d) 986, 97 A.L.R. 1235.

[14] Annotation: 72 A.L.R. 1376.

[15] Annotation: 72 A.L.R. 1376.

[16] Williams v. Baltic Ins. Asso. [1924] 2 K. B. (Eng.) 282, 15 B. R. C. 280.
Annotation: 72 A.L.R. 1384.

[17] Williams v. Baltic Ins. Asso. [1924] 2 K. B. (Eng.) 282, 15 B. R. C. 280.
Annotation: 72 A.L.R. 1376.

[18] **Under a clause providing that "while the automobile covered by this policy is being used with the express or implied consent of the assured** named in the policy . . . it is agreed that any insurance granted by this policy shall, in addition to the said named assured, inure to the benefit of any person responsible for the operation of the said automobile," the policy would inure to the benefit of and protect one operating the car with the express or implied consent of the named assured, the same as if his name had been filled in. Whitney v. Employers Indem. Corp. 200 Iowa, 25, 202 N. W. 236, 41 A.L.R. 495.

§ 534. **"Permission" or "Consent" of Assured.**—Most omnibus coverage clauses indemnify others than the insured only where such other persons are riding in or operating the insured automobile with the "permission" or "consent" of the assured.[2] In many of the clauses, the words relating to permission or consent are somewhat removed from the descriptive words "riding in," "operating," etc. Yet in all cases involving the operation of the clause with respect to a person "riding in" the car, or to a person "operating" the car, as the case may be, the words relating to permission or consent have been regarded applicable to such person. Thus, as regards a clause, by its terms applicable to "any person or persons while riding in or legally operating any automobile insured hereunder and any person, firm, or corporation legally responsible for the operation thereof with the permission of the named assured," etc., the words "with the permission of the named assured," etc., have been regarded applicable not only to a "person . . . legally responsible for the operation" of the car,[3] but also to a "person . . . riding in" the car[4] and a "person . . . operating" the car.[5] With one exception, most clauses are so framed as to leave little or no room for doubt as to the applicability of the words relating to permission or consent to a person "operating," etc., the car; the exception is that clause by its terms applicable to "(a) any person (s) while riding in or legally operating" the car, "or (b) any person, firm or corporation legally responsible for the operation thereof, providing such use or operation is with the permission of the named assured," etc. But, even as regards a clause couched in the language last quoted, the proviso relating to permission has been regarded applicable to a "person . . . operating" the car.[6] Under a clause of this character, to entitle one other than the named assured to indemnity on account of an accident in which the car was involved, the use or operation of the car at the time of such accident must have been with the "permission" ("or consent") of the named assured, etc., within the meaning and intent of the clause.[7]

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[19] Annotation: 72 A.L.R. 1377.

[20] Clements v. Preferred Acci. Ins. Co. (C. C. A. 8th) 41 F. (2d) 470, 76 A.L.R. 17 (involving clause reading: "The word 'assured' wherever used in the policy shall include in addition to the assured named in the policy any person, firm, or corporation riding in or responsible for the operation of said automobile or automobiles . . . with the permission of said named assured," etc., recovery denied for breach of condition relating to notice of accident).

Annotation: 72 A.L.R. 1377.

"The words 'additional assured(s),' used in the insuring agreements, shall mean (a) any person(s) while riding in or legally operating an automobile insured hereunder, or (b) any person, firm, or corporation legally responsible for the operation thereof, providing such use or operation is with the permission of the named assured." Stovall v. New York Indem. Co. 157 Tenn. 301, 8 S. W. (2d) 473, 72 A.L.R. 1368.

Protection against third party risks to one coming within the defined group is afforded by a clause reading: "The insurance provided by this policy is so extended as to be available, in the same manner and under the same conditions ['provisions' sometimes substituted] as it is available to the named assured, to any person or persons while riding in or legally operating" the car, "and ['or' sometimes substituted] to any person, firm, or corporation legally responsible for the operation thereof, provided such use or operation is with the permission of the named assured." Maryland Casualty Co. v. Ronan (C. C. A. 2d) 37 F. (2d) 449, 72 A.L.R. 1360; Dickinson v. Maryland Casualty Co. 101 Conn. 369, 125 A. 866, 41 A.L.R. 500.

"Assured" to Include Third Persons or Form.—Protection against third party risks to one coming within the defined group is likewise afforded by a clause reading: "The unqualified word 'assured,' wherever used in this policy, shall be construed to include, in addition to the named assured in this policy, any person or persons while riding in or legally operating any automobile insured hereunder, and any person, firm, or corporation legally responsible for the operation thereof with the permission of the named assured." Odden v. Union Indem. Co. 156 Wash. 10, 286 P. 59, 72 A.L.R. 1363.

One who rents a car from a corporation engaged in the business of renting automobiles, without drivers, to persons who either drive them or independently employ drivers, comes within the protection of a policy issued to the corporation and specifying as those who are insured not only the corporation itself and allied companies designated as the "named assured," but also "renters," "drivers," etc. Royal Indem. Co. v. Morris (C. C. A. 9th) 37 F. (2d) 90, writ of certiorari denied in 281 U. S. 748, 74 L. ed. 1160, 50 S. Ct. 353.

[1] Annotation: 72 A.L.R. 1377.

[2] Annotation: 72 A.L.R. 1386.

[3] Odden v. Union Indem. Co. 156 Wash. 10, 286 P. 59, 72 A.L.R. 1363.
Annotation: 72 A.L.R. 1387.

[4] Odden v. Union Indem. Co. 156 Wash. 10, 286 P. 59, 72 A.L.R. 1363.
Annotation: 72 A.L.R. 1387.

[5] Odden v. Union Indem. Co. 156 Wash. 10, 286 P. 59, 72 A.L.R. 1363.
Annotation: 72 A.L.R. 1387.

As regards the construction of the word "permission," as used in a clause of this character, there applies, under some circumstances at least, the general rule to the effect that where words are so used in a contract of insurance that their meaning is ambiguous or susceptible of two interpretations differing in import, that interpretation which will sustain the claim of the policyholder and cover the loss should be adopted.[8] There applies also, however, the general rule to the effect that "the terms of the policy cannot be enlarged or diminished by judicial construction."[9]

§ 535. **—Capacity to Grant.**—For one's use and operation of a car to be "with the express or implied consent" of the named assured, within the meaning and effect of the omnibus clause, the relation of the named assured to the car must be such that he or it is in a position to give consent.[10] A conditional vendor of the car, which, though retaining title to the car until fully paid for, has no control over the car and no right to the use of the same in its business, is in no position to give the consent provided for in such a clause, so as to bring the conditional vendee within the protection of a policy issued to the conditional vendor as the named assured, and containing such a clause.[11]

By the terms of some omnibus clauses the permission or consent prerequisite to the applicability of the clause may be granted not only by the named assured himself, where an individual, but also by an adult member of his family or household.[12] A bailee has been held authorized to give such permission.[13]

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[6] Stovall v. New York Indem. Co. 157 Tenn. 301, 8 S. W. (2d) 473, 72 A.L.R. 1368.
Annotation: 72 A.L.R. 1387.

[7] Whitney v. Employers Indem. Corp. 200 Iowa, 25, 202 N. W. 236, 41 A.L.R. 495; Stovall v. New York Indem. Co. 157 Tenn. 301, 8 S. W. (2d) 473, 72 A.L.R. 1368.
Annotation: 72 A.L.R. 1387.

[8] Dickinson v. Maryland Casualty Co. 101 Conn. 369, 125 A. 866, 41 A.L.R. 500; Stovall v. New York Indem. Co. 157 Tenn. 301, 8 S. W. (2d) 473, 72 A.L.R. 1368.
Annotation: 72 A.L.R. 1388.

[9] Annotation: 72 A.L.R. 1388.

[10] Whitney v. Employers Indem. Corp. 200 Iowa, 25, 202 N. W. 236, 41 A.L.R. 495.
Annotation: 72 A.L.R. 1390.

[11] Whitney v. Employers Indem. Corp. 200 Iowa, 25, 202 N. W. 236, 41 A.L.R. 495.
Annotation: 72 A.L.R. 1390.

[12] Dickinson v. Maryland Casualty Co. 101 Conn. 369, 125 A. 866, 41 A.L.R. 500 (car held to have been operated with the "permission" of a brother of the named assured, he being an adult member of the named assured's household other than a chauffeur or a domestic servant).
Annotation: 72 A.L.R. 1391.

[13] **Bailee with Full Power to Permit Its Use by Others.**—Where from the findings of the trial judge, supported by the evidence, it plainly appears that the loan of the car by the named assured to one H. vested in the latter full power, while the car was so in his possession, to use it personally for his own business and pleasure, and full power to permit its use by others for their own business and pleasure, as if he were the owner of the automobile it follows that H.'s permission to another, one B., so to use and permit the use of the car, was in legal effect the same as if the named assured himself had granted to the said B. permission to use the car for his own pleasure. Odden v. Union Indem. Co. 156 Wash. 10, 286 P. 59, 72 A.L.R. 1363 (held, as a further conclusion that a fourth person, one O., riding in the car as

Ordinarily, "permission" (or "consent") to use the car, granted by an officer of the named assured, where the latter is a corporation, is "permission" (or "consent") "of the named assured" [some clauses omit the word "named"], within the meaning and effect of "omnibus" clause.[14]

536. —**Continuous Permission.**—"Permission," within the meaning of the omnibus clause, may be continuous.[15]

§ 537. —**Implied Permission or Consent.**—Some omnibus clauses use the words "express or implied consent," thereby precluding any question as to whether or not the consent contemplated by the clause may be implied as well as express. In other such clauses, the words "permission," "permission and consent," "knowledge and consent," etc., if and when they are used, appear without definition; in that event, the word or words involved are construed to include implied permission, etc.[16] For one's use and operation of a car to be "with the express or implied consent" of the named assured, within the meaning and effect of an omnibus clause, the relation of the named assured to the car must be such that it (he) is in a position to give its (his) consent.[17] Permission to take and use the car upon a particular occasion, within the meaning and effect of the omnibus clause, may, in a proper case, be implied by usage and common practice of the parties.[18]

By some courts it is held that for one's use or operation of the car to be with the "permission" of the named assured, etc., within the meaning and effect of the omnibus clause, he need have received only permission or authority to take and use the car in the first instance.[19] Some other courts take the less extreme view, as regards one having permission to take and use the car in the first instance, that slight deviations by him in the use of the car from the purpose, etc., for which he received permission to use it do not make his use or operation of the car at the time without the "permission" of the person granting him the limited permission to take and use the car.[20]

§ 538. —**Effect of Deviations.**—As regards the breadth to be given the word "permission," as used in an omnibus coverage clause, where one asks for and receives permission to use the car for a purpose indicated by him in his request, it will not be held that any deviation or departure from the purpose

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an invited guest of B.—at a time when it was being used by the latter for his own pleasure, with the permission of H.—was in legal effect riding in the car with the permission of the named assured). Annotation: 72 A.L.R. 1395.

[14] Maryland Casualty Co. v. Ronan (C. C. A. 2d) 37 F. (2d) 449, 72 A.L.R. 1360; Whitney v. Employers Indem. Corp. 200 Iowa, 25, 202 N. W. 236, 41 A.L.R. 495 (named assured held to have been in no position to grant its "express or implied consent" to the use of particular car); Stovall v. New York Indem. Co. 157 Tenn. 301, 8 S. W. (2d) 473, 72 A.L.R. 1368 (sales manager).

Annotation: 72 A.L.R. 1394.

[15] Annotation: 72 A.L.R. 1397.

[16] Annotation: 72 A.L.R. 1398.

[17] Whitney v. Employers Indem. Corp. 200 Iowa, 25, 202 N. W. 236, 41 A.L.R. 495.

Annotation: 72 A.L.R. 1398.

[18] Where a salesman of the named assured, for whose use as such the latter purchased and kept a car, not only used it in and about the business of the named assured, but used it in and about his own private affairs, at times with the knowledge and express permission of the officers of the named assured, and at other times without their knowledge or express permission, permission having always been given when asked for, and no objection having ever been made to his use of the car for his personal accommodation without their knowledge or express permission, though on numerous occasions he had afterwards told them of such use of the car, such salesman's taking of the car and driving it to the cemetery, for his personal accommodation, though without having obtained specific permission of the officers of the named assured, was with their "permission," and therefore that of the named assured, implied by usage and common practice, within the meaning of a clause of this character. Maryland Casualty Co. v. Ronan (C. C. A. 2d) 37 F. (2d) 449, 72 A.L.R. 1360. Annotation: 72 A.L.R. 1398.

[19] Annotation: 72 A.L.R. 1400.

[20] Annotation: 72 A.L.R. 1400.

so indicated by him annuls the permission and puts him in the position of unlawfully using the car.[1] Nor will slight deviations from the route to the place to which he asked for, and received, permission to drive the car have that effect.[2] The view taken by some courts is, broadly stated, that for the use or operation of the car to be with the "permission," or "consent," of the named assured, etc., within the meaning and effect of an omnibus clause, permission or consent must have been given, impliedly at least, not only to the taking and use of the car in the first instance, but also to the particular use being made of the car at the time in question.[3] Other courts take the view that for one's use or operation of the car to be with the "permission" of the named assured, etc., within the meaning and effect of an omnibus clause, he need have received only permission or authority to take and use the car in the first instance.[4] In other words, if one receives the permission of the named assured, etc., to take and use the car in the first instance, his use or operation of the car while the same remains in his possession is with the "permission" of that person, within the meaning and effect of the omnibus clause, though for a purpose, etc., not contemplated by said person at the time he parted with possession.[5]

§ 539. Liability Depending on Lawful Operation of Car.—Very often the omnibus clause by its terms applies to, or among others to, any person or persons while riding in or "legally operating" the car, with the permission of the named assured, etc., or—as more often appears in the clause, provided ["providing" sometimes used] such use or operation is with the permission of the named assured, etc. In some such clauses, otherwise similar, the words "lawfully operating" are substituted for those above quoted. In still other such clauses, there is the proviso, following the enumeration of those to whom the clause applies, "provided the use and operation thereof are lawful" and with the permission of the named assured, etc.[6] If the person operating the car at the time of an accident is doing so with the permission of the named assured, its owner, and in violation of no law, it follows, as a matter of course, that he is "legally operating" said car, within the meaning and effect of those words, as employed in an omnibus clause by its terms applicable to any person or persons while riding in or "legally operating" the car, etc.[7]

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[1] Dickinson v. Maryland Casualty Co. 101 Conn. 369, 125 A. 866, 41 A.L.R. 500.
Annotation: 72 A.L.R. 1401.

Deviation by Borrower of Car as Affecting Right of His Guest to Insurance.—Under an omnibus clause in a policy insuring the owner of an automobile against liability for injuries through the operation of the car, which makes the insurance available to any person while riding in or legally operating the car, "provided such use or operation is with the permission" of the assured, the permission is not limited to use of the car for a specified purpose, but extends to any use made while the permission lasts, so that if the car is lent to one to go to his home to change his clothes, the insurance will inure to the benefit of a guest of the borrower while the borrower is operating the car entirely off the route along which the errand for which he borrowed the car would have taken him. Dickinson v. Maryland Casualty Co. 101 Conn. 369, 125 A. 866, 41 A.L.R. 500.

[2] Dickinson v. Maryland Casualty Co. 101 Conn. 369, 125 A. 866, 41 A.L.R. 500.
Annotation: 72 A.L.R. 1402.

[3] Annotation: 72 A.L.R. 1403.

[4] Annotation: 72 A.L.R. 1405.

[5] Stovall v. New York Indem. Co. 157 Tenn. 301, 8 S. W. (2d) 473, 72 A.L.R. 1368. See also Dickinson v. Maryland Casualty Co. 101 Conn. 369, 125 A. 866, 41 A.L.R. 500.
Annotation: 72 A.L.R. 1406.

[6] Annotation: 72 A.L.R. 1411.

[7] Maryland Casualty Co. v. Ronan (C. C. A. 2d) 37 F. (2d) 449, 72 A.L.R. 1360.
Annotation: 72 A.L.R. 1411.

Other cases, involving such a clause, in which judgment for the plaintiff was affirmed, it appearing that the driver of the car at the time of the accident was then operating it with the permission of the named assured or other person having authority under the clause to grant permission include Dickinson v. Maryland Casualty Co. 101 Conn. 369, 125 A. 866, 41 A.L.R. 500; Stovall v. New York Indem. Co. 157 Tenn. 301, 8 S. W. (2d) 473, 72 A.L.R. 1368. Annotation: 72 A.L.R. 1411.

The use of the words "legally operating," as employed in an "omnibus" clause,—in this case a clause providing that the unqualified word "assured,"

§ 540. Legal Responsibility for Operation of Car.—In one of its simplest forms, the omnibus clause by its terms applies, without further enumeration, to "any person responsible for the operation" of the car while the same is being used with the express or implied consent of the named assured.[8] Ordinarily a person operating the car is "responsible," or "legally responsible," "for the operation" of the same, within the meaning of the omnibus clause. Of that there can be no doubt.[9]

§ 541. Inapplicability of Clause to Certain Classes of Persons.—Frequently, the omnibus clause contains an exception or proviso, the effect of which is to declare the clause inapplicable to "a public automobile garage, automobile repair shop, automobile sales agency, automobile service station, and the agents or ['and'] employees thereof."[10] There may be, of course, variations of the language quoted.[11]

§ 542. Preferential Protection of Assured.—A proviso inserted in the omnibus clause, to the effect that "insurance payable hereunder shall be applied first to the protection of the named assured, and the remainder, if any, to the protection of other persons entitled to insurance under the provisions and conditions of this clause, as the named assured shall in writing direct," applies only where more than one person is entitled to the protection of the insurance contract, in respect of an accident upon which a claim is based.[12]

§ 543. Right of Action against Insurer.—One within the protection of the omnibus clause, in respect of an accident and his liability therefor, is an "assured," within the meaning and effect of a policy provision giving to an injured person, or his or her personal representative, a right of action against the insurer "in case execution against the assured is returned unsatisfied" because of the latter's insolvency or bankruptcy.[13]

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wherever used in the policy, shall be construed to include, in addition to named assured therein, "any person or persons while riding in or legally operating any automobile insured hereunder, and any person, firm, or corporation legally responsible for the operation thereof with the permission of the named assured," etc.,—is meant to absolve the insurer from liability to one to whom the clause otherwise applies only in case his use of the car is illegal as between himself and the named assured, the owner of the car. Odden v. Union Indem. Co. 156 Wash. 10, 286 P. 59, 72 A.L.R. 1363.

[8] Annotation: 72 A.L.R. 1414.

[9] See Whitney v. Employers Indem. Corp. 200 Iowa, 25, 202 N. W. 236, 41 A.L.R. 495. See also, in effect so declaring, Maryland Casualty Co. v. Ronan (C. C. A. 2d) 37 F. (2d) 449, 72 A.L.R. 1360.
Annotation: 72 A.L.R. 1414.

[10] Annotation: 72 A.L.R. 1415.

[11] Annotation: 72 A.L.R. 1415.

[12] Maryland Casualty Co. v. Ronan (C. C. A. 2d) 37 F. (2d) 449, 72 A.L.R. 1360.
Annotation: 72 A.L.R. 1417.

Where the driver of the car, himself within the protection of the clause, is the only person entitled to claim indemnity in respect of an accident, being the only person liable therefor, his right to such indemnity, notwithstanding the proviso in question, is not dependent upon any direction in writing by the named assured. Maryland Casualty Co. v. Ronan (C. C. A. 2d) 37 F. (2d) 449, 72 A.L.R. 1360.

In Dickinson v. Maryland Casualty Co. 101 Conn. 369, 125 A. 866, 41 A.L.R. 866, the proposition is apparently assumed.

[13] Annotation: 72 A.L.R. 1430.

One within the protection of an "omnibus" clause, in respect of an accident and his liability therefor, is an "assured," or an "insured," as the case may be, within the meaning and effect of a statutory or policy provision giving to injured person, etc., a right of action against insurer after recovery of judgment against "the assured," or "the insured;" in several cases, however, there was no room for the application of the rule, for the reason that the judgment debtor, for one cause or another, was held not to have been within the protection of the "omnibus" clause. Clements v. Preferred Acci. Ins. Co. (C. C. A. 8th) 41 F. (2d) 470, 76 A.L.R. 17; Maryland Casualty Co. v. Ronan (C. C. A. 2d) 37 F. (2d) 449, 72 A.L.R. 1360; Royal Indem. Co. v. Morris (C. C. A. 9th) 37 F. (2d) 90, writ of certiorari denied in 281 U. S. 748, 74 L. ed. 1160, 50 S. Ct. 353; Dickinson v. Maryland Casualty Co. 101 Conn. 369, 125 A. 866, 41 A.L.R. 500; Whitney v. Employers Indem. Corp. 200 Iowa, 25, 202 N. W. 236, 41 A.L.R. 495; Stovall v. New York Indem. Co. 157 Tenn. 301, 8 S. W. (2d) 473, 72 A.L.R. 1368; Odden v. Union Indem. Co. 156 Wash. 10, 286 P. 59, 72 A.L.R. 1363.
Annotation: 72 A.L.R. 1431.

5. Duties and Liabilities of Insured

§ 544. Generally.—The duties and liabilities of an insured against liability by reason of his maintenance or operation of an automobile arise after the occurrence of the act resulting in liability, and consist in giving proper notice of an accident or claim which might result in the insurer's liability, and in co-operating with the insurer in the defense of an action to recover upon such liability. These questions will be considered separately in the following sections.[14]

§ 545. Co-operation by Insured.[15]—Sometimes there is included in liability or indemnity policies a clause, positive in its character, providing that the assured shall co-operate with and assist the insurer in resisting claims, etc., or, more particularly, that he shall aid in securing information, evidence, and the attendance of witnesses, in effecting settlements, in prosecuting appeals, etc.[16] A clause of this character is a perfectly reasonable one, framed with the object of protecting the insurance company against the risk of collusion between the assured and persons claiming damages for alleged torts,[17] and is a material condition of the policy, the violation of which by the assured forfeits his right to claim indemnity under the policy.[18] The insured must, therefore, comply with such provision,[19] as for a breach thereof in some material respect, the insurer is justified in withdrawing from the defense of the action brought against the assured and canceling the protection to him.[20]

On the other hand, co-operation may be excused as a matter of law if improperly demanded.[1] The assured "is not to be a mere puppet in the hands of the insurer, he is under no obligation to permit a sham defense to be set up in his name, nor can he be expected to verify an answer which he does not believe to be true; he cannot evade personal responsibility, and hence he is not bound to yield to any demand which would entail violation of any law or ethical principle; but he cannot arbitrarily or unreasonably decline to assist in making any fair and legitimate defense."[2]

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[14] See infra, §§ 545 et seq.

[15] See Insurance [Also 14 R. C. L. p. 823].

[16] Annotation: 72 A.L.R. 1448, s. 98 A.L.R. 1466.

[17] Fidelity & C. Co. v. Marchand [1924] (Can.) S. C. R. 86, 13 B. R. C. 1135, [1924] 4 D. L. R. 157.

Annotation: 72 A.L.R. 1451, s. 98 A.L.R. 1467.

[18] Royal Indem. Co. v. Morris (C. C. A. 9th) 37 F. (2d) 90, writ of certiorari denied in 281 U. S. 748, 74 L. ed. 1160, 50 S. Ct. 353; Collins v. Standard Acci. Ins. Co. 170 Ky. 27, 185 S. W. 112, Ann. Cas. 1917D, 59; Daly v. Employers' Liability Assur. Corp. 269 Mass. 1, 168 N. E. 111, 72 A.L.R. 1436.

Fidelity & C. Co. v. Marchand [1924] (Can.) S. C. R. 86, 13 B. R. C. 1135, [1924] 4 D. L. R. 157, reversing Rap. Jud. Quebec 35 K. B. 5, [1923] 4 D. L. R. 913, which affirmed 29 Rev. Leg. Quebec 5, [1923] 4 D. L. R. 914.

Annotation: 72 A.L.R. 1448, s. 98 A.L.R. 1467.

[19] Collins v. Standard Acci. Ins. Co. 170 Ky. 27, 185 S. W. 112, Ann. Cas. 1917D, 59.

Annotation: Ann. Cas. 1917D, 61.

[20] Annotation: 72 A.L.R. 1452, s. 98 A.L.R. 1468.

[1] Annotation: 72 A.L.R. 1453, s. 98 A.L.R. 1468.

In Collins v. Standard Acci. Ins. Co. (1916) 170 Ky. 27, 185 S. W. 112, Ann. Cas. 1917D, 59, there was held to be no violation of a provision of a policy indemnifying against liability for injuries by an automobile, requiring the insured to aid in resisting the recovery of damages against her, because of her refusal to rely on the defense that the negligence of the chauffeur was imputable to the injured person, a guest, as, under the facts shown, there was no ground for such defense.

[2] Royal Indem. Co. v. Morris (C. C. A. 9th) 37 F. (2d) 90, writ of certiorari denied in 281 U. S. 748, 74 L. ed. 1160, 50 S. Ct. 353.

Annotation: 72 A.L.R. 1453, s. 98 A.L.R. 1468.

Accurate Disclosure of Facts.—Co-operation in a policy of automobile liability insurance requiring the assured, whenever requested by the insurance company, to "co-operate" with it in all matters which the company deems necessary in the defense of any suit, means that there shall be a fair, full, and accurate disclosure of facts by the assured, but does not require him to make statements, regardless of their truth, which establish nonliability.

§ 546. **—Waiver of Right or Estoppel to Set Up Breach of Clause.**—That the insurer may waive its right, or estop itself, to set up the assured's breach of co-operation clause, as a ground of defense when sued upon the policy, is a proposition not subject to debate.[3] Such waiver or estoppel may be accomplished by the assumption of, or continuation in, the defense of an action brought against the assured.[4] Thus, where, at the time actions brought against the assured went to trial, the insurer had notice that he could not or would not come to court at that time, and it then further knew all facts upon which, in subsequent actions against itself, it relied as establishing his breach of co-operation clause, but did not then notify the assured that it disclaimed liability under the policy, or that by continuing in the cases it would not waive its defenses to any action on the policy, or that he should engage personal counsel or otherwise take measures to protect his own interest in the cases, it, by continuing in the defense of those actions to trial and judgment, estopped itself to say that the assured's breach of co-operation clause relieved it from liability under the policy.[5]

The injured person, in an action against an insurer, is entitled to the benefit of a waiver of the right, or an estoppel, on the part of insurer to set up as against the assured the latter's alleged breach of co-operation clause; in other words, that which operates as a waiver or estoppel in favor of the assured, supposing an action upon the policy had been brought by him, also operates as a waiver or estoppel in favor of the injured person.[6]

§ 547. **Notice of Accident or Claim.**—Automobile liability insurance policies ordinarily contain a provision requiring immediate written notice of the occurrence of an accident or of a claim for damages resulting therefrom. The purpose of notice is to enable the insurer to inform itself promptly concerning the accident, so that it may investigate the circumstances, prepare for a defense, if necessary, or be advised whether it is prudent to settle any claim arising therefrom.[7] Because of its apparent wisdom,[8] such a provision is held reasonable[9] and valid,[10] and, being of the essence of the contract,[11] substantial com-

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Ocean Acci. & G. Corp. v. Lucas (C. C. A. 6th) 74 F. (2d) 115, 98 A.L.R. 1461.

Deliberate and wilful falsification of material facts by the assured constitutes a violation of the terms of a policy of automobile liability insurance requiring the assured to co-operate with the insurer in all matters which the latter deems necessary in the defense of any suit. Ibid.

Variance between Statements and Testimony.—If lack of co-operation on the part of the assured, under a policy of automobile liability insurance requiring him to co-operate with the insurer in all matters which the latter deems necessary in the defense of any suit, is found to exist upon the sole ground of variance between statements of the assured to the insurer and his testimony on the trial, the variance must be not only material, but conscious. Ibid.

[3] Annotation: 72 A.L.R. 1492, s. 98 A.L.R. 1480.

[4] Annotation: 72 A.L.R. 1493, s. 98 A.L.R. 1481.

[5] Daly v. Employers' Liability Assur. Corp. 269 Mass. 1, 168 N. E. 111, 72 A.L.R. 1436.

Annotation: 72 A.L.R. 1493, s. 98 A.L.R. 1481.

Sufficiency of Disclaimer of Responsibility.—A statement by the insurer to the assured in an automobile liability insurance policy, that his unwillingness to attend the trial of the case against him violated the terms of his policy, is not in substance or effect a disclaimer on its part of full responsibility for continuing in sole control of the defense, or notice that it did not thereby intend to waive any defense to its liability under the policy. Daly v. Employers' Liability Assur. Corp. 269 Mass. 1, 168 N. E. 111, 72 A.L.R. 1436. Annotation: 72 A.L.R. 1498, s. 98 A.L.R. 1482.

[6] Daly v. Employers' Liability Assur. Corp. 269 Mass. 1, 168 N. E. 111, 72 A.L.R. 1436.

Annotation: 72 A.L.R. 1506, s. 98 A.L.R. 1486.

[7] Chapin v. Ocean Acci. & G. Corp. 96 Neb. 213, 147 N. W. 465, 52 L.R.A.(N.S.) 227.

[8] Lewis v. Commercial Casualty Ins. Co. 142 Md. 472, 121 A. 259, 28 A.L.R. 1287.

[9] United States Fidelity & G. Co. v. Miller, 237 Ky. 43, 34 S. W. (2d) 938, 76 A.L.R. 12; Chapin v. Ocean Acci. & G. Corp. 96 Neb. 213, 147 N. W. 465, 52 L.R.A.(N.S.) 227; Miller v. Metropolitan Casualty Ins. Co. 50 R. I. 166, 146 A. 412.

Annotation: 6 A.L.R. 384, s. 13 A.L.R.

pliance with it is a condition precedent to the right to recover thereunder,[12] as an unreasonable failure to observe it constitutes a good ground for the forfeiture of the indemnity.[13]

§ 548. —Accidents Subject to Notice.—In an automobile liability insurance policy requiring immediate notice of the occurrence of an accident, the word "accident" means an undesigned and unforeseen occurrence of an afflictive or unfortunate character, resulting in bodily injury to a person other than the insured.[14] In other words, the provision does not require that notice be given of all accidents resulting from the operation of the insured's automobile, but merely those which result in bodily injuries to others.[15] The provision does not apply to trivial occurrences, and this is true even though such an occurrence may prove afterwards to result in serious injury,[16] provided the triviality of the occurrence is well ascertained.[17]

The word "loss," in an automobile indemnity insurance policy requiring immediate notice of accident or loss, means the injury or damage caused by the accident for which the insurer may, under the provisions of the policy, be liable, though at the time the extent of the loss may not be ascertainable.[18]

§ 549. —Time of Notice.—The time of giving notice of an accident, and its sufficiency, depend upon the provisions of the policy covering the accident. Practically all such policies provide for "immediate" notice. The word "immediate," as used in a clause by its terms requiring immediate notice of accident, claim, or suit, is not to be given a literal construction, and so does not mean that the notice shall be given instantaneously or without the lapse of any time.[19] It means notice within a reasonable time after the insured learns of an accident or claim.[20] The same construction has been applied where the words "prompt"[1] or "at once"[2] have been used instead of the usual word "immediate."

What is a reasonable time within which notice may be given depends upon the facts of the case.[3] Ordinarily notice must be given at the time of the accident, and cannot be deferred until a claim is made upon the assured for damages growing out of the accident.[4] Meritorious circumstances, however,

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135, 19 A.L.R. 879, 23 A.L.R. 1472, 28 A.L.R. 1301, and 41 A.L.R. 507; 76 A.L.R. 180.

[10] Clements v. Preferred Acci. Ins. Co. (C. C. A. 8th) 41 F. (2d) 470, 76 A.L.R. 17; United States Fidelity & G. Co. v. Miller, 237 Ky. 43, 34 S. W. (2d) 938, 76 A.L.R. 12.

[11] Annotation: 76 A.L.R. 183.

[12] Clements v. Preferred Acci. Ins. Co. (C. C. A. 8th) 41 F. (2d) 470, 76 A.L.R. 17.
Annotation: 76 A.L.R. 184.

[13] United States Fidelity & G. Co. v. Miller, 237 Ky. 43, 34 S. W. (2d) 938, 76 A.L.R. 12.

[14] Chapin v. Ocean Acci. & G. Corp. 96 Neb. 213, 147 N. W. 465, 52 L.R.A.(N.S.) 227.

[15] Ibid.

[16] Haas Tobacco Co. v. American Fidelity Co. 226 N. Y. 343, 123 N. E. 755, 13 A.L.R. 132.
Annotation: 6 A.L.R. 384; 13 A.L.R. 138.

[17] Haas Tobacco Co. v. American Fidelity Co. 226 N. Y. 343, 123 N. E. 755, 13 A.L.R. 132.

Where a boy is knocked down in the street by the assured's automobile, and is at least slightly injured, the assured may not, without any investigation whatever, rely upon his opinion or that of his driver that because the boy went away, the injury was too trivial to require attention. Ibid.

[18] Lewis v. Commercial Casualty Ins. Co. 142 Md. 472, 121 A. 259, 28 A.L.R. 1287.

[19] Chapin v. Ocean Acci. & G. Corp. 96 Neb. 213, 147 N. W. 465, 52 L.R.A.(N.S.) 227.
Annotation: 76 A.L.R. 53.

[20] Chapin v. Ocean Acci. & G. Corp. 96 Neb. 213, 147 N. W. 465, 52 L.R.A.(N.S.) 227.
Annotation: 76 A.L.R. 54.

[1] Annotation: 76 A.L.R. 59.

[2] Annotation: 76 A.L.R. 59.

[3] Clements v. Preferred Acci. Ins. Co. (C. C. A. 8th) 41 F. (2d) 470, 76 A.L.R. 17 (twenty-three months not "immediate," within provision); Haas Tobacco Co. v. American Fidelity Co. 226 N. Y. 343, 123 N. E. 755, 13 A.L.R. 132 (ten days not "immediate," within the meaning and effect of clause).
Annotation: 76 A.L.R. 60.

[4] Lewis v. Commercial Casualty Ins. Co. 142 Md. 472, 121 A. 259, 28 A.L.R. 1287.

may sometimes warrant extending beyond what would ordinarily be reasonable time, the time within which the insured may give notice,[5] such as the impossibility of giving notice,[6] or mental or physical incapacity.[7]

§ 550. —**Who May or Must Give Notice.**—Notwithstanding that by the terms of a clause the notice of accident is to be given by "the assured," this does not mean that the assured, where an individual, must personally give the notice; it may be given by another acting as his agent and representative in the matter.[8] Where the assured is a corporation, such notice is given by and through its officers and agents.[9] As regards the rights against the insurer of an injured person under a statutory or policy provision giving to him a right of action upon the policy, his own giving of notice of the accident sufficiently complies with a condition in the policy requiring the assured to give notice of the accident.[10]

§ 551. —**Oral or Written Notice.**—Some clauses requiring notice of an accident, or of a claim made against the assured on account thereof, do not specify in what manner or by what means the notice shall be given. Ordinarily, however, the clause, by its terms, requires "written" notice, or notice "in writing." A requirement that notice must be in writing is not satisfied by an oral notice [11] or notice given over the telephone.[12]

§ 552. —**Scope of Notice.**—When the clause requires a simple "written notice of any accident," a detailed report is unnecessary.[13] But where "the fullest information obtainable at the time" is required, the assured must furnish information not only as to how the accident occurred, but also of the injuries from which any loss covered by the policy resulted.[14]

§ 553. —**Waiver of Right to Notice.**—A condition in an automobile indemnity insurance policy, requiring the insured to give immediate notice of any serious accident, is for the benefit of the insurer and may be waived by the latter.[15] Similarly, a condition in the policy with respect to the forwarding of the suit papers in an action brought against the assured may be waived.[16] Such a waiver may be effected by an agent, officer, or representative of the insurer,[17] and may result from any words or conduct of the insurer, with knowledge of the facts which furnish the ground of forfeiture, that show a recognition of the continued existence of the insurance.[18] On the other hand, waiver against the insured does not constitute a waiver against others covered by the policy.[19] For instance, failure to give notice of the accident as required by an automobile liability policy, although waived as to the named assured, relieves the insurer from direct liability to the person injured who has recovered a judgment, upon which an execution has been returned unsatisfied, against one other than the named assured, who was within the coverage of the policy but who would have been precluded by such failure from holding the insurer liable if he had paid the judgment.[20]

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[5] Annotation: 76 A.L.R. 74.

[6] Annotation: 76 A.L.R. 75.

By some statutes a liability policy is required to contain a provision that failure to give any notice required to be given by such policy within the time specified therein shall not invalidate any claim made by the assured if it shall be shown not to have been reasonably possible to give such notice within the time prescribed, and that notice was given as soon as was reasonably possible. Annotation: 76 A.L.R. 71.

Where No Injury Apparent.—Where, at the time a person was thrown from his bicycle as a result of being struck by the insured's automobile, no injury was apparent, and the person thrown stated that he had received none, and for about a year thereafter the insured honestly believed that none resulted, it was held that it could not be said, as a matter of law, that the conditions of the accident were such as to bring it within the class of which it was the insured's duty to give immediate notice, or that the notice given was not given within a reasonable time, it appearing that upon the insured's being notified that a suit was to be brought against him on account of the injury, he immediately notified the insurer. Chapin v. Ocean Acci. & G. Corp. 96 Neb. 213, 147 N. W. 465, 52 L.R.A.(N.S.) 227.

Fact that Injuries Slight No Excuse for Delay.—The accident covered by the policy having in fact caused bodily injuries, the view is taken by some courts that the fact that the injuries are slight, or the fact that they are apparently so, or the fact that the assured believes them to be so, will not excuse his delay in giving notice of the accident. Annotation: 76 A.L.R. 114.

[7] Annotation: 76 A.L..R 76.

[8] Annotation: 76 A.L.R. 37.

[9] Annotation: 76 A.L.R. 37.

[10] Royal Indem. Co. v. Morris (C. C. A. 9th) 37 F. (2d) 90, writ of certiorari denied in 281 U. S. 748, 74 L. ed. 1160, 50 S. Ct. 353; Metropolitan Casualty Ins. Co. v. Colthurst (C. C. A. 9th) 36 F. (2d) 559, writ of certiorari denied in 281 U. S. 746, 74 L. ed. 1158, 50 S. Ct. 351.

Annotation: 76 A.L.R. 38.

[11] Annotation: 76 A.L.R. 40.

[12] Annotation: 76 A.L.R. 41.

[13] Annotation: 76 A.L.R. 43.

[14] Lewis v. Commercial Casualty Ins. Co. 142 Md. 472, 121 A. 259, 28 A.L.R. 1287.

[15] Clements v. Preferred Acci. Ins. Co. (C. C. A. 8th) 41 F. (2d) 470, 76 A.L.R. 17; United States Fidelity & G. Co. v. Miller,

D. Collision Insurance

§ 554. Generally.—Insurance against damage resulting to automobiles from collision with other automobiles, vehicles, or objects, either as part of automobile insurance policies or independently therefrom, is very common, and the courts have been frequently called upon to determine the meaning of the word "collision," to determine the liability of the insurer for damages resulting from particular accidents. The meaning of the word "collision," and what constitutes a collision within the meaning of an automobile insurance policy, will be considered in the following sections.[1]

§ 555. What Constitutes Collision.—The word "collision," as used in automobile collision insurance policies, means the act of colliding, and imports a

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237 Ky. 43, 34 S. W. (2d) 938, 76 A.L.R. 12. Annotation: 76 A.L.R. 128.

Stipulation for Written Indorsement of Waiver.—As regards a clause in an insurance policy stipulating in effect that no condition or provision of the policy shall be waived or altered, except by written indorsement attached thereto and signed by certain designated officers, in many jurisdictions there prevails the rule that such a clause does not apply to conditions, etc., which are to be performed after a loss has occurred, such as that requiring notice. Annotation: 76 A.L.R. 137.

[16] Annotation: 76 A.L.R. 128.

[17] **One who is such an agent as is entitled to receive notice** of an accident, under the terms of the contract, has the right to waive a written notice of the accident and to agree to take care of the matter himself. Annotation: 76 A.L.R. 139.

Provision in Policy Denying Power to Waive.—The clause of an indemnity policy providing that no officer, agent, or other representative of the company shall have power to waive any condition thereof, except such as may be indorsed thereon or added thereto, has no reference to those stipulations which are to be performed after a loss has occurred, such as giving notice of the accident. Annotation: 76 A.L.R. 138.

[18] United States Fidelity & G. Co. v. Miller, 237 Ky. 43, 34 S. W. (2d) 938, 76 A.L.R. 12.

Taking Control of Litigation.—An automobile indemnity insurer irrevocably waives failure to receive immediate notice of the accident by accepting from one within the coverage of the policy the summons served upon the latter and taking control of the litigation, with knowledge of the facts and without reservation of rights in the premises. Ibid.

Conducting Defense and Offer of Settlement.—The acts of an automobile liability insurer in causing the defense of an action against the insured to be conducted by an attorney in its employ after the insured had disappeared, and in offering considerable sums in settlement of the claim and the judgment recovered thereon, operate, as to the judgment creditor garnishing the insurer, as a waiver of the failure of the insured to give notice of the accident and to assist in the defense as required by the policy. Brandon v. St. Paul Mercury Indem. Co. 132 Kan. 68, 294 P. 881, 83 A.L.R. 673.

Facts Held Not to Constitute Waiver of Absence of Notice of Claim.—An indemnity insurer does not waive its right to exemption from liability because of failure to give it immediate notice of the accident as required by the policy, by requesting a copy of notice of claim when notified of it and telling insured not to worry, that it would "look after him," if it promptly notifies insured after learning the facts that the claim is not covered by the policy. Lewis v. Commercial Casualty Ins. Co. 142 Md. 472, 121 A. 259, 28 A.L.R. 1287. Annotation: 76 A.L.R. 17.

[19] Clements v. Preferred Acci. Ins. Co. (C. C. A. 8th) 41 F. (2d) 470, 76 A.L.R. 17.

[20] Ibid.

[1] See infra, §§ 555 et seq.

striking together or against,[2] a violent contact,[3] the sudden contact of a moving body with an obstruction in the line of motion.[4] It is not necessary, in order to constitute a "collision" within the meaning of a policy insuring against damage resulting from a collision of an automobile with any other automobile, vehicle, or object, that both objects should be in motion.[5]

Most collisions occur in the violent impact of two bodies on the same plane or level, and it is undoubtedly true that the word is more frequently used to express such impacts than other violent impacts. However, it is doubtful that this fact has given to the word such a common understanding of its meaning as to exclude violent impacts not upon the same plane or level.[6] If one machine was going up and another going down a steep hill, and they came together violently, no one would hesitate for a moment in using the word "collision."[7] The better rule, the safe rule, is to treat and consider the word as having the meaning given it uniformly by the lexicographers, that where there is a striking together, a violent contact or meeting of two bodies, there is a collision between them, and that the angle from which the impact occurs is unimportant.[8]

§ 556. **Collision with "Objects."**—Automobile collision insurance policies ordinarily provide for insurance against damages by collision with other automobiles, vehicles, or objects. Such a provision covers striking against a stationary object.[9] According to some courts, water and land are "objects," and an automobile which runs into either or both collides with an object or objects, though the objects are horizontal rather than perpendicular,[10] but other courts have limited a provision as to collisions with any vehicle or other object to like objects, so as to preclude a recovery for injury caused, for instance, by running off a bank.[11] Ordinarily, the word "object," as used in provisions insuring against damage to automobiles by collision with other automobiles, vehicles, or objects, has been held not to be confined to objects similar to an automobile or vehicle,[12] but to include objects of a class different from automobiles or vehicles, since otherwise it would have no meaning because the specific words used embrace all objects of the class covered by them.[13] Because of the multiple variety of collisions and the variety of provisions in policies, no line of demarcation can be drawn between those accidents which constitute collisions within the meaning of insurance policies and those that do not. Each case seems to depend upon such provisions and facts. The insurer has been held liable for collision, by the contact of an automobile with the bank of a ditch,[14] by striking of the ground at the bottom of a declivity,[15] for collision with a paved roadway [16] or embankment,[17] for the striking of an elevator, in which an automobile was being transported in a garage, against the bottom of the shaft,[18] and for injury to an automobile truck by the falling upon it of a loaded scoop of a steam shovel.[19] On the other hand, liability has been denied for damages to an automobile due to skidding,[20] to the sinking

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[2] Harris v. American Casualty Co. 83 N. J. L. 641, 85 A. 194, 44 L.R.A.(N.S.) 70, Ann. Cas. 1914B, 846.
Annotation: 14 A.L.R. 188, s. 26 A.L.R. 429, 30 A.L.R. 806, 35 A.L.R. 1031, 40 A.L.R. 999, 42 A.L.R. 1130, and 54 A.L.R. 1445.

[3] Ætna Casualty & Surety Co. v. Cartmel, 87 Fla. 495, 100 So. 802, 35 A.L.R. 1013.

[4] St. Paul F. & M. Ins. Co. v. American Compounding Co. 211 Ala. 593, 100 So. 904, 35 A.L.R. 1018.

[5] Harris v. American Casualty Co. 83 N. J. L. 641, 85 A. 194, 44 L.R.A.(N.S.) 70, Ann. Cas. 1914B, 846.
Annotation: 14 A.L.R. 188, s. 26 A.L.R. 429, 30 A.L.R. 806, 35 A.L.R. 1031, 40 A.L.R. 999, 42 A.L.R. 1130, and 54 A.L.R. 1445; Ann. Cas. 1914B, 848.

[6] Universal Service Co. v. American Ins. Co. 213 Mich. 523, 181 N. W. 1007, 14 A.L.R. 183.

[7] Ibid.

[8] Ibid.

[9] Annotation: 51 L.R.A.(N.S.) 583, Ann. Cas. 1915A, 630.

[10] Harris v. American Casualty Co. 83 N. J. L. 641, 85 A. 194, 44 L.R.A.(N.S.) 70, Ann. Cas. 1914B, 846.
Annotation: 14 A.L.R. 190, s. 26 A.L.R. 429, 30 A.L.R. 806, 35 A.L.R. 1031, 40 A.L.R. 999, 42 A.L.R. 1130, and 54 A.L.R. 1445; Ann. Cas. 1914B, 848.

[11] Weltengel v. United States "Lloyds," 157 Wis. 433, 147 N. W. 360, Ann. Cas. 1915A, 626.

[12] Harris v. American Casualty Co. 83 N. J. L. 641, 85 A. 194, 44 L.R.A.(N.S.) 70, Ann. Cas. 1914B, 846; Bell v. American Ins. Co. 173 Wis. 533, 181 N. W. 733, 14 A.L.R. 179, 20 N. C. C. A. 867.
Annotation: 14 A.L.R. 190, s. 26 A.L.R. 429, 30 A.L.R. 806, 35 A.L.R. 1031, 40 A.L.R. 999, 42 A.L.R. 1130, and 54 A.L.R. 1445.

[13] Bell v. American Ins. Co. 173 Wis. 533, 181 N. W. 733, 14 A.L.R. 179, 20 N. C. C. A. 867.
Exclusion of liability for injury caused by striking any portion of the roadbed or the rails of railroads does not indicate a practical construction of a policy insuring against collisions with any object, and omitting such words, as including liability for injury caused by the overturning of the vehicle. Ibid.

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[14] **The contact of an automobile with the bank of a ditch** into which it dropped when the driver turned out of the road to avoid an obstruction is within the provision of an accident insurance policy against accidental collision with any object. T. C. Power Motor Car Co. v. United States F. Ins. Co. 69 Mont. 563, 223 P. 112, 35 A.L.R. 1028. Annotation: 30 A.L.R. 807, s. 35 A.L.R. 1031, 40 A.L.R. 999, 42 A.L.R. 1130, and 54 A.L.R. 1445.

[15] **The striking of the ground at the bottom of the declivity** by an automobile falling over a precipice at the side of the road after it has started by the force of gravity when left standing on an inclined roadway is a collision within the meaning of a policy insuring against damage by accidental collision with any other automobile, vehicle, or object. St. Paul F. & M. Ins. Co. v. American Compounding Co. 211 Ala. 593, 100 So. 904, 35 A.L.R. 1018.

Reason for Rule.—This is so held upon the sound basis of reason that the form of contract is made by the insurer and tendered to the public. He may insert therein, as is often done in this kind of policy, such exceptions as he may desire, to limit the effect of general words to a narrower meaning than given by lexicographers. Ibid.

[16] **Collision with Paved Roadway.**—Under an insurance policy indemnifying the assured against direct loss or damage to an automobile by "accidental collision with another object, either moving or stationary," the insurer is liable for injury to such automobile caused by a collision with the paved roadway as a result of turning a sudden and sharp curve which threw the automobile over on its side. Great American Mut. Indem. Co. v. Jones, 111 Ohio St. 84, 144 N. E. 596, 35 A.L.R. 1023, 23 N. C. C. A. 647.

The term "roadbed" in a policy excluding damage caused by striking the "roadbed" has been held to apply only to that portion of the road which was constructed and used for travel, and an embankment adjoining the highway, down which the plaintiff's automobile skidded, was held not a part of the "roadbed" within the exception. Annotation: 14 A.L.R. 190, s. 26 A.L.R. 429, 30 A.L.R. 806, 35 A.L.R. 1031, 40 A.L.R. 999, 42 A.L.R. 1130, and 54 A.L.R. 1445.

[17] **Collision with Embankment.** — Insurance of an automobile against collision with any object, moving or stationary, covers a collision with an embankment near the highway when the car becomes unmanageable, leaves the road, and strikes such embankment, crushing the front wheels and overturning. Interstate Casualty Co. v. Stewart, 208 Ala. 377, 94 So. 345, 26 A.L.R. 427.

Collision with Embankment Adjacent to Highway.—In Pred v. Employer's Indem. Corp. 112 Neb. 161, 198 N. W. 864, 35 A.L.R. 1003, it was held that when an automobile, while being driven along the highway, is driven against an embankment alongside of and adjacent to the highway with such force as to cause it to be overturned and wrecked, the injury resulting to the car is caused by a collision, within the meaning of the terms of an insurance policy which insured against loss or damage by "collision with another object, either moving or stationary." An embankment adjacent to the highway is an object, within the meaning of the clause quoted.

[18] **The striking of an elevator, in which an automobile is being transported in a garage,** against the bottom of the shaft upon the breaking of its apparatus is a collision, within the meaning of a clause insuring the automobile, while being transported in any conveyance, against the stranding, sinking, collision, burning, or derailment of such conveyance. National F. Ins. Co. v. Elliott (C. C. A. 8th) 7 F. (2d) 522, 42 A.L.R. 1121.

[19] **Injury to a truck by the falling upon it of a loaded scoop of a steam shovel** which is engaged in loading the truck is within a full coverage collision insurance policy upon the truck. Universal Service Co. v. American Ins. Co. 213 Mich. 523, 181 N. W. 1007, 14 A.L.R. 183.

[20] **Skidding as Proximate Cause of Injury.**—In Ploe v. International Indem. Co. 128 Wash. 480, 223 P. 327, 35 A.L.R. 999, it was held that the skidding of an automobile, which carries it out of the road and down an embankment, and not the object with which it comes in contact during its descent, is the proximate cause of the injury to it by such collision, and therefore, the loss is not within a policy insuring against damage by collision. In this case it was held that the striking of an automobile, which has left the highway on a mountain side, with the earth, as it rolls and bounds downward, is not a collision within the meaning of a policy insuring against damage by collision with any object.

The overturning of an automobile, due to its skidding upon an oiled pavement, reversing its position, and causing a wheel to collapse, is not within a policy insuring against damage to it, if caused solely by collision with another object, either movof a roadbed,[1] to running off a ferryboat in which the automobile was being transported,[2] to tipping over on the road in attempting to avoid a collision,[3] and to rolling down a hill.[4]

§ 557. **Provisions as to "Upsets."**—The insurance of an automobile against injury from collision with any other automobile, vehicle, or object does not include injury due to the upsetting of the machine.[5] However, a provision in a policy indemnifying against collision, that damages resulting from collision due wholly or in part to upsets shall be excluded does not operate to defeat recovery where an automobile runs off a bridge, is precipitated into the water below, and lands at the bottom of the stream upside down, the collision not being due to the upset, but rather, the upset being the result of the collision.[6]

E. Fire Insurance

§ 558. **Generally.**—Insuring automobiles against loss by fire is a very common type of insurance, and, consequently, actions upon such policies are just as common.[7] Sometimes, for convenience or expediency, the parties may enter into an oral contract for fire insurance before the issuance of a policy. Such a contract, if valid, is binding upon the insurer.[8]

§ 559. **Provisions against Encumbrances.**—Automobile fire insurance policies sometimes provide that the policy shall be void if the automobile is or

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ing or stationary. Great Eastern Casualty Co. v. Solinsky, 150 Tenn. 206, 263 S. W. 71, 35 A.L.R. 1007.

[1] **Sinking in Roadbed.**—A contract of insurance indemnified the owner against loss or damage sustained to an automobile described, "if caused solely by collision with another object, either moving or stationary." In an action on the policy it was proved at the trial that "all of a sudden" the roadbed "gave way under the car," and it "went down in soft sand" and "stuck." This was held not a "collision" within the meaning of the term as employed in the policy. Ætna Casualty & Surety Co. v. Cartmel, 87 Fla. 495, 100 So. 802, 35 A.L.R. 1013.

[2] **Running Off Ferryboat in Which Being Transported.** — A policy insuring against loss of an automobile while being transported in any conveyance—stranding, sinking, collision, burning, or derailment of such conveyance—does not cover loss of the automobile by its running off from a ferryboat through the improper handling of the car by the owner. Johnson v. Glens Falls Ins. Co. 131 S. C. 253, 127 S. E. 14, 40 A.L.R. 993. Annotation: 40 A.L.R. 999, s. 42 A.L.R. 1130, and 54 A.L.R. 1445.

[3] **Injury to an automobile by tipping over on the road** in attempting to avoid a collision with other cars is not within the operation of a policy insuring against injuries "caused solely by accidental collision with another object." Brown v. Union Indem. Co. 159 La. 641, 105 So. 918, 54 A.L.R. 1439.

[4] **Injury to Car Rolling Down Hill.**—In Continental Casualty Co. v. Paul, 209 Ala. 166, 95 So. 814, 30 A.L.R. 802, it was held that injury to an automobile by the failure of its brakes to hold on an incline, so that of its own momentum, without the application of any exterior force, and simply in obedience to the law of gravity, it rolls down an embankment to the bottom of a cut by the side of the road, is not the result of collision with any moving or stationary object within the meaning of a policy insuring against injury so caused, although the injury is caused by impact with the earth or other obstructions at the bottom of the declivity.

[5] Bell v. American Ins. Co. 173 Wis. 533, 181 N. W. 733, 14 A.L.R. 179, 20 N. C. C. A. 867.

[6] Harris v. American Casualty Co. 83 N. J. L. 641, 85 A. 194, 44 L.R.A.(N.S.) 70, Ann. Cas. 1914B, 846.

Annotation: 14 A.L.R. 191, s. 26 A.L.R. 429, 30 A.L.R. 806, 35 A.L.R. 1031, 40 A.L.R. 999, 42 A.L.R 1130, and 54 AL.R. 1445.

As to the meaning of a provision excepting damage due to "upset," it was said in Harris v. American Casualty Co. 83 N. J. L. 641, 85 A. 194, 44 L.R.A.(N.S.) 70, Ann. Cas. 1914B, 846: "It is true that it is provided in the indorsement insuring against damage resulting from collision that 'damage resulting from collision due wholly or in part to upsets' shall be excluded. But it cannot be said that the collision of the plaintiff's automobile with the water and land under the water was caused by an upset. It may be that the car upset by reason of contact with the water or the earth, but the collision was not due to an upset—the upset may have been the result of the collision. The provision in the policy cannot mean that where collision has first taken place, there can be no recovery because, as the result of the collision, the machine is upset. When the car ran off the bridge, dynamic force and gravitation determined the position in which it would strike first the water and then the bed of the stream. Its final position was merely incidental to the collision." Annotation: Ann. Cas. 1915A, 631.

[7] Annotation: 44 L.R.A.(N.S.) 71.

[8] Annotation: 14 A.L.R. 200, s. 35 A.L.R. 1471.

becomes encumbered by a chattel mortgage, or if any change takes place in the interest, title, or posession of the subject of insurance. A provision to this effect is reasonable and valid, and in case the insured fails to comply with it, the insurer has a right to insist that its liability is terminated.[9] But the inclusion, in a deed of trust of personal property, of an automobile insured by a fire policy providing that it shall be void if the property becomes encumbered, will not prevent a recovery on the policy if the deed of trust is only temporary, is satisfied and canceled before a loss, and is not material to the risk or is fraudulent.[10] Likewise, if, during the use and trial of an automobile by a prospective buyer, the property is covered by a fire insurance policy issued to the original owner, insuring against loss by fire, and the car is destroyed by fire, it will not defeat the insured's right to recover on the policy.[11]

§ 560. Identification and Description of Car.—In automobile fire insurance policies the insured is ordinarily required to make statements as to the age, motor number, cost, etc., of the automobile insured. Such statements are, of course, for the identification of the subject of insurance and constitute representations material to the risk, the falsity of which will avoid the policy.[12] While this is true generally, a partial misdescription of an automobile will not bar a recovery if the misdescription relates to an unimportant matter and the automobile is otherwise fully identified.[13] However, if the policy makes a misdescription a breach of warranty and this is proper under controlling statutes, a misdescription bars recovery, irrespective of its materiality.[14] The view has been taken that since the age of an automobile upon which fire insurance is sought is material only in so far as it affects its value, and thereby the moral hazard to be assumed by the insurer, an order directing a verdict for the insurer, based solely upon a misrepresentation of the age of the automobile, is not warranted, in the absence of evidence as to relative values.[15] Furthermore an erroneous statement of the year of manufacture has been held immaterial where other information was supplied or opportunity for inspection furnished from which the correct year could have been determined.[16] Moreover, where the insured obtains the car in exchange for other property, his statements as to the cost thereof may not be material.[17]

561. Provision as to Renting or Use for Hire.—In automobile fire insurance policies a condition is often stipulated to the effect that the insured automobile shall not be rented or used for passenger service of any kind for hire. Such a stipulation implies more than a single act of renting or using, and refers to the business of carrying passengers for hire.[18] A single act of renting or using the car for hire, a mere casual or isolated instance, is not contemplated thereby,[19] unless the stipulation is a warranty, in which case even a temporary breach thereof will bar a recovery.[20]

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[9] Annotation: 14 A.L.R. 201, s. 35 A.L.R. 1471.

A warranty or representation by insured that the automobile is unencumbered is generally held to be of a fact material to the risk, so that a breach thereof will avoid the policy or prevent its attaching. Annotation: 35 A.L.R. 1472.

[10] Cottingham v. Maryland Motor Car Ins. Co. 168 N. C. 259, 84 S. E. 274, L.R.A. 1915D, 344, Ann. Cas. 1917B, 1237.

Annotation: 14 A.L.R. 201, s. 35 A.L.R. 1471.

[11] Automobile Ins. Co. v. Lewis, 93 Okla. 280, 220 P. 639, 35 A.L.R. 1463.

Where insured delivered a car to a prospective purchaser for the purpose of permitting the latter to use it a short while in order to determine the condition of the property, the final sale being made to depend on the condition in which the purchaser should find the property, it was held that the title to the car did not pass until final acceptance, so that the fact that the car burned while in the possession of such prospective purchaser did not defeat insured's right to recover on the policy. Ibid.

[12] Annotation: 14 A.L.R. 202, s. 35 A.L.R. 1473; 30 A.L.R. 666, 667.

[13] Annotation: 14 A.L.R. 201, s. 35 A.L.R. 1471.

[14] Annotation: 14 A.L.R. 201, s. 35 A.L.R. 1471.

[15] Traynor v. Automobile Mut. Ins. Co. 105 Neb. 677, 181 N. W. 566, 14 A.L.R. 195.

[16] Ibid.

[17] Annotation: 14 A.L.R. 204, s. 35 A.L.R. 1471.

§ 562. **Place of Keeping.**—Automobile fire insurance policies ordinarily provide as to the place of keeping the insured automobile.[1] Where such a policy requires the automobile to be kept in a designated private garage, a breach of this requirement, by reason of which the car is destroyed, bars a recovery.[2]

§ 563. **Fire Originating within Vehicle.**—A fire burning an automobile originates inside the vehicle, within the meaning of an exception of fires so originating, where, in consequence of the machine's running into a ditch, gasoline leaks from the tank and the vapor penetrates the lamp forming the headlight and explodes, causing the fire.[3]

§ 564. **Effect of Insured's Negligence or Violation of Law.**—Policies insuring automobiles against loss by fire sometimes provide to the effect that a loss caused by the assured's negligence or violation of law shall absolve the insurer from any liability. Such provisions are binding, and the assured has been denied a recovery where he has failed to maintain a fire extinguisher in his automobile as required by the policy,[4] where he has not properly registered the automobile, or has allowed an unlicensed chauffeur to drive it,[5] or where the automobile was wilfully burned by a copartner of the assured.[6]

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[18] Crowell v. Maryland Motor Car Ins. Co. 169 N. C. 35, 85 S. E. 37, Ann. Cas. 1917D, 50.

[19] Ibid.

Merely carrying passengers for hire for one or two days does not constitute a breach of provisions of fire policies that the insured automobile shall not be rented or used for carrying passengers for compensation. Ibid. Annotation: 14 A.L.R. 205, s. 35 A.L.R. 1471.

[20] **Temporary noncompliance** with a provision in a policy insuring an automobile against fire, against letting an automobile or using it for carrying passengers for hire, will not work a forfeiture, where the car was not let at the time it burned, unless the provision is a warranty, or where such use is without the insured's knowledge. If, however, the provision is made a warranty, even a temporary breach thereof bars a recovery. Annotation: 14 A.L.R. 205, s. 35 A.L.R. 1471.

[1] **Proposal for Policy as Basis of Contract.**—A recital in a policy insuring a motor vehicle against loss by fire, that the proposal for the policy shall be the basis of the contract and be held as incorporated in the policy, makes the truth of the statements in the proposal, apart from the question of materiality, a condition of the liability of the insurer, and no recovery can be had under the policy for a destruction of the vehicle by fire where there was a misstatement inadvertently made in the proposal as to the place at which it was to be garaged. Dawsons v. Bonnin [1922] 2 A. C. 413. Annotation: 11 B. R. C. 468, 441.

[2] Lummus v. Firemen's Fund Ins. Co. 167 N. C. 654, 83 S. E. 688, L.R.A.1915D, 239.

Annotation: 14 A.L.R. 206, s. 35 A.L.R. 1471.

It has been held that a shed or lean-to on insured's barn is a "garage," and that a policy insuring an automobile against loss by fire is not avoided by a statement in the application that the automobile was usually kept in a private garage, where it was kept in such shed or lean-to. Annotation: 14 A.L.R. 206, s. 35 A.L.R. 1471.

Effect of Removal to Another State.—A policy on an automobile to be kept in a specified private garage with the privilege of operating the car and housing it temporarily in other places while en route or being cleaned or repaired, which has been suspended by the permanent removal of the car to another state, is not restored by temporarily placing the car in a repair shop without returning it to the place specified in the policy, so as to render the insurer liable for its destruction while in such shop. Lummus v. Firemen's Fund Ins. Co. 167 N. C. 654, 83 S. E. 688, L.R.A.1915D, 239.

[3] Preston v. Ætna Ins. Co. 193 N. Y. 142, 85 N. E. 1006, 19 L.R.A.(N.S.) 133.

Annotation: 14 A.L.R. 207, s. 35 A.L.R. 1471; Ann. Cas. 1915A, 627.

[4] **Where one of the conditions of the policy was that the insured should at all times carry a fire extinguisher** on the automobile and "use due diligence to maintain said fire extinguisher in full and complete working order during the life of the policy," it was held that insured's failure to have an extinguisher on the car at the time of the fire was not excused by the fact that some two weeks earlier the extinguisher had been exhausted in putting out a fire in the car, nor by the fact that the fire causing the loss was of such a character that it could not have been extinguished even if he had had an extinguisher. Union Marine Ins. Co. v. High, 153 Ark. 156, 239 S. W. 741, 23 A.L.R. 24. Annotation: 35 A.L.R. 1475.

[5] **Car Not Properly Registered, or Driven by Unlicensed Chauffeur.**—A provision of a policy against loss of an automobile, that

§ 565. **Proof of Loss.**—A condition that a failure to furnish proofs of loss to the insurer within sixty days after the loss will avoid the policy is a valid and binding provision, and a failure to submit such proofs within the time specified in the policy will prevent a recovery,[7] unless compliance with such condition is waived by the insurer.[8]

§ 566. **Amount of Recovery.**—Generally the amount for which a company is liable under a policy insuring an automobile is the actual loss, which, in case of total destruction, is the value of the car.[9] Where, however, there is no total loss, the assured is often allowed to decide whether he wishes to have the car repaired or to settle for a certain amount in damages. If he elects to settle, his rights under the policy are terminated and depend upon the contract of settlement.[10]

F. THEFT INSURANCE

§ 567. **Generally.**—Insurance policies are commonly issued indemnifying the owner of an automobile against loss by "theft, robbery, and pilferage." Such insurance does not differ from other burglary insurance.[11]

§ 568. **What Constitutes "Theft."**—The general rule that words are to be given their usual and ordinary meaning unless the context requires a different construction is applicable to determine the meaning of the terms "theft," "robbery," and "pilferage," employed in automobile insurance policies.[12] The term "theft" has not been uniformly defined. The difference of opinion arises over the question whether the term is practically synonymous with the term "larceny" or whether it has a more extensive meaning.[13] There is an undercurrent of thought, however, that the usual meaning attached to the term "theft" is sub-

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liability shall not attach if the automobile is, at the time of loss, being driven by a person not authorized by law, or contrary to law, is not unreasonable or against public policy, and therefore no recovery can be had if at the time of loss the machine is not properly registered, or is driven by an unlicensed chauffeur. Standard Auto Ins. Asso. v. Neal, 199 Ky. 699, 251 S. W. 966, 35 A.L.R. 1468. Annotation: 35 A.L.R. 1471.

[6] An innocent partner cannot recover for the loss of automobiles wilfully burned by his copartner, especially in view of a provision in the policy requiring insured to use all reasonable means at hand after a fire to preserve the property. Bellman v. Home Ins. Co. 178 Wis. 349, 189 N. W. 1028, 27 A.L.R. 945. Annotation: 35 A.L.R. 1475.

[7] Annotation: 35 A.L.R. 1479.

[8] Annotation: 35 A.L.R. 1479.

[9] Annotation: 14 A.L.R. 211, s. 35 A.L.R. 1471.

[10] In Gaffey v. St. Paul F. & M. Ins. Co. 221 N. Y. 113, 116 N. E. 778, Ann. Cas. 1918B, 1041, where it appeared that after proof had been made for a total loss, the insurer stated that it would settle for a certain amount, which was smaller than the face of the policy, or ship the car for repairs, and the insured wrote that if the car was made as good as before the fire, and they were not delayed too long, it would be all right, and the insurer advised them that arrangements had been made to have the repairs made and estimated that it would take about four weeks, it was held that the election of the insured to have the car repaired, and the undertaking of the insurer to make the repairs within a reasonable time, created a contractual relation between them which terminated all rights under the policy and deprived the insurer of asserting any rights or options thereunder, and also prevented the plaintiff from maintaining an action thereon, the only remedy of either party thereafter being an action for a breach of the new contract.

Annotation: 14 A.L.R. 210, 211, s. 35 A.L.R. 1471.

[11] See INSURANCE [Also 14 R. C. L. p. 823].

[12] Royal Ins. Co. v. Jack, 113 Ohio St. 153, 148 N. E. 923, 46 A.L.R. 529; Allen v. Berkshire Mut. F. Ins. Co. 105 Vt. 471, 168 A. 698, 89 A.L.R. 460.

Annotation: 14 A.L.R. 215, s. 19 A.L.R. 171, 24 A.L.R. 740, 30 A.L.R. 662, 38 A.L.R. 1123, 46 A.L.R. 534, 54 A.L.R. 1344, and 89 A.L.R. 465.

[13] Royal Ins. Co. v. Jack, 113 Ohio St. 153, 148 N. E. 923, 46 A.L.R. 529; Allen v. Berkshire Mut. F. Ins. Co. 105 Vt. 471, 168 A. 698, 89 A.L.R. 460.

stantially equivalent to that attached to the term "larceny," and this is the majority view.[14] The term "pilferage" is held to mean "petit larceny."[15]

A "theft," within the meaning of a theft policy, is shown if possession is actually taken by a wrongdoer,[16]—possession, as distinguished from misuse,[17]—and if an intent to steal exists or may be inferred.[18] This is true even though the possession is but temporary.[19]

§ 569. —**Intent to Steal.**—To warrant a recovery on a policy insuring an automobile against theft, there must be more than a wrongful taking; the taking must be with the intent to steal.[20] The intent to steal is a necessary ingredient of the offense[1] and may be inferred from the facts and circumstances of the case.[2]

§ 570. —**Obtaining Property under False Pretenses.**—Obtaining property under false pretenses is not theft, as that term is employed in an insurance policy indemnifying the owner of an automobile against loss by "theft, robbery, or pilferage."[3] Accordingly, where an owner of an automobile executes a contract of sale for his car, helps the vendee change the license numbers, and, in pursuance of his contract of sale, transfers possession and title to the vendee, who pays therefor with a forged check, such fraudulent transaction, so perpetrated by the vendee, does not constitute a "theft," within the terms of the policy.[4] And there is no liability under a policy where the insured sells the car and takes notes and a mortgage on property which the buyer falsely represents that he owns, and the latter subsequently takes the car outside the state and abandons it, inasmuch as the owner intended to transfer not merely the possession, but the title.[5] However, depriving an automobile dealer of a car by a preconceived scheme of impersonation, misrepresentation, and fraud, is a species of theft, so that the loss is covered by a policy insuring against "theft, robbery, or pilferage."[6] Liability under such a policy arises in case one borrowing a car to go to a specified place, drives it to a distant state, abandons it in a remote place in a badly damaged condition, and fails to notify the owner where it may be found.[7]

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[14] Illinois Auto. Ins. Exch. v. Southern Motor Sales Co. 207 Ala. 265, 92 So. 429, 24 A.L.R. 734; Phœnix Assur. Co. v. Eppstein, 73 Fla. 991, 75 So. 537, L.R.A.1917F, 540.

Annotation: 14 A.L.R. 216, s. 19 A.L.R. 171, 24 A.L.R. 740, 30 A.L.R. 662, 38 A.L.R. 1123, 46 A.L.R. 534, 54 A.L.R. 1344, and 89 A.L.R. 465.

[15] Illinois Auto. Ins. Exch. v. Southern Motor Sales Co. 207 Ala. 265, 92 So. 429, 24 A.L.R. 734.

Annotation: 24 A.L.R. 741, s. 30 A.L.R. 662, 38 A.L.R. 1123, 46 A.L.R. 534, 54 A.L.R. 1344, and 89 A.L.R. 465.

[16] Price v. Royal Ins. Co. 119 Wash. 93, 204 P. 803, 24 A.L.R. 731.

The act of a bailee of an automobile in decamping with it is theft, within the meaning of a policy insuring against "theft." Allen v. Berkshire Mut. F. Ins. Co. 105 Vt. 471, 168 A. 698, 89 A.L.R. 460. Annotation: 89 A.L.R. 465.

[17] **Misuse by Chauffeur.**—The mere fact that a chauffeur who, after giving a purchaser of an automobile a lesson in driving it and being told to return with the car later in the day, drives the car away on an errand of his own, during which time the car is wrecked and he is killed, does not establish his theft of the car within the meaning of a policy insuring the owner against theft. Ledvinka v. Home Ins. Co. 139 Md. 434, 115 A. 596, 19 A.L.R. 167.

Wrongful Use of Car by Garage Keeper.—A policy insuring the owner of an automobile against theft does not cover the wrongful use of the car by the keeper of a garage where it was left for repair, although such use is, by statute, declared to be larceny. Van Vechten v. American Eagle F. Ins. Co. 239 N. Y. 303, 146 N. E. 432, 38 A.L.R. 1115.

[18] See infra, § 569.

[19] Price v. Royal Ins. Co. 119 Wash. 93, 204 P. 803, 24 A.L.R. 731.

[20] Phœnix Assur. Co. v. Eppstein, 73 Fla. 991, 75 So. 537, L.R.A.1917F, 540; Rydstrom v. Queen Ins. Co. 137 Md. 349, 112 A. 586, 14 A.L.R. 212; Valley Mercantile Co. v. St. Paul F. & M. Ins. Co. 49 Mont. 430, 143 P. 559, L.R.A.1915B, 327, Ann. Cas. 1916A, 1126.

Annotation: 14 A.L.R. 215, s. 19 A.L.R. 171, 24 A.L.R. 740, 30 A.L.R. 662, 38 A.L.R. 1123, 46 A.L.R. 534, 54 A.L.R. 1344, and 89 A.L.R. 465; Ann. Cas. 1917D, 55.

Use of Car by Employees of Garage.—A policy insuring the owner of an automobile against loss by theft does not cover a loss caused by an accident to the car while it is in the possession of employees of a shop to which it had been taken for repairs, who had taken it from the shop in the daytime, after working hours, for a joy ride, intending to return it to the shop when they were through with it, there having been no criminal intent permanently to deprive the owner of the car, and therefore no theft of it. Valley Mercantile Co. v. St. Paul F. & M. Ins. Co. 49 Mont. 430, 143 P. 559, L.R.A.1915B, 327, Ann. Cas. 1916A, 1126. Annotation: 14 A.L.R. 217, s. 19 A.L.R. 171, 24 A.L.R. 740, 30 A.L.R. 662, 38 A.L.R. 1123, 46 A.L.R. 534, 54 A.L.R. 1344, and 89 AL.R. 465.

[1] Phœnix Assur. Co. v. Eppstein, 73 Fla. 991, 75 So. 537, L.R.A.1917F, 540.

[2] Price v. Royal Ins. Co. 119 Wash. 93, 204 P. 803, 24 A.L.R. 731.

Annotation: 24 A.L.R. 740, s. 30 A.L.R. 662, 38 A.L.R. 1123, 46 A.L.R. 534, 54 A.L.R. 1344, and 89 A.L.R. 465.

A theft of the insured's automobile may be found from the facts that it was left parked on an inclined street, with brakes set and gears locked, that a stranger entered and started it down the hill, and that it was soon after found abandoned, with the brakes released, but gears and transmission still locked, at the foot of the hill, where it had collided with an obstruction, to its injury. Price v. Royal Ins. Co. 119 Wash. 93, 204 P. 803, 24 A.L.R. 731.

[3] Royal Ins. Co. v. Jack, 113 Ohio St. 153, 148 N. E. 923, 46 A.L.R. 529.

§ 571. —Open Taking under Claim of Ownership.—An automobile policy against theft does not cover an open taking under claim of ownership. Indemnity against theft by others than employees covers theft by an employee of a garage keeper where the machine is stored.[8]

§ 572. —Conversion by Mortgagor or Conditional Vendee.—Quite commonly, an automobile theft policy will contain a clause expressly excepting from the risks insured against "the wrongful conversion, embezzlement, or secretion by a mortgagor or vendee in possession under mortgage, conditional sale, or lease agreement," or some clause of similar import.[9] On the other hand, some insurance contracts specifically insure against risks of the kind thus excepted.[10] A very simple type of coverage is that by which the conditional vendor of the car is insured against all direct loss or damage which he may sustain, caused by the fraudulent "disposal or concealment" of the car by the conditional vendee thereof. Other types of coverage are those by which the conditional vendor, or mortgagee, of a car is insured against loss resulting from the act or conduct of the conditional vendee, or mortgagor, by a "sale," "wrongful conversion," "embezzlement, or concealment," [11] or "larceny, embezzlement, or conversion," etc.[12] Such a policy insures the equity of the conditional vendor only so long as the conditional sales contract is in existence.[13] Whether a particular contingency is one covered by a policy must be determined by a construction of the terms of the contract of insurance when such contract is considered in the light of the nature of the risk that manifestly formed the

[4] Ibid.

[5] Illinois Auto. Ins. Exch. v. Southern Motor Sales Co. 207 Ala. 265, 92 So. 429, 24 A.L.R. 734.

[6] Hill v. North River Ins. Co. 111 Kan. 225, 207 P. 205, 24 A.L.R. 736.

Annotation: 24 A.L.R. 740, s. 30 A.L.R. 662, 38 A.L.R. 1123, 46 A.L.R. 534, 54 A.L.R. 1344; and 89 A.L.R. 465.

[7] Federal Ins. Co. v. Hiter, 164 Ky. 743, 176 S. W. 210, L.R.A.1915E, 575.

Annotation: 14 A.L.R. 218, s. 19 A.L.R. 171, 24 A.L.R. 740, 30 A.L.R. 662, 38 A.L.R. 1123, 46 A.L.R. 534, 54 A.L.R. 1344, and 89 A.L.R. 465.

[8] Annotation: 51 L.R.A.(N.S.) 584.

[9] Rydstrom v. Queen Ins. Co. 137 Md. 349, 112 A. 586, 14 A.L.R. 212; Royal Ins. Co. v. Jack, 113 Ohio St. 153, 148 N. E. 923, 46 A.L.R. 529.

Annotation: 55 A.L.R. 827.

A provision in an automobile theft policy excepting from the risks assumed a wrongful conversion, embezzlement, or secretion by a person in lawful possession of the insured property under a mortgage, conditional sale, lease, or other contract, written or verbal, does not relieve the insurer from liability where one who had been permitted to take the insured automobile on trial, with a view to its purchase, and who, on demand, had surrendered possession thereof and promised to drive it to the owner's garage, decamped with it instead. Allen v. Berkshire Mut. F. Ins. Co. 105 Vt. 471, 168 A. 698, 89 A.L.R. 460.

[10] Annotation: 55 A.L.R. 828.

[11] Annotation: 55 A.L.R. 828.

[12] Automobile Finance & Securities Co. v. Globe Indem. Co. 161 La. 303, 108 So. 545, 55 A.L.R. 823.

Annotation: 55 A.L.R. 828.

[13] Annotation: 55 A.L.R. 831.

basis of the contract, with a consideration of the purpose of the parties in bringing it forth.[14]

§ 573. **—Persons Excepted from Coverage.**—Policies insuring automobiles against theft usually except thefts by persons in the employment, service, or household of the insured.[15] The term "household," within the meaning of such an exception, includes all the dwellers in a house under the common control of one person,[16] such as a nephew of the owner temporarily visiting him.[17] The terms "employment" and "service" refer to persons actually employed and do not include a chauffeur furnished by the seller to give the purchaser driving instructions.[18]

Some policies except thefts by any person to whom the assured might voluntarily part possession. Here again, the owner must actually part with possession before the exception will be applied. For instance, where one who had been permitted to take an automobile on trial, with a view to purchase, surrendered the transmission keys upon demand being made for the purchase price or the car, but subsequently agreed to drive it to the owner's garage three days later, before which time he decamped with it, the owner is deemed to have been in constructive possession thereof at the time of its loss, and not to have parted with possession within the meaning of a policy insuring against the theft of the automobile excepting by any person to whom the assured might voluntarily part with possession.[19]

§ 574. **Description of Car.**—In policies insuring automobiles against theft, the insured is ordinarily required to describe, for purposes of identification, the automobile insured, and false statements regarding such description may avoid the policy. For example, where it was alleged that the theft policy sued on covered a touring car of a certain make, year and number, it was held that the plaintiff's proof failed to support his allegation, where the only common point of description or identification, between the car described in the policy and the car which plaintiff had in his possession, was the name.[20] On the other hand, a description of an automobile as a 1920–1921 model is not erroneous where the car was built in 1919 and altered in 1920 to make it conform in appearance and substance to the 1921 model.[1] And it has been held that in case of an erroneous description in an insurance policy of an automobile insured by it, a bill in equity will lie to reform the policy to conform to the facts.[2]

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[14] Annotation: 55 A.L.R. 833.

In Automobile Finance & Securities Co. v. Globe Indem. Co. 161 La. 303, 108 So. 545, 55 A.L.R. 823, where, with the consent of the seller, a firm of retail automobile dealers, notes secured by a chattel mortgage on the car sold, and representing the credit portion of the purchase price thereof, were executed by the purchaser directly to finance company which, being engaged in the business of financing the sales of automobiles on credit, purchased said notes, it was held that the act of the purchaser of the car in surrendering the same to the seller thereof, with instructions to sell it—which was done, with the result that the chattel mortgage became extinguished—amounted to a "conversion" thereof by the purchaser, within the meaning of policy issued to the finance company, and insuring it against any such direct pecuniary loss as it might sustain by "any act of larceny, embezzlement, or conversion of the purchaser, whereby the obligee is deprived of the security of any motor vehicle, . . . either directly or through the connivance with others on the part" of the purchaser.

"Disposal or Concealment" with Intent to Defraud.—Under policy insuring a conditional vendor of a car against "all direct loss or damage which he may sustain by the disposal or concealment of said automobile by the said vendee, with intent to defraud the said vendor," there can be no recovery where there was in fact neither a disposal nor a concealment of the car by the conditional vendee. Annotation: 55 A.L.R. 838.

[15] Rydstrom v. Queen Ins. Co. 137 Md. 349, 112 A. 586, 14 A.L.R. 212.

Annotation: 14 A.L.R. 215.

[16] Rydstrom v. Queen Ins. Co. 137 Md. 349, 112 A. 586, 14 A.L.R. 212.

[17] Ibid.

Annotation: 14 A.L.R. 218, s. 19 A.L.R. 171, 24 A.L.R. 740, 30 A.L.R. 662, 38 A.L.R. 1123, 46 A.L.R. 534, 54 A.L.R. 1344, and 89 A.L.R. 465.

[18] **A chauffeur furnished by the seller** of an automobile to instruct the purchaser how to run the car as part of the consideration for the purchase price is not in the employ of the purchaser when he has been sent by the seller with the car to give a lesson, so as to prevent his misappropriation of the car being theft, although the buyer had given him tips for his services. Ledvinka v. Home Ins. Co. 139 Md. 434, 115 A. 596, 19 A.L.R. 167.

[19] Allen v. Berkshire Mut. F. Ins. Co. 105 Vt. 471, 168 A. 698, 89 A.L.R. 460.

Annotation: 89 A.L.R. 465.

§ 575. Place of Keeping.—Policies insuring automobiles against theft ordinarily provide as to the place of keeping the insured automobile. Whether the assured has complied with such a provision depends upon the provisions of the particular policy. A statement, under the caption, "Warranties," in a policy purporting to cover a car while within the limits of the United States and Canada, and while in a building, on a road, railroad, or other conveyance, that the car "is usually kept" in a certain place has been held not to be a continuing warranty.[3] And a warranty that the car was "usually kept" in a certain private garage was not breached by the fact that subsequent to the issuance of the policy, and for several months prior to loss of the car, it was kept in a public garage.[4] A policy which excludes from the risks assumed the theft of the automobile stored in any building not securely inclosed and locked when unattended is merely suspended while the insured automobile is so stored, and attaches again as soon as the situation comes to an end.[5]

§ 576. Locking Safety Device.—In some policies insuring loss of automobiles by theft, the insured, in consideration of a reduced premium, warrants that the automobile will be continuously equipped with a locking device of specified make, and undertakes during the life of the policy "to use all diligence and care in maintaining the efficiency of said locking device, and in locking the automobile when leaving" the same "unattended."[6] While such a provision has been held binding, avoiding the policy when the car is left with the device unlocked,[7] it has also been construed not to require the car to be locked when unattended, but to require the owner to use the care which a man of ordinary prudence would exercise under the circumstances.[8]

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[20] Hessen v. Iowa Auto. Mut. Ins. Co. 195 Iowa, 141, 190 N. W. 150, 30 A.L.R. 657.
Annotation: 24 A.L.R. 744, s. 30 A.L.R. 662, 38 A.L.R. 1123, 46 A.L.R. 534, 54 A.L.R. 1344, and 89 A.L.R. 465.

[1] Sawyer v. National F. Ins. Co. 53 S. D. 228, 220 N. W. 503, 61 A.L.R. 306.

[2] Hessen v. Iowa Auto. Mut. Ins. Co. 195 Iowa, 141, 190 N. W. 150, 30 A.L.R. 657.

[3] Sawyer v. National F. Ins. Co. 53 S. D. 228, 220 N. W. 503, 61 A.L.R. 306.
Annotation: 61 A.L.R. 312.

[4] Sawyer v. National F. Ins. Co. 53 S. D. 228, 220 N. W. 503, 61 A.L.R. 306.
Annotation: 61 A.L.R. 312.

[5] Allen v. Berkshire Mut. F. Ins. Co. 105 Vt. 471, 168 A. 698, 89 A.L.R. 460.

Where an automobile was stolen by a bailee thereof, an insurer against theft under a policy excluding from the risks assumed the theft of an automobile stored in any building not securely inclosed and locked when unattended, is not exonerated from liability by the fact that the automobile was kept by the bailee in a building not securely inclosed and locked, since it was not unattended by its custodian at the time it was taken. Ibid.

[6] Annotation: 54 A.L.R. 1344, s. 89 A.L.R. 465.

[7] Doerr v. National F. Ins. Co. 315 Mo. 266, 285 S. W. 961, 54 A.L.R. 1336.

Estoppel to Contest Policy.—The mere fact that upon loss of an automobile by theft, the insurer's agent refers the insured to an adjuster, who states that the claim will be paid if the car is not found in sixty days, does not estop the insurer from relying on a breach of the provision requiring a locking device on the car, where there is nothing to show any change of position by the insured because of such acts. Ibid.

Waiver of Breach of Condition.—The failure to have a locking device locked when an automobile is stolen, as required by a policy insuring it against theft, is not waived by the insurer's agent referring insured to an adjuster to have the claim adjusted, which was necessary to fix the rights of a mortgagee, and by the adjuster, with knowledge of the facts, offering to pay the claim if the car was not reclaimed in sixty days, and tendering the amount for which the premium paid, in the unlocked condition of the car. Ibid.

Return of the premium by one insuring an automobile against theft is not required where, at the time of loss, the policy had run one third of its life and covered the interest of a mortgagee, which was satisfied, while knowledge of the breach of condition in failing to maintain a locking device did not come to the insurer until after the loss. Ibid.
Annotation: 54 A.L.R. 1344.

§ 577. Proof of Loss.—Insurance policies against loss of automobiles by theft ordinarily provide that the assured, in case of loss, give notice to the insurer, within a certain time, as to time and cause of loss, etc., and failure to comply with such requirement will bar a recovery on the policy.[9]

§ 578. Effect of Recovery of Stolen Car.—Obviously, in order to make a theft insurance policy of value to the owner there must be some time fixed after which the return of the automobile will not release the company from liability. Automobiles are so generally used in business affairs and other activities of life that public policy requires that a person having a theft policy should not be compelled to wait indefinitely on the chance of having the stolen automobile recovered, or be compelled to incur the expense of buying a new one and thereafter taking the old one back if recovered.[10] A common provision of the policy is to the effect that the sum for which the company is liable pursuant to the policy "shall be payable sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received" by the company. If the car has not been found within the sixty-day limit, the insured, under such a provision, is entitled to recover as for a total loss, or the full amount for which the company may be held liable, unaffected by the fact that the car is subsequently found and recovered, and that the company offers to return it.[11] In the absence of a specified time agreed upon for the return of the car from the insurer to the insured, the law will imply that the agreement was for a return within a reasonable time.[12]

When the car is recovered in a damaged condition, the insurer has the right to retain possession thereof for a reasonable time, in order to ascertain, by agreement or by appraisal, the insured's loss and damage, but only for such length of time.[13] No right on the part of the insurer to retain possession of the car beyond a reasonable time within which to ascertain the loss is conferred by another clause in the policy that the damage is not payable until sixty days after an award has been made by the appraisers, if an appraisal is demanded.[14]

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[8] Allgood v. Hartford F. Ins. Co. 186 N. C. 415, 119 S. E. 561, 30 A.L.R. 652.

Annotation: 30 A.L.R. 670, s. 38 A.L.R. 1123, 46 A.L.R. 534, 54 A.L.R. 1344, and 89 A.L.R. 465.

[9] Hessen v. Iowa Auto. Mut. Ins. Co. 195 Iowa, 141, 190 N. W. 150, 30 A.L.R. 657.

Annotation: 24 A.L.R. 745, s. 30 A.L.R. 662, 38 A.L.R. 1123, 46 A.L.R. 534, 54 A.L.R. 1344, and 89 A.L.R. 465.

Proof of Loss.—To recover for loss of an automobile under a policy insuring by name, date, and factory number, the insured must prove the entire description appearing in the policy. Phœnix Assur. Co. v. Eppstein, 73 Fla. 991, 75 So. 537, L.R.A. 1917F, 540; Hessen v. Iowa Auto. Mut. Ins. Co. 195 Iowa, 141, 190 N. W. 150, 30 A.L.R. 657.

Sufficiency of Proof.—One whose automobile was insured against loss by theft is entitled to rely on the assurance of the insurer's agent that his proof of loss was sufficient, although sworn proof was not furnished. O'Connor v. Maryland Motor Car Ins. Co. 287 Ill. 204, 122 N. E. 489, 3 A.L.R. 787. Annotation: 14 A.L.R. 220; 19 A.L.R. 171; 24 A.L.R. 740; 30 A.L.R. 662; 38 A.L.R. 1123, 46 A.L.R. 534, 54 A.L.R. 1344, and 89 AL.R. 465.

[10] O'Connor v. Maryland Motor Car Ins. Co. 287 Ill. 204, 122 N. E. 489, 3 A.L.R. 787. See also, quoting the second or concluding sentence, Pennsylvania F. Ins. Co. v. Levy, 85 Colo. 565, 277 P. 779, 75 A.L.R. 1416.

Annotation: 75 A.L.R. 1421.

[11] O'Connor v. Maryland Motor Car Ins. Co. 287 Ill. 204, 122 N. E. 489, 3 A.L.R. 787; Sawyer v. National F. Ins. Co. 53 S. D. 228, 220 N. W. 503, 61 A.L.R. 306.

Annotation: 75 A.L.R. 1421.

Finding Prior to Institution of Action.—It is immaterial that the car was found, and offer of its return made, prior to the institution of the insured's action, where it was not found within the sixty-day limit. O'Connor v. Maryland Motor Car Ins. Co. 287 Ill. 204, 122 N. E. 489, 3 A.L.R. 787. Annotation: 75 A.L.R. 1421.

[12] Pennsylvania F. Ins. Co. v. Levy, 85 Colo. 565, 277 P. 779, 75 A.L.R. 1416.

Annotation: 75 A.L.R. 1424.

[13] Pennsylvania F. Ins. Co. v. Levy, 85 Colo. 565, 277 P. 779, 75 A.L.R. 1416.

Annotation: 75 A.L.R. 1424.

IX. ACTIONS

A. In General.

§ 579. **Generally.**—This subdivision deals with actions for injuries to person or property caused by the operation of an automobile, excluding, however, any discussion of actions for injuries resulting from defects in streets or highways.[1] The subject-matter defines, distinguishes, and classifies such phases of the broad subject of actions as are peculiar to automobiles. Rules of evidence and practice, the province of the jury, as well as of the court, on those disputed points that most commonly arise in automobile accident cases, and procedural matters in general, in such cases, are considered in this chapter.

The general rules governing liability in actions to recover damages for injuries sustained through the negligence of another[2] apply, except, of course, as they may be modified by local statute.[3]

§ 580. **Nature and Form of Action.**—The nature and form of an action brought for the recovery of damages sustained by reason of the operation of an automobile are determined by the principles applicable to civil actions generally. In most jurisdictions technical common-law forms of action or remedies for the enforcement of a cause of action have been abolished;[4] in these jurisdictions the civil remedy for injuries due to the operation of an automobile is the ordinary civil action. In jurisdictions where common-law distinctions are retained, the form of action may be either in trespass or in case.[5] Generally this is determined by whether the charge is that the defendant acted intentionally, or merely negligently; if the former, the action is to be classed as an action of trespass; if the latter, it is to be classed as an action in case.[6] In some jurisdictions all demands formerly recoverable under the various common-law forms of action ex delicto are enforced in an action of trespass; this, of course, includes actions for injuries arising from the operation of automobiles.[7]

Where the party letting an automobile for hire furnishes one that is not reasonably fit and proper for the purpose intended, the hirer may maintain an action for breach of contract, or at his option an action in tort for the damages sustained by reason of the defective condition; no contractual duty, however, is owed to a person riding with the hirer, or to a pedestrian, such as will enable either to maintain an action of contract; their remedy is by way of an action in tort.[8]

§ 581. **Limitations.**—In the absence of a statute to the contrary, the general rules applicable to the limitation of actions brought to recover damages[9] apply in automobile accident cases. The provisions of local statutes or regulations should always be consulted for any variance from the general rules governing limitation of actions with respect to proceedings involving the operation of motor vehicles.

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[14] Pennsylvania F. Ins. Co. v. Levy, 85 Colo. 565, 277 P. 779, 75 A.L.R. 1416.
Annotation: 75 A.L.R. 1424.

[1] See Highways, Streets and Sidewalks [Also 13 R. C. L. p. 1].

[2] See Negligence [Also 20 R. C. L. p. 1].

[3] Annotation: 41 A.L.R. 1223.

[4] See Actions, Vol. 1, p. 438, § 47.

[5] Babbitt, Motor Vehicle Law, 4th ed. pp. 1575, 1576.

[6] Aldrich v. Tyler Grocery Co. 206 Ala. 138, 89 So. 289, 17 A.L.R. 617.

[7] 1 Standard Pa. Prac. p. 348, § 63.

[8] Eklof v. Waterston, 132 Or. 479, 285 P. 201, 68 A.L.R. 1002.

[9] See Limitation of Actions [Also 17 R. C. L. p. 733, § 96].

§ 582. **Abatement and Revival.**—The rules which govern the abatement of pending actions and the survival of causes of actions, discussed under another title,[10] govern the abatement of a pending action for injuries arising from the operation of an automobile and the survival of the cause of action therefor. Thus, the rule that the pendency in any court of competent jurisdiction in the state of another action between the same parties, involving substantially the same subject-matter or cause of action, will abate the action last begun,[11] is applicable in actions involving the operation of automobiles.[12] Whether, upon the death of the tort-feasor, a cause of action for personal injuries resulting from the negligent operation of an automobile survives, depends upon the local statutes;[13] at common law such a cause of action will not survive.[14]

§ 583. **Conditions Precedent; Notice of Claim.**—It is necessary, before an action can properly be commenced, that all conditions precedent to its institution, whether prescribed by statute or implied by law, be complied with unless the conduct of the defendant is such as to prevent or excuse performance thereof.[15] The local statute or ordinance should always be consulted for any provisions respecting the giving of notice of claim or injury, or intention to sue, especially in cases where liability for the accident is attributed wholly, or in part, to a municipal corporation,[16] or where the injury is the result of a defect or obstruction in a highway,[17] and any such requirement should be complied with before institution of suit.[18]

§ 584. **Joinder of Causes of Action.**—The joinder in one action of several causes of action arising from the operation of an automobile is determined by the general rules which control the joinder of several causes of action ex delicto. In most jurisdictions there are liberal statutory provisions which permit joinder of all claims arising out of the same transactions, or transactions connected with the same subject-matter, provided the several causes affect all the parties and are consistent with each other. In jurisdictions which follow the common-law practice the right to join causes is much more limited.[19] Under the common-law practice a cause of action in trespass for having intentionally caused an injury with an automobile cannot be joined with a cause of action in the case for mere negligence in such operation.[20] In some jurisdictions, by statute, a husband's or a parent's cause of action accruing by reason of an injury inflicted upon the wife or child, and the wife's or child's own cause of action, must be redressed in a single suit.[1]

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[10] See Abatement, Survival, and Revival, Vol. 1, p. 15.

[11] See Abatement, Survival, and Revival, Vol. 1, pp. 27–47, §§ 14–44.

[12] Underwood v. Dooley, 197 N. C. 100, 147 S. E. 686, 64 A.L.R. 656.

However, the pendency of an action brought by an insurer of an automobile against damage by collision, against one whose negligence is claimed to have caused such damage, is not ground for dismissing an action brought by the owner of the car for personal injuries resulting from the collision. Ibid.

[13] Ford v. Maney, 251 Mich. 461, 232 N. W. 393, 70 A.L.R. 1315.

[14] See Abatement, Survival, and Revival, Vol. 1, p. 92, § 133.

[15] See Actions, Vol. 1, p. 426, § 34.

[16] See Municipal Corporations [Also 19 R. C. L. pp. 1040 et seq.]

[17] See Highways, Streets and Sidewalks [Also 13 R. C. L. p. 1].

[18] Touhey v. Decatur, 175 Ind. 98, 93 N. E. 540, 32 L.R.A.(N.S.) 350; Randolph v. Springfield, 302 Mo. 33, 257 S. W. 449, 31 A.L.R. 612; Cole v. St. Joseph, — Mo. —, 50 S. W. (2d) 623, 82 A.L.R. 742.

[19] See Actions, Vol. 1, p. 460, §§ 70 et seq.

[20] See discussion in Aldrich v. Tyler Grocery Co. 206 Ala. 138, 89 So. 289, 17 A.L.R. 617.

§ 585. Splitting Causes of Action.—In accordance with the rule followed in a majority of the states, that a single wrongful or negligent act or omission causing an injury to both the person and the property of the same individual, constitutes but one cause of action with separate items of damage,[2] it has been held, with respect to an action to recover damages resulting from an automobile accident, that the cause of action cannot be split, and that a recovery of a judgment for one item of damage may be pleaded in bar of an action to recover for another item of damage.[3]

An exception to the rule that a single tort causing injury to a person and to his property constitutes but one cause of action, which cannot be split, has been enunciated with respect to actions involving subrogation under insurance policies. After the insurer has paid the loss or damage under its policy, it becomes subrogated to the rights of the insured, and can maintain the action as the real party in interest. In such a case a judgment recovered by the insurance company, representing the damage to the car, is no bar to an action instituted by the insured to recover for personal injuries.[4] Some courts have, however, adopted the rule that damage to property and injury to the person, although the result of the same wrongful act, are infringements of different rights and give rise to distinct causes of action,[5] and where this view obtains, a recovery in an action brought to recover damages for injuries arising out of an automobile accident cannot be pleaded in bar of recovery on the other cause of action.[6]

§ 586. Defenses.—Those matters which may properly be set up as defenses in actions involving automobile accidents have already been considered in preceding sections, as, for example, the defense of contributory negligence,[7] or that of the absence of any proximate relationship between the acts attributed to the defendant and the accident.[8]

§ 587. —Payment of Insurance Money.—It is well settled that the receipt of money on an accident insurance policy by one who has suffered a personal injury does not preclude a recovery, or lessen the amount recoverable from the person who is responsible for the injury,[9] and it appears to be equally well settled that a recovery for death by wrongful act is not barred, or the amount of the recovery diminished, by the receipt by any of the beneficiaries of the suit, of money paid by an insurance company on a casualty insurance policy.[10] The fact that damage to an automobile is covered by insurance is no defense to an action by the owner against the one causing the damage.[10a] Nor is a conditional vendee of an automobile precluded from recovering full damages for its negligent destruction by the fact that the car was insured by the vendor, and the amount collected on the policy was credited on the contract price.[11]

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[1] 3 Standard Pa. Prac. p. 73, § 64.

[2] See ACTIONS, Vol. 1, p. 494, § 114.

[3] Georgia R. & Power Co. v. Endsley, 167 Ga. 439, 145 S. E. 851, 62 A.L.R. 263; Sprague v. Adams, 139 Wash. 510, 247 P. 960, 47 A.L.R. 529.

[4] Lloyds Ins. Co. v. Vicksburg Traction Co. 106 Miss. 244, 63 So. 455, 51 L.R.A.(N.S.) 319; Underwood v. Dooley, 197 N. C. 100, 147 S. E. 686, 64 A.L.R. 656.

The injured automobile owner, after settling with the insurance company for the destruction of his car, and transferring his claim to it, may proceed against the wrongdoer for any claim for personal injuries, or injury to other property, caused by the act which destroyed the automobile. Hamilton F. Ins. Co. v. Greger, 246 N. Y. 162, 158 N. E. 60, 55 A.L.R. 921.

[5] See ACTIONS, Vol. 1, p. 495, § 114.

[6] Annotation: 64 A.L.R. 672.

[7] See supra, §§ 407 et seq.

[8] See supra, § 164.

[9] Gatzweiler v. Milwaukee Electric R. & Light Co. 136 Wis. 34, 116 N. W. 633, 18 L.R.A.(N.S.) 211, 128 Am. St. Rep. 1057, 16 Ann. Cas. 633.

Annotation: 18 A.L.R. 683.

[10] Carroll v. Missouri P. R. Co. 88 Mo. 239, 57 Am. Rep. 382; Lipscomb v. Houston & T. C. R. Co. 95 Tex. 5, 64 S. W. 923, 55 L.R.A. 869, 93 Am. St. Rep. 804.

Annotation: 18 A.L.R. 686.

B. JURISDICTION AND VENUE

§ 588. **Generally.**—In the absence of a special statutory provision, the ordinary rules governing jurisdiction of civil actions brought to recover damages[12] apply in proceedings involving the operation of automobiles. Such actions are transitory, and may be maintained wherever the defendant may be found,[13] in accord with the general rule governing the venue of personal or transitory actions.[14] In many jurisdictions, however, there are special statutory provisions which extend this common-law rule as to venue. Some of such statutes permit an action for injuries caused by the operation of an automobile to be brought in the county where the injury occurs;[15] others permit such action to be brought in the county where the plaintiff resides. Still others applicable to motor transportation companies permit an action for injury to person or property by a common carrier bus or trucking company to be brought in any county on the road or line where service could be obtained on a driver.[16]

Such statutes have been sustained against attacks based on their constitutionality.[17]

Statutes which designate a state official as the proper person to receive service of process in actions against nonresidents for injuries arising out of the use of automobiles on the state highways[18] also have the effect of changing the common-law rule as to venue.[19]

C. PROCESS

§ 589. **Generally.**—In the absence of any special statutory provisions the service of process in automobile accident cases is governed by the practice in other civil actions.[20] Where, however, such an action is, pursuant to statutory authority, brought in the county where the injury occurs or where the plaintiff resides,[1] there are usually statutory provisions directing the method in which process shall be served upon the defendant.[2] There are also in most states statutes which provide for substituted or constructive service upon nonresidents in actions for tort in connection with the operation of automobiles within the state.[3]

§ 590. **Provisions for Constructive Service upon Nonresident Motorist—Validity.**—There are in many states statutes providing for constructive or substituted service of process on a nonresident motorist in an action growing out of an automobile accident in which such motorist was involved while operating his automobile in the state. These statutes usually designate a state official as the proper person to receive service of process.[4] Such statutes are constitutional[5] provided they contain provisions which make it reasonably probable that notice will be communicated to the person to be served,[6] as by requiring the mailing of a copy of the summons and complaint to his last known address.[7] The act of a nonresident in using the highways may properly be declared to be an agreement to accept service of summons through a designated state official in a suit growing out of such use.[8] The fact, however, that a nonresident had actual notice of the suit does not render valid the statute under which the suit was brought, which permitted service of process on a state official without providing for notice to defendant, or validate the judgment rendered in accordance with its provisions.[9]

[10a] Bader v. Marlin, 160 Wash. 460, 295 P. 160, 78 A.L.R. 914.

[11] Criez v. Sunset Motor Co. 123 Wash. 604, 213 P. 7, 32 A.L.R. 627.

[12] See COURTS [Also 7 R. C. L. p. 969].

[13] Loranger v. Nadeau, 215 Cal. 362, 10 P. (2d) 63, 84 A.L.R. 1264.

[14] See VENUE [Also 27 R. C. L. p. 776].

[15] 4 Ohio Jur. p. 797, § 194; 1 Standard Pa. Prac. p. 519, § 15.

[16] See MOTOR TRANSPORTATION COMPANIES.

[17] Schwarting v. Ogram, 123 Neb. 76, 242 N. W. 273, 81 A.L.R. 769; Allen v. Smith, 84 Ohio St. 283, 95 N. E. 829, Ann. Cas. 1912C, 611.

[18] See infra, § 590 et seq.

[19] 1 Standard Pa. Prac. p. 521, § 15.

[20] See PROCESS [Also 21 R. C. L. p. 1258.]

[1] See supra, § 588.

[2] 4 Ohio Jur. p. 801, § 199; 1 Standard Pa. Prac. 476, § 91; Babbitt, Motor Vehicle Law, 4th ed. p. 1581, § 2197.

[3] See infra, §§ 590 et seq.

§ 591. —Application and Construction.—Statutes which provide for constructive or substituted service of process on nonresident motorists are in derogation of common rights and should be strictly construed, and strict compliance therewith must be observed, although provisions should not be read into such a statute which are not expressly stated or necessarily implied.[10] In construing such statutes the intention of the legislature must be ascertained from an examination of the whole act, and given effect, and the reason and spirit of the law must be considered.[11] Such statutes have no application to accidents occurring before they became effective; their operation is prospective and not retroactive,[12] although changes in the provisions of such a statute may be held to be applicable to actions brought subsequent to such changes, even though the cause of action may have arisen before their enactment.[13] Such statutes apply to corporations as well as to natural persons.[14]

An owner of an automobile, who has procured a license therefor within the state, but who resides in another state, is a "nonresident" within the meaning of some of such statutes.[15] But a nonresident employer of a resident owner of an automobile licensed within the state is not a "nonresident" within the meaning of such statute.[16]

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[4] Annotation: 35 A.L.R. 951, s. 57 A.L.R. 1239; 82 A.L.R. 768, s. 96 A.L.R. 594.

[5] Wuchter v. Pizzutti, 276 U. S. 13, 72 L. ed. 446, 48 S. Ct. 259, 57 A.L.R. 1230; Hess v. Pawloski, 274 U. S. 352, 71 L. ed. 1091, 47 S. Ct. 632; Kane v. New Jersey, 242 U. S. 160, 61 L. ed. 222, 37 S. Ct. 30; Mann v. Humphrey, 257 Ky. 647, 79 S. W. (2d) 17, 96 A.L.R. 584; Pawloski v. Hess, 250 Mass. 22, 144 N. E. 760, 35 A.L.R. 945; Masci v. Young, 109 N. J. L. 453, 162 A. 623, 83 A.L.R. 869, affirmed in 289 U. S. 253, 77 L. ed. 1158, 53 S. Ct. 599, 88 A.L.R. 170; State ex rel. Cronkhite v. Belden, 193 Wis. 145, 211 N. W. 916, 214 N. W. 460, 57 A.L.R. 1218.

Annotation: 35 A.L.R. 951, s. 57 A.L.R. 1239.

[6] Wuchter v. Pizzutti, 276 U. S. 13, 72 L. ed. 446, 48 S. Ct. 259, 57 A.L.R. 1230.

[7] State ex rel. Cronkhite v. Belden, 193 Wis. 145, 211 N. Y. 916, 214 N. W. 460, 57 A.L.R. 1218.

[8] Wuchter v. Pizzutti, 276 U. S. 13, 72 L. ed. 446, 48 S. Ct. 259, 57 A.L.R. 1230.

The legislature may provide that the operation by a nonresident of a motor vehicle upon the highways of the state shall be deemed equivalent to an appointment by him of the registrar of motor vehicles for the time being as his agent to receive service of process in any action growing out of any accident or collision in which he may be involved during such operation, so that service of process on such registrar and the mailing of a copy to the nonresident at his place of residence will constitute due process of law and support a judgment in favor of the person injured. Pawloski v. Hess, 250 Mass. 22, 144 N. E. 760, 35 A.L.R. 945.

[9] Wuchter v. Pizzutti, 276 U. S. 13, 72 L. ed. 446, 48 S. Ct. 259, 57 A.L.R. 1230.

[10] Mann v. Humphrey, 257 Ky. 647, 79 S. W. (2d) 17, 96 A.L.R. 584.

[11] Ibid.

[12] Annotation: 82 A.L.R. 769, s. 96 A.L.R. 595.

[13] Duggan v. Ogden, 278 Mass. 432, 180 N. E. 301, 82 A.L.R. 765.

Notice by service of process on the state registrar of motor vehicles as the statutory agent of nonresident motorists, of the commencement of an action growing out of an accident in which he was involved while operating a motor vehicle on the highways of the state, may be given him in a way other than that prescribed by statute in force at the time of the accident, but permitted by an amendment enacted prior to the institution of the action. Ibid.

[14] Annotation: 82 A.L.R. 769, s. 96 A.L.R. 595.

[15] Mann v. Humphrey, 257 Ky. 647, 79 S. W. (2d) 17, 96 A.L.R. 584.

These statutes in general apply to nonresidents who operate their automobiles personally, or through or by an agent or employee acting within the scope of his employment; they generally do not apply to a nonresident owner whose car is being operated within the state, with his consent, by one who is not his agent.[17] Some statutes, however, apply to a nonresident owner whose automobile is being operated on the highways of the state by another with his consent.[18]

While some of such statutes by their terms are applicable only to suits by residents, others are construed to authorize constructive service upon officers of the state in actions brought by nonresident plaintiffs against nonresident defendants.[19]

Under a statute requiring a copy of the summons and complaint to be mailed to the nonresident defendant to his last known address, the address is not necessarily the last address known to the plaintiff; he is required at his peril to ascertain the last known address of the defendant as a matter of fact.[20] The term "last known address" means the last address so far as it is reasonably possible to ascertain it.[1]

In the absence of any provision indicating an intention to make substituted service upon the personal representative of the deceased nonresident motorist, a statute will be inapplicable to an action against his personal representative.[2]

D. PARTIES

§ 592. Generally.—The proper and necessary parties in an action for injuries arising from the operation of an automobile are determined by an application of the general rules which govern in the ordinary civil action based on a tort.[3] An intelligent determination as to whom to sue presupposes a workable knowledge of the substantive rules applicable to the specific situation. Active participation in the accident, or in the events leading thereto, is not the sole criterion by which to determine who may properly be named as defendants in the action. It is also clear that before one can determine with any reasonable degree of accuracy the proper defendants to an action, it is essential that the provisions of any local statute applicable to the situation, and definitive of the rights of the parties involved in the occurrence, be carefully studied, particularly in the light of any judicial rulings on that point.

In determining the proper party plaintiff in an action for an injury to or the conversion of an automobile, it should be borne in mind that under most practice statutes actions must be prosecuted by the real party in interest.[4] Such a statute does not prevent the conditional vendee of an automobile from bringing an action for damage to or conversion of it.[5] The conditional seller or his assignee may also maintain such an action.[6]

A person injured by the negligent operation of a rented automobile is the

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[16] Annotation: 82 A.L.R. 770.

[17] Annotation: 82 A.L.R. 770, s. 96 A.L.R. 596.

[18] Annotation: 96 A.L.R. 596.

[19] Annotation: 96 A.L.R. 596.

[20] State ex rel. Cronkhite v. Belden, 193 Wis. 145, 211 N. W. 916, 214 N. W. 460, 57 A.L.R. 1218.

[1] Annotation: 82 A.L.R. 772, s. 96 A.L.R. 597.

[2] State ex rel. Ledin v. Davison, 216 Wis. 216, 256 N. W. 718, 96 A.L.R. 589.

[3] See PARTIES [Also 20 R. C. L. p. 660].

[4] See PARTIES [Also 20 R. C. L. p. 665, § 6].

[5] Stotts v. Puget Sound Traction, Light & P. Co. 94 Wash. 339, 162 P. 519, L.R.A. 1917D, 214.
Annotation: L.R.A.1917D, 217.
See SALES [Also 24 R. C. L. p. 1].

[6] Babbitt, Motor Vehicle Law, 4th ed. p. 808, § 1195.

"direct, sole, and exclusive" beneficiary of the contractual obligation imposed by a statute making the hirer of such automobile liable for any damage to person or property caused by its operation while so rented, and may maintain an action in contract against such hirer for the injuries sustained.[7]

In determining the proper person or persons to bring an action for wrongful death caused by the operation of an automobile, the local statutes should be consulted.

New parties defendant may be added by amendment of the process of the plaintiff's pleading, without notice to such parties of the motion to make the amendment; they must, however, be served with process;[8] the allowance of an amendment striking out the name of the owner of one of the automobiles, and substituting as defendant the person who was operating it at the time, with the owner's permission, but not as his agent, is proper.[9]

§ 593. Joinder of Parties.—The propriety and necessity of the joinder of several persons as parties plaintiff or parties defendant are governed by the general rules which govern such questions in other civil actions.[10] For example, an action for damage to an automobile owned by two persons jointly must be brought in the name of both joint owners; one joint owner cannot recover in an action brought in his own name only.[11] The familiar rule that two or more tort-feasors who by concurrent acts of negligence which, although disconnected, yet in combination inflict an injury, are all jointly liable,[12] and may at the election of the person injured be sued jointly,[13] applies in cases involving the joint liability of owners or operators of two or more automobiles for injuries to a third person or damage to his property.[14] Such persons may be sued jointly, even though they did not owe the injured person the same degree of care,[15] and notwithstanding that there may exist a difference in the degree of liability, or in the quantum of evidence necessary to support such liability.[16] The fact that there can be no contribution between the defendants joined does not affect the propriety of their joinder.[17] It is, however, optional with the person injured whether he will make all joint tort-feasors defendants in one action or sue each separately; he is not required to join them in one suit.[18]

An automobile liability insurer made directly liable by statute for a liability created by the owner of the automobile is properly joined as defendant in an action against the owner.[19]

Most of the courts seem to have regarded the rules as to the joinder of parties and causes of action as not sufficiently flexible to permit the trial in one action of claims against persons who are concurrently liable, each to the extent to which he may have occasioned the damage sustained, as in the case of simultaneous or successive injuries,[20] although there are some exceptions to this rule in cases where, by reason of some close relationship between the defendants, or of some conduct on their part, it is impossible to determine where the liability rests.[1]

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[7] Levy v. Daniels' U-Drive Auto Renting Co. 108 Conn. 333, 143 A. 163, 61 A.L.R. 846.

[8] Johnson v. Carroll, 272 Mass. 134, 172 N. E. 85, 69 A.L.R. 1244.

[9] Ibid.

[10] See Parties [Also 20 R. C. L. p. 675, §§ 14 et seq.].

[11] Wiley v. Dobbins, 204 Iowa, 174, 214 N. W. 529, 62 A.L.R. 432.
Annotation: 62 A.L.R. 432.

[12] See Torts [Also 26 R. C. L. pp. 763 et seq.].

[13] See Parties [Also 20 R. C. L. p. 678, § 17].

[14] McDonald v. Robinson, 207 Iowa, 1293, 224 N. W. 820, 62 A.L.R. 1419; Reader v. Ottis, 147 Minn. 335, 180 N. W. 117, 16 A.L.R. 463; Shafir v. Sieben (Mo.) 233 S. W. 419, 17 A.L.R. 637, later appeal in (Mo.) 274 S. W. 755; West v. Jaloff, 113 Or. 184, 232 P. 642, 36 A.L.R. 1391; Carlton v. Boudar, 118 Va. 521, 88 S. E. 174, 4 A.L.R. 1480.
Annotation: 16 A.L.R. 465, s. 62 A.L.R. 1425.

[15] Carlton v. Boudar, 118 Va. 521, 88 S. E. 174, 4 A.L.R. 1480 (joinder of taxicab company and owner of automobile which collided with taxicab in action by passenger in taxicab).

[16] Annotation: 62 A.L.R. 1429.

[17] Carlton v. Boudar, 118 Va. 521, 88 S. E. 174, 4 A.L.R. 1480.

[18] McDonald v. Robinson, 207 Iowa, 1293, 224 N. W. 820, 62 A.L.R. 1419.

[19] Biller v. Meyer (C. C. A. 7th) 33 F. (2d) 440, 66 A.L.R. 436.

§ **594. —Master and Servant or Principal and Agent.**—Both the principal or master, and his agent or servant, are liable for torts of the latter, committed in the course or scope of his employment.[2] This rule finds frequent application in automobile accident cases,[3] and according to the weight of authority the employer and employee may be sued jointly.[4] In some jurisdictions, however, a joint action against an employer and his employee for the recovery of damages resulting from the act of the employee cannot be maintained.[5]

The owner of an automobile and the one operating it at the time of a collision, not as agent of the owner, but with his permission and in his absence, may not be joined as defendants in an action for damages occasioned by the collision.[6]

§ **595. —Husband and Wife.**—In conformity with what appears to be a well-settled rule, that in the absence of a statute modifying the common-law rule a husband and wife cannot maintain a single or joint action based upon a wrong affecting each in an individual capacity,[7] a husband and wife, both of whom were injured by an automobile driven by defendant, cannot maintain a joint action, alleging separate causes of action for injuries to each.[8]

In some instances, statutes have been held so to modify the common-law rule as to permit a husband and wife to maintain a joint action for the same wrong affecting both.[9]

E. Pleading

§ **596. Generally.**—In actions to recover damages for injuries sustained through the operation of a motor vehicle, the general rules pertaining to pleading in civil actions,[10] particularly those which obtain in negligence actions,[11] are applicable.[12] As in other cases, averments of a pleading will be construed against the pleader.[13] Ultimate and issuable facts, as distinguished from evidentiary facts, should be pleaded.[14] Matters as to which the court will take judicial notice need not be averred.[15]

§ **597. Complaint, Declaration, Petition, or Statement of Claim.**—In automobile accident cases, as in other civil actions,[16] the plaintiff's declaration, complaint, petition, or statement of claim should be a plain and concise statement of the ultimate facts constituting his cause of action; a detailed statement of the evidence upon which he relies to prove his case is neither necessary nor proper.[17] He should, of course, set forth a complete cause of action, although it is not necessary that each paragraph of his pleading set out a complete cause of action.[18] He should allege with sufficient clarity and definiteness the existence of a duty on the part of the defendant, or facts from which the law will imply such duty, its breach,[19] and the proximate relationship between such breach and the injuries alleged to have been sustained in the accident.[20] However, a mere allegation in a petition to recover damages for injuries, that each and every act, omission, and neglect stated was a proximate cause of the injury, without the operation of which the injury would not have occurred, is a mere legal conclusion.[1] Nor is an allegation that the defendant's negligence was the proximate cause of the injury to the plaintiff sufficient when not sustained by the averments that follow.[2] A general allegation of damages is sufficient to support a recovery of all damages which are the natural and necessary consequences of the cause of action stated, under a statute requiring the declaration to state concisely and with substantial certainty the substantive facts necessary to constitute the cause of action, but special or peculiar damages must be alleged.[3]

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[20] Annotation: 41 A.L.R. 1224.

[1] Annotation: 41 A.L.R. 1231.

[2] See Agency, Vol. 2, p. 278, §§ 359 et seq.; p. 254, § 324; Master and Servant [Also 18 R. C. L. p. 775, §§ 236 et seq.].

[3] See supra, §§ 373 et seq.

[4] Babbitt, Motor Vehicle Law, 4th ed. pp. 807, 1572, §§ 1207, 2178.

[5] See Agency, Vol. 2, p. 345, § 437; Master and Servant [Also 18 R. C. L. p. 480].

[6] Johnson v. Carroll, 272 Mass. 134, 172 N. E. 85, 69 A.L.R. 1244.

[7] See Husband and Wife [Also 13 R. C. L. pp. 1415, 1416].

[8] Annotation: 25 A.L.R. 744.

[9] Annotation: 25 A.L.R. 746.

[10] See Pleading [Also 21 R. C. L. p. 431].

[11] See Negligence [Also 20 R. C. L. p. 174, §§ 145 et seq.].

[12] Saunders System Birmingham Co. v. Adams, 217 Ala. 621, 117 So. 72, 61 A.L.R. 1333.

[13] Ex parte Mobile Light & R. Co. 211 Ala. 525, 101 So. 177, 34 A.L.R. 921.

[14] Switzer v. Sherwood, 80 Wash. 19, 141 P. 181, Ann. Cas. 1917A, 216.

[15] Edwards v. Earnest, 206 Ala. 1, 89 So. 729, 22 A.L.R. 1387.

[16] See Pleading [Also 21 R. C. L. p. 431].

§ 598. **—Ownership or Control of Automobile.**—The allegations of the complaint, declaration, or petition should aver the ownership in the defendant of the vehicle involved in the accident, or that he had such operation or control over the automobile as will charge him with liability for its negligent management at the time of the accident.[4] Allegations that defendant's servant, acting within the scope of his authority, did the acts of negligence complained of, and that by reason of such negligent acts of defendant's servant the plaintiff sustained the damages claimed, without directly alleging that defendant did such acts, are sufficient on demurrer.[5] But a mere allegation of ownership of an automobile operated by another is insufficient to charge the alleged owner with the operator's negligence, where the complaint contains additional allegations by which it is attempted to invoke the family purpose doctrine, thereby negativing the presumption that the driver of the car was operating it as the owner's agent.[6] A mere allegation that the automobile which was damaged was in the possession of the person named raises only an implication that he was in possession as bailee.[7]

A cause of action based solely on the family purpose doctrine is stated by allegations that at the time of the accident the operator, the defendant's daughter, was a member of his family and household, and was living at home with the defendant; that the automobile involved in the accident was the family car and was owned, provided, and maintained for the general use, pleasure, and convenience of the family, and was being so used by a member of defendant's family at the time of the accident; that at such time the daughter was wholly supported by defendant, was herself without property, and was driving the car with the consent, knowledge, acquiescence, approval, and direction of the defendant, and was engaged upon the business for which the car was purchased, to wit, for the general use of the family of defendant; and that by reason of these facts the daughter, while driving the car, became and was the agent of the defendant.[8]

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[17] Switzer v. Sherwood, 80 Wash. 19, 141 P. 181, Ann. Cas. 1917A, 216.

[18] Griffin v. Russell, 144 Ga. 275, 87 S. E. 10, L.R.A.1916F, 216, Ann. Cas. 1917D, 994.

[19] See NEGLIGENCE [Also 20 R. C. L. p. 174, § 145]; PLEADING [Also 21 R. C. L. p. 501, § 65].

[20] See PLEADING [Also 21 R. C. L. p. 499].

[1] Howard v. Redden, 93 Conn. 604, 107 A. 509, 7 A.L.R. 198.

[2] Woodbury v. Tampa Waterworks Co. 57 Fla. 243, 49 So. 556, 21 L.R.A.(N.S.) 1034.

[3] Antokol v. Barber, 248 Mass. 393, 143 N. E. 350, 32 A.L.R. 703.

[4] Gordon v. Rose, 54 Idaho, 502, 33 P. (2d) 351, 93 A.L.R. 984; Rowley v. Cedar Rapids, 203 Iowa, 1245, 212 N. W. 158, 53 A.L.R. 375.

[5] Burdette v. Henson, 96 W. Va. 31, 122 S. E. 356, 37 A.L.R. 489.

[6] Gordon v. Rose, 54 Idaho, 502, 33 P. (2d) 351, 93 A.L.R. 984.

[7] Morgan County v. Payne, 207 Ala. 674, 93 So. 628, 30 A.L.R. 1243.

§ 599. —**Negligence.**—The broad general rule that a pleader may allege negligence in an action therefor in general terms, or that a general allegation of negligence is sufficient,[9] is applicable in proceedings involving the operation of a motor vehicle.[10] The specific facts evidencing the negligence need not ordinarily be set out in the complaint, declaration, or petition,[11] the particular acts of negligence being a matter of proof.[12] A pleading which alleges that defendants negligently lost control of their automobile and drove recklessly over a part of the street which was several feet from the usual traveled way, without giving warning of their approach or slackening their speed, and negligently permitted the automobile to collide with plaintiff, and that the injury sustained by him was due solely to the negligence of defendants, pleads the ultimate and issuable facts as against a motion requiring plaintiff to specify the particulars of the negligence, and in what respect defendants lost control of the automobile or were careless in operating it.[13]

§ 600. —**Gross Negligence.**—Where in an automobile accident case liability is dependent upon gross negligence or wantonness or wilfulness on the part of the defendant,[14] the plaintiff's pleading must charge the defendant with gross negligence, wilfulness, or wantonness.[15] There can be no recovery where the complaint charges only ordinary negligence or want of ordinary care, and the cause is tried on that theory.[16] Gross negligence is not charged by an allegation that defendant's acts were reckless, negligent, and unlawful,[17] or by allegations that defendant permitted a boy of seventeen, known to be inexperienced and unskilful, to drive the automobile, and that by reason of the driver's inexperience, lack of skill, and incompetence, while driving at an excessive speed, he lost control of the car, which left the pavement and went into the ditch.[18]

§ 601. —**Violation of Statute or Ordinance.**—Where the complaint, declaration, or petition in an action for damages sustained in an automobile accident relies upon the violation of a statute in proof of negligence, the general rule that it is unnecessary for the pleader to set out the provisions of a statute or make any reference to it in his pleadings, in order to prove same at the trial,[19] is applicable.[20]

On the other hand, as a general rule, a municipal ordinance relied upon in an action brought in a court of general jurisdiction must be pleaded, although when a court is required, by statute, to take judicial notice of an ordinance, a pleading based upon a violation thereof need not necessarily allege that the ordinance was in force when the injury was inflicted.[1]

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[8] Gordon v. Rose, 54 Idaho, 502, 33 P. (2d) 351, 93 A.L.R. 984.
Annotation: 93 A.L.R. 991.

[9] See NEGLIGENCE [Also 20 R. C. L. p. 1].

[10] Saunders System Birmingham Co. v. Adams, 217 Ala. 621, 117 So. 72, 61 A.L.R. 1333.

[11] Ibid.

[12] Annotation: 59 A.L.R. 210.

[13] Switzer v. Sherwood, 80 Wash. 19, 141 P. 181, Ann. Cas. 1917A, 216.

[14] See supra, §§ 231, 234, 237-243.

[15] Annotation: 20 A.L.R. 1019.

[16] Bentson v. Brown, 186 Wis. 629, 203 N. W. 380, 38 A.L.R. 1417.

[17] Bentson v. Brown, 186 Wis. 629, 203 N. W 380, 38 A.L.R. 1417; Astin v. Chicago, M. & St. P. R. Co. 143 Wis. 477, 128 N. W. 265, 31 L.R.A.(N.S.) 158.

[18] Naudzius v. Lahr. 253 Mich. 216, 234 N. W. 581, 74 A.L.R. 1189.

[19] See PLEADING [Also 21 R. C. L. p. 443, § 7].

[20] Edwards v. Earnest, 206 Ala. 1, 89 So. 729, 22 A.L.R. 1387.

An averment that a motor vehicle which inflicted injury on a pedestrian was at the time of the accident, or "just immediately prior thereto," being operated in violation of an ordinance, is not insufficient as failing to show violation of the ordinance at the time of the injury.[2]

The fact that a complaint in an action for damages for injuries caused by the negligent operation of an automobile is based upon a void city ordinance will not prevent recovery if the allegations are sufficient to sustain a verdict for common-law negligence.[3]

§ 602. Plea, Answer, or Affidavit of Defense.—The general rules applicable to pleas and answers or to affidavits of defense in tort actions[4] are applicable in actions instituted to recover for injuries sustained in an automobile accident.[5] Such a pleading must generally be filed in order to prevent a judgment by default,[6] although under the practice in some jurisdictions an answer or affidavit of defense is necessary in such actions only where certain facts alleged, such as the agency of the operator or the ownership of the automobile, are to be put in issue.[7] Where this is the practice, if the defendant fails to file an answer or an affidavit of defense in an action for personal injuries alleged to have been caused by the negligent operation of a motor car, he admits responsibility for the manner in which it was operated, but does not admit that it struck the plaintiff, or that it was operated in the manner averred by the plaintiff.[8] Affirmative defenses must, of course, be pleaded. Thus, the majority rule that contributory negligence, to be available to the defendant in an action for personal injuries, must be specifically pleaded unless such negligence appears from the allegations of the plaintiff's petition or complaint,[9] applies to proceedings involving the operation of motor vehicles.[10] Where this is the rule, no consideration can be given, in an action to recover damages for injuries negligently inflicted, to an alleged ground of contributory negligence, which is not set up in the answer,[11] unless it appears from the plaintiff's own evidence that he was contributorily negligent. In many jurisdictions, however, the defense of contributory negligence is available under a general denial.[11a] In some jurisdictions a distinction is drawn between actions for personal injuries resulting from negligence and actions for death caused by wrongful act; in the latter action contributory negligence may be required to be pleaded even though such a plea is not necessary in ordinary negligence actions.[11b]

§ 603. Necessity of Asserting Set-off or Counterclaim.—Although the defendant in an automobile accident case, as in any other civil action, may, under the penalty of being barred from availing himself of such matters in any subsequent action, be required to set up all matters strictly of defense that he may have, he is not required to assert matters not strictly of defense, which are rather matters of set-off, counterclaim, or cross action.[12] A defendant in an action for damages for injuries arising out of an automobile collision is not bound, in order to protect his own claim for injuries growing out of the collision, to set it up by way of set-off or counterclaim in that action, but may maintain an independent action to recover his damages.[13]

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[1] Ibid.

[2] Ibid.

[3] West v. Jaloff, 113 Or. 184, 232 P. 642, 36 A.L.R. 1391.

[4] See NEGLIGENCE; PLEADING [Also 21 R. C. L. p. 431].

[5] Speight v. Simonsen, 115 Or. 618, 239 P. 542, 43 A.L.R. 1149.

[6] See PLEADING [Also 21 R. C. L. p. 431].

[7] 4 Standard Pa. Prac. p. 117, § 113, p. 394, § 392.

[8] Railway Exp. Agency v. Little (C. C. A. 3d) 50 F. (2d) 59, 75 A.L.R. 963.

[9] See NEGLIGENCE [Also 20 R. C. L. p. 182, § 151].

[10] Cahill v. E. B. & A. L. Stone & Co. 153 Cal. 571, 96 P. 84, 19 L.R.A.(N.S.) 1094; Olson v. Butte, 86 Mont. 240, 283 P. 222, 70 A.L.R. 1352; Speight v. Simonsen, 115 Or. 618, 239 P. 542, 43 A.L.R. 1149.

[11] Speight v. Simonsen, 115 Or. 618, 239 P. 542, 43 A.L.R. 1149.

[11a] See NEGLIGENCE [Also 20 R. C. L. p. 182, § 151].

[11b] See DEATH [Also 8 R. C. L. p. 808, §§ 86 et seq.].

F. EVIDENCE

1. JUDICIAL NOTICE

§ 604. Generally.—The broad principle of evidence that courts will take judicial notice of whatever is generally known, or ought to be generally known, within the limits of their jurisdiction,[14] finds frequent application in actions growing out of automobile accidents. Thus, the courts will take judicial notice of statutes affecting or regulating the operation of automobiles,[15] but not of municipal ordinances,[16] unless required to do so by statute.[17]

The courts will also take judicial notice of facts which are commonly and generally known with reference to automobiles and their operation.[18] They will take judicial notice of the fact that the blowout of a tire can affect the direction of an automobile,[19] that tire punctures occur more frequently than such disabling of other parts of an automobile as to render it temporarily unusable,[20] and that motor trucks are operated or propelled by gasoline engines or motors.[1] It is a matter of common knowledge that emergency stops often must be made, of which there is no time to give a signal.[2] Judicial notice may be taken of the facts that commercial motor vehicle transportation is rapidly increasing, that the traffic on main highways is becoming more and more congested,[3] and that an automobile depreciates materially in value when once sold and used.[4] Courts also will take judicial notice that pedestrians, when traveling along the sidewalk of a street, are oftentimes engaged in thought about their own individual affairs.[5] As suggested above, however, judicial notice will be taken only of those matters relative to automobiles, and their use and operation, which are of general or common knowledge.[6] The court will not take judicial notice of the meaning of the phrase, "diffusing type of lens," in a statute regulating the lights to be carried by automobiles,[7] nor will it take judicial notice of the fact that a blowout of the front tire of an automobile running at 15 miles per hour cannot cause the car to leave a perfectly smooth roadway and plunge into the ditch at the side of the road,[8] or that a certain combination truck and semitrailer is less likely than others to weave and twist upon the highways.[9]

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[12] See JUDGMENTS [Also 15 R. C. L. p. 554]; and PLEADING [Also 21 R. C. L. p. 431].

[13] Seager v. Foster, 185 Iowa, 32, 169 N. W. 681, 8 A.L.R. 690.

[14] See EVIDENCE [Also JUDICIAL NOTICE, 15 R. C. L. p. 1057, § 2].

[15] Steele v. Commercial Mill. Co. (C. C. A. 6th) 50 F. (2d) 1037, 84 A.L.R. 278 (judicial notice of state statute by Federal court).

[16] Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A.L.R. 1172.

[17] Edwards v. Earnest, 206 Ala. 1, 89 So. 729, 22 A.L.R. 1387.

[18] Re Berry, 147 Cal. 523, 82 P. 44, 109 Am. St. Rep. 160; People v. Schneider, 139 Mich. 673, 103 N. W. 172, 69 L.R.A. 345, 5 Ann. Cas. 790.

It is a matter of common knowledge that automobiles are more often driven without any reference to legal speed than in observance of it. Bragdon v. Kellogg, 118 Me. 42, 105 A. 433, 6 A.L.R. 669.

It is common knowledge that automobiles out of control often demolish standard structures which impede their progress. Annotation: 86 A.L.R. 1405.

Judicial notice will be taken that for many years automobile races have been as common as, if not more so than, horse races. Swanbrough v. United Commercial Travelers, 66 Colo. 384, 181 P. 204, 6 A.L.R. 485.

[19] Annotation: 79 A.L.R. 1218.

[20] Long v. Steffen, 194 Wis. 179, 215 N. W. 892, 61 A.L.R. 1155.

[1] Haddad v. Commercial Motor Truck Co. 146 La. 897, 84 So. 197, 9 A.L.R. 1380.

[2] Ritter v. Johnson, 163 Wash. 153, 300 P. 518, 79 A.L.R. 1270.

[3] Iowa Motor Vehicle Asso. v. Railroad Comrs. 207 Iowa, 461, 221 N. W. 364, 75 A.L.R. 1, affirmed in 280 U. S. 529, 74 L. ed. 595, 50 S. Ct. 151.

[4] Lynch v. Sable-Oberteuffer-Peterson, 122 Or. 597, 260 P. 222, 55 A.L.R. 180.

[5] Henderson v. O'Leary, 177 Wis. 130, 187 N. W. 994, 24 A.L.R. 942.

[6] Babbitt, Motor Vehicle Law, 4th ed. p. 1604.

[7] Re Hinkelman, 183 Cal. 392, 191 P. 682, 11 A.L.R. 1222.

2. Presumptions and Inferences

§ 605. **Generally.**—As in other civil actions,[10] in the trial of automobile accident cases either party may be aided in his proof by presumptions which the law attaches to a given state of facts.[11] There is a presumption that a motorist is innocent in respect of any violation of the provisions of the law.[12] Thus, a person operating his automobile on the public highway will be presumed to have registered and to have obtained a license for his machine.[13] There is also a presumption, in the absence of evidence to the contrary, that trolley poles in a street were located under the direction of proper authorities.[14] Motorists are presumed to know the law, and are, therefore, presumed to know to whom a statute gives the right of way at a street intersection.[15]

In this class of actions, as in other kinds of actions, care must be taken to distinguish between an inference and a presumption. An inference is a deduction from facts which reason dictates; a presumption, in its true sense, is an arbitrary conclusion which the law directs to be made from certain facts.[16] No inference that the brakes on a rented car were not properly adjusted can be drawn from the testimony of the driver that on applying the brakes, while traveling at a speed of 30 miles an hour, the car swerved, there being no testimony to show what caused the automobile to swerve.[17]

The court must assume that the legislature, in enacting a statute limiting the liability of the owner or operator of an automobile for accidental injuries to a guest therein, was familiar with the decisions of the court permitting recovery by a guest in an automobile for injuries resulting from the negligence of the owner or operator, and that, in undertaking to legislate upon the subject, it intended to make some change in the existing law.[18]

§ 606. **Of Negligence or of Contributory Negligence.**—There is no presumption or inference as to the negligence of a driver of an automobile arising from the mere fact that it collided with another vehicle,[19] struck a pedestrian,[20] or caused other damage. Negligence in the operation of an automobile is not presumed.[1] That the driver of an automobile did not know what happened when an accident occurred, or what caused the accident, does not raise a presumption that he was heedless and reckless in the operation of the automobile.[2] The accompanying facts and circumstances may, however, call into operation the doctrine of res ipsa loquitur, as where an automobile left the highway, ran upon the sidewalk, and there struck a pedestrian.[3]

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[8] Klein v. Beeten, 169 Wis. 385, 172 N. W. 736, 5 A.L.R. 1237.

[9] State v. Wetzel, 208 Wis. 603, 43 N. W. 763, 86 A.L.R. 274.

[10] See Evidence [Also 10 R. C. L. p. 867, §§ 10 et seq.].

[11] Doherty v. Ayer, 197 Mass. 241, 83 N. E. 677, 14 L.R.A.(N.S.) 816, 125 Am. St. Rep. 355; Morris v. Bloomgren, 127 Ohio St. 147, 187 N. E. 2, 89 A.L.R. 831.

[12] **One driving an automobile bearing license plates issued to another** and delivered to a third person for safe-keeping will be presumed to have used them with the knowledge, consent, and permission of such third person, notwithstanding such use was in violation of a statute making it an offense to operate a motor vehicle bearing license plates other than those issued to the registered owner of such vehicle. State ex rel. Vesper-Buick Auto. Co. v. Daues, 323 Mo. 388, 19 S. W. (2d) 700, 67 A.L.R. 157.

[13] Doherty v. Ayer, 197 Mass. 241, 83 N. E. 677, 14 L.R.A.(N.S.) 816, 125 Am. St. Rep. 355.

The fact that an automobile has been duly registered, and that this registration has expired, although the machine still bears the number of the old registration, is evidence that the machine is not duly registered and numbered. Feeley v. Melrose, 205 Mass. 329, 91 N. E. 306, 27 L.R.A.(N.S.) 1156, 137 Am. St. Rep. 445.

[14] Meese v. Goodman, 167 Md. 658, 176 A. 621, 98 A.L.R. 480.

[15] Morris v. Bloomgren, 127 Ohio St. 147, 187 N. E. 2, 89 A.L.R. 831.

[16] Judson v. Bee Hive Auto Serv. Co. 136 Or. 1, 294 P. 588, 297 P. 1050, 74 A.L.R. 944.

[17] Eklof v. Waterston, 132 Or. 479, 285 P. 201, 68 A.L.R. 1002.

[18] Silver v. Silver, 108 Conn. 371, 143 A. 240, 65 A.L.R. 943, affirmed in 280 U. S. 117, 74 L. ed. 221, 50 S. Ct. 57, 65 A.L.R. 939.

[19] Millsaps v. Brogdon, 97 Ark. 469, 134 S. W. 632, 32 L.R.A.(N.S.) 1177; Bloom v.

It will not be assumed that one who, while intoxicated and engaged in driving a truck as an agent, apparently deliberately ran into another vehicle and killed its driver, did not act negligently, but wilfully or maliciously.[4]

There is no presumption of contributory negligence on the part of the person injured. In the absence of evidence to the contrary, the person injured or killed is presumed to have exercised at all times the requisite degree and amount of care for his own safety and preservation.[5] It will be presumed that a pedestrian, seeing a car approaching, did not walk in front of it deliberately, or so carelessly as to stumble and fall without cause other than his own negligence.[6]

§ 607. Application of Res Ipsa Loquitur Doctrine.—While no presumption as to the negligence of the driver of an automobile arises from the mere fact that an accident occurred while it was being operated,[7] the accompanying facts and circumstances may call into operation the doctrine of res ipsa loquitur,[8] which is that when both the apparatus and the operation of it are within the control of defendant, and the accident is one which ordinarily could not happen except by reason either of defects in the apparatus or negligence in the operation, a presumption of one or the other arises from the happening of the accident sufficient to justify a verdict against defendant.[9]

To render this doctrine applicable in an automobile accident, the accident must be one which ordinarily could not happen except through fault in the operation of the car[10]—one which does not ordinarily happen when due care is exercised.[11] It is only where circumstances leave no room for a different presumption that the doctrine applies.[12] It must appear that the probable cause was within the control of the operator of the automobile against whom the doctrine is sought to be invoked.[13] Thus, where an injury results from the overturning of an automobile, and it is established that one of the front

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Bailey, 292 Pa. 348, 141 A. 150, 57 A.L.R. 585.

[20] Railway Exp. Agency v. Little (C. C. A. 3d) 50 F. (2d) 59, 75 A.L.R. 963; Millsaps v. Brogdon, 97 Ark. 469, 134 S. W. 632, 32 L.R.A.(N.S.) 1177; Beyrent v. Kaplan, 315 Pa 353, 172 A. 651, 92 A.L.R. 1515.

Annotation: 5 A.L.R. 1242, s. 64 A.L.R. 258, and 93 A.L.R. 1110.

[1] Bloom v. Bailey, 292 Pa. 348, 141 A. 150, 57 A.L.R. 585; Osborne v. Charbneau, 148 Wash. 359, 268 P. 884, 64 A.L.R. 251.

[2] Giddings v. Honan, 114 Conn. 473, 159 A. 271, 79 A.L.R. 1215.

[3] See infra, §§ 607, 608.

[4] Dixon v. Haynes, 146 Wash. 163, 262 P. 119, 55 A.L.R. 1218.

[5] Hatzakorzian v. Rucker-Fuller Desk Co. 197 Cal. 82, 239 P. 709, 41 A.L.R. 1027 (pedestrian killed while walking along highway).

[6] Railway Exp. Agency v. Little (C. C. A. 3d) 50 F. (2d) 59, 75 A.L.R. 963.

A child in the custody of its father, if charged with the father's negligence, is entitled to the benefit of a statute providing that in actions to recover for injuries, the person injured shall be presumed to have been in the exercise of due care, and contributory negligence on his part must be proved by the defendant. Gallagher v. Johnson, 237 Mass. 455, 130 N. E. 174, 15 A.L.R. 411.

[7] See supra, § 606.

[8] Annotation: 5 A.L.R. 1240, s. 12 A.L.R. 668, 64 A.L.R. 256, and 93 A.L.R. 1102.

[9] Klein v. Beeten, 169 Wis. 385, 172 N. W. 736, 5 A.L.R. 1237.

See NEGLIGENCE [Also 20 R. C. L. p. 187, § 156].

[10] Giddings v. Honan, 114 Conn. 473, 159 A. 271, 79 A.L.R. 1215.

[11] Annotation: 5 A.L.R. 1240, s. 12 A.L.R. 668, 64 A.L.R. 255, and 93 A.L.R. 1101.

[12] Klein v. Beeten, 169 Wis. 385, 172 N. W. 736, 5 A.L.R. 1237.

[13] Giddings v. Honan, 114 Conn. 473, 159 A. 271, 79 A.L.R. 1215.

tires had blown out, the doctrine does not apply, it being a well-known physical fact that a deflated tire can readily cause such an accident.[14] Nor does the doctrine apply where there is evidence that the accident in question might have happened as a result of the concurrent negligence of two or more persons, or the concurrence of two or more causes.[15]

§ 608. —**Particular Injuries Generally.**—The most frequent application of the doctrine of res ipsa loquitur in respect to automobiles is found in those cases where an automobile leaves the traveled portion of the highway and strikes a pedestrian, or causes other damage.[16] It has been applied in a number of cases where an automobile, stage bus, or taxicab ran off the highway on which it was traveling, and overturned, injuring passengers therein,[17] or where a private motor vehicle overturned on the highway, causing injury or damage;[18] other courts, however, have denied the application of the doctrine where an automobile traveling along a highway overturned when the driver lost control.[19] The doctrine has been applied where the detachment of a wheel caused injury or damage,[20] or where an automobile started from some unknown cause, after it had been parked,[1] as where a car parked on a grade started down the grade shortly after the owner left it.[2] The doctrine has been denied, however, where the car remained for some time standing in the position in which defendant parked it, and especially where shortly before it started other persons were seen in proximity to it.[3] The doctrine is not applicable where it is proved that the blowout of a tire might have caused the automobile to leave the highway.[4]

§ 609. —**Collision between Automobiles.**—Generally, it may be said that the mere happening of a collision between two motor vehicles does not present a situation for the application of the doctrine of res ipsa loquitur.[5] This is so even though the collision is a rear-end collision.[6] The collision may, however, have occurred under such circumstances as to call for the application of the doctrine.[7] It has been held, for example, that the doctrine is applicable in an action against the driver of an automobile by his invited guest for injuries occasioned by the overturning of the car through the hooking of the front bumper with the rear bumper of another car, which crossed in front at a street intersection.[8] The doctrine has been applied also in several cases involving injuries to passengers while riding in an automobile bus or taxicab, as the result of colliding with another vehicle.[9] Nor is the doctrine of res ipsa loquitur restricted, in cases involving a collision between two vehicles in one of which the plaintiff was a passenger, to those only wherein the operator of such vehicle was a common carrier.[10]

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[14] Ibid.

[15] Yellow Cab Co. v. Hodgson, 91 Colo. 365, 14 P. (2d) 1081, 83 A.L.R. 1156.

[16] Linberg v. Stanto, 211 Cal. 771, 297 P. 9, 75 A.L.R. 555; Brown v. Des Moines Steam Bottling Works, 174 Iowa, 715, 156 N. W. 829, 1 A.L.R. 835 (striking pedestrian on sidewalk).

Annotation: 5 A.L.R. 1240, s. 12 A.L.R. 668, 64 A.L.R. 256, and 93 A.L.R. 1102, 75 A.L.R. 562.

The doctrine of res ipsa loquitur applies where a 4,000-pound automobile, after colliding with a truck at a street intersection, ran nearly across the street, climbed an elevation of nearly a foot on to the sidewalk, and crashed nearly one half its length into a frame building abutting on the walk, to show that it was exceeding the speed limit of 12 miles an hour when it reached the intersection. West v. Jaloff, 113 Or. 184, 232 P. 642, 36 A.L.R. 1391.

Permitting a heavy autotruck to be diverted without warning from the street on to the sidewalk, to the injury of a person standing there, is prima facie evidence of negligence, to overcome which by proof of due care the burden is on the owner of the truck. Brown v. Des Moines Steam Bottling Works, 174 Iowa, 715, 156 N. W. 829, 1 A.L.R. 835.

As to presumption of negligence arising from mere fact that a pedestrian is struck by an automobile, see supra, § 606.

[17] Annotation: 64 A.L.R. 256, s. 93 A.L.R. 1108.

[18] Annotation: 93 A.L.R. 1120, 1121.

[19] Annotation: 93 A.L.R. 1122.

[20] Annotation: 93 A.L.R. 1123.

[1] Annotation: 5 A.L.R. 1244, s. 64 A.L.R. 260, and 93 A.L.R. 1116; 66 A.L.R. 441.

[2] Biller v. Meyer (C. C. A. 7th) 33 F. (2d) 440, 66 A.L.R. 436.

[3] Annotation: 5 A.L.R. 1244, 64 A.L.R. 260, and 93 A.L.R. 1116; 66 A.L.R. 443.

[4] Klein v. Beeten, 169 Wis. 385, 172 N. W. 736, 5 A.L.R. 1237.

[5] Riggsby v. Tritton, 143 Va. 903, 129 S. E. 493, 45 A.L.R. 280.

Annotation: 5 A.L.R. 1243, s. 12 A.L.R. 668, 64 A.L.R. 259, and 93 A.L.R. 1111.

[6] Annotation: 93 A.L.R. 1111.

[7] Annotation: 5 A.L.R. 1243, s. 12 A.L.R. 668, 64 A.L.R. 259, and 93 A.L.R. 1111.

§ 610. —Skidding.—The mere skidding of an automobile is not an occurrence of such an uncommon or unusual character as to constitute, if unexplained, evidence of the driver's negligence so as to render the doctrine of res ipsa loquitur applicable. Nor will such circumstance, standing alone, generally invoke the application of the doctrine of res ipsa loquitur.[11] In other words, the mere skidding of an automobile does not, alone and unexplained, furnish evidence of the negligent operation of the car.[12]

§ 611. Presumptions Arising from Proof of Ownership.—The ownership of an automobile implies the right of possession and control,[13] and, according to one line of authority, from proof of the defendant's ownership of the automobile, a rebuttable presumption, or an inference, arises that at the time of the injury the automobile was in the owner's possession, and being operated by him or by his servant or agent under circumstances which would render him liable for their conduct under the doctrine of respondeat superior.[14] Many courts take the view, however, that proof of ownership alone is not sufficient to raise an inference of fact, or a presumption, that at the time of the accident the driver was an agent or servant of the owner or under his control.[15] According to the view expressed by some courts, to hold that ownership of a car creates the presumption that the person driving it at the time of the injury was the agent of the owner, and acting within the scope of his employment, would require the court to base one presumption or inference upon another presumption or inference.[16]

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[8] Godfrey v. Brown, 220 Cal. 57, 229 P. (2d) 165, 93 A.L.R. 1092.

[9] Annotation: 93 A.L.R. 1114.

[10] Godfrey v. Brown, 220 Cal. 57, 29 P. (2d) 165, 93 A.L.R. 1092.

[11] Barret v. Caddo Transfer & Warehouse Co. 165 La. 1075, 116 So. 563, 58 A.L.R. 261; Lambert v. Eastern Massachusetts Street R. Co. 240 Mass. 495, 134 N. E. 340, 22 A.L.R. 1291; Osborne v. Charbneau, 148 Wash. 359, 268 P. 884, 64 A.L.R. 251; Linden v. Miller, 172 Wis. 20, 177 N. W. 909, 12 A.L.R. 665.

Annotation: 5 A.L.R. 1246, s. 12 A.L.R. 668, 64 A.L.R. 261, and 93 A.L.R. 1117; 58 A.L.R. 269; 3 B. R. C. 97.

No inference of contributory negligence on the part of the driver of an automobile can be conclusively drawn from the fact that the car skidded on an icy pavement. McCracken v. Curwensville, 309 Pa. 98, 163 A. 217, 86 A.L.R. 1379.

Generally, as to res ipsa loquitur as applied to automobile accidents, see annotations in 5 A.L.R. 1240, s. 12 A.L.R. 668.

[12] Osborne v. Charbneau, 148 Wash. 359. 268 P. 884, 64 A.L.R. 251.

[13] Judson v. Bee Hive Auto Serv. Co. 136 Or. 1, 294 P. 588, 297 P. 1050, 74 A.L.R. 944.

[14] Heavilin v. Wendell, 214 Iowa, 844, 241 N. W. 654, 83 A.L.R. 872; Rose v. Balfe, 223 N. Y. 481, 119 N. E. 842, Ann. Cas. 1918D, 238; Potts v. Pardee, 220 N. Y. 431, 116 N. E. 78, 8 A.L.R. 785; Ferris v. Sterling, 214 N. Y. 249, 108 N. E. 406, Ann. Cas. 1916D, 1161; Judson v. Bee Hive Auto Serv. Co. 136 Or. 1, 294 P. 588, 297 P. 1050, 74 A.L.R. 944; Birch v. Abercrombie, 74 Wash. 486, 133 P. 1020, 50 L.R.A.(N.S.) 59.

[15] Tice v. Crowder, 119 Kan. 494, 240 P. 964, 42 A.L.R. 893; Gardner v. Farnum, 230 Mass. 193, 119 N. E. 666, L.R.A.1918E, 997; White Oak Coal Co. v. Rivoux, 88 Ohio St. 18, 102 N. E. 302, 46 L.R.A.(N.S.) 1091, Ann. Cas. 1914C, 1082; Lotz v. Hanlon, 217 Pa. 339, 66 A. 525, 10 L.R.A.(N.S.) 202, 118 Am. St. Rep. 922, 10 Ann. Cas. 731; McFarlane v. Winters, 47 Utah, 598, 155 P. 437, L.R.A. 1916D, 618.

Annotation: 42 A.L.R. 908, s. 74 A.L.R. 958.

There is no presumption that a minor child is the agent of the father in driving the latter's car, or that when driving such car he is acting within the scope of his authority. Hays v. Hogan, 273 Mo. 1, 200 S. W. 286, L.R.A.1918C, 715, Ann. Cas. 1918E, 1127; Stumpf v. Montgomery, 101 Okla. 257, 226 P. 65, 32 A.L.R. 1490.

[16] Hays v. Hogan, 273 Mo. 1, 200 S. W. 286, L.R.A.1918C, 715, Ann. Cas. 1918E, 1127; Stumpf v. Montgomery, 101 Okla. 257, 226 P. 65, 32 A.L.R. 1490.

Annotation: 42 A.L.R. 909.

§ 612. Presumption that Driver Was Acting for Owner.—The fact that an employee was in charge of an automobile at the request of his employer gives rise to the inference, in the absence of evidence to the contrary, that he was in the performance of his duty at the time of a collision.[17] A slight deviation from the proper route of travel will not overcome this presumption or inference.[18] Again, if it is proved that the automobile in question was owned by defendant, and further proved that the driver was in the employment of defendant, a presumption then arises that such driver was within the scope of his employment when the accident occurred.[19] The burden of proof is then placed on the defendant to prove that at the time of the accident the driver was not acting for him, but was using the machine for his own purposes, or outside the scope of the employment.[20] But evidence that the owner told his chauffeur to deliver several friends and then drive home, a trip which would have taken an hour, and that the chauffeur ran into and injured plaintiff some six hours later, overcomes the presumption that the chauffeur was acting within the scope of his employment at the time of the accident.[1] Proof that the defendant owned the car, and that it was being driven by his child, with his consent, at the time of the accident, is not sufficient to raise the presumption that the child was acting as the agent of the father and within the scope of his authority, thereby shifting the burden upon the father to prove the contrary. To do this would require the court to base one presumption upon another.[2]

A bookkeeper or cashier, employed in the office of a company, is not presumed, from that fact alone, to have the implied authority to use or operate an automobile purchased and owner by the company for the use and purchase of a traveling salesman.[3] But a husband driving his wife's automobile, even with the wife present, is presumed, in the absence of evidence to the contrary, to be in control of the car and solely responsible for its operation.[4]

3. BURDEN OF PROOF

§ 613. Generally.—The broad general principle that the burden of proof is upon the party asserting the affirmative of the issue as determined by the pleadings and the nature of the case[5] applies, of course, to actions arising out of the operation or ownership of automobiles. In such cases the burden of proof never shifts from the party who has the affirmative issue, but the burden of proceeding with the evidence sometimes does.[6] The burden of proving that one in whose name an automobile is registered is not in fact the owner is on the one asserting that it was not legally registered.[7] And one who assails the classification in a police regulation governing the operation of automobiles has the burden of showing that it does not rest upon any reasonable basis.[8]

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[17] Babington v. Yellow Taxi Corp. 250 N. Y. 14, 164 N. E. 726, 61 A.L.R. 1354.

[18] Dixon v. Haynes, 146 Wash. 163, 262 P. 119, 55 A.L.R. 1218.

[19] Hays v. Hogan, 273 Mo. 1, 200 S. W. 286, L.R.A.1918C, 715, Ann. Cas. 1918E, 1127; Guthrie v. Holmes, 272 Mo. 215, 198 S. W. 854, Ann. Cas. 1918D, 1123; Stumpf v. Montgomery, 101 Okla. 257, 226 P. 65, 32 A.L.R. 1490.

[20] See infra, § 615.

[1] Guthrie v. Holmes, 272 Mo. 215, 198 S. W. 854, Ann. Cas. 1918D, 1123.

[2] Stumpf v. Montgomery, 101 Okla. 257, 226 P. 65, 32 A.L.R. 1490.

[3] White Oak Coal Co. v. Rivoux, 88 Ohio St. 18, 102 N. E. 302, 46 L.R.A.(N.S.) 1091, Ann. Cas. 1914C, 1082.

[4] Rodgers v. Saxton, 305 Pa. 479, 158 A. 166, 80 A.L.R. 280.

[5] See EVIDENCE [Also 10 R. C. L. p. 898, § 48].

[6] Judson v. Bee Hive Auto Serv. 136 Or. 1, 294 P. 588, 297 P. 1050, 74 A.L.R. 944.

[7] Balian v. Ogassin, 277 Mass. 525, 179 N. E. 232, 78 A.L.R. 1021.

The burden of proving affirmative defenses is on the defendant. Thus, it is incumbent on the defendant to prove that the plaintiff's vehicle was not registered according to law.[9] And the participation of an occupant of an unregistered automobile in its alleged operation is in the nature of a defense to an action by such occupant against the operator for personal injuries, to be established by the defendant, where a statute provides that the operation of an unregistered automobile on the highway shall not constitute a defense unless it is shown that the person injured knew, or had reasonable cause to know, that the statute requiring the registration of motor vehicles was being violated.[10]

§ 614. Negligence and Contributory Negligence.—There is no presumption of negligence on the part of the person operating an automobile, arising from the mere fact that it has caused injury to the person or property of another,[11] and one who alleges that he has been injured by the negligent operation of an automobile has the burden of establishing negligence on the part of the operator,[12] and of showing that such negligence was the proximate cause of his injury,[13] unless the common-law rule has been changed by a statute imposing upon the owner or driver of an automobile which, while being operated on the highway, has caused injury or damage to another, the burden of proving that the injury or damage did not arise through the negligence of the driver.[14] There is much controversy upon the question whether the plaintiff in a negligence action must show his own freedom from contributory negligence or whether the defendant has the burden of proving that the injury complained of was due to the plaintiff's fault.[15] The rule in an automobile accident case is determined by the rule applied in the particular jurisdiction in other negligence actions. In most jurisdictions the burden of proof is on the defendant,[16] unless the plaintiff's own evidence raises a presumption or inference of negligence on his part.[17] The burden of establishing contributory negligence is on the defendant, where plaintiff has made out a case from which his contributory negligence does not appear.[18] In several jurisdictions, however, a plaintiff in an automobile case, in order to make out a prima facie case, must prove not only negligence on the part of the defendant, but also that he, the plaintiff, was exercising due care.[19] In some jurisdictions in death actions the statutes impose upon the defendant the burden of proving contributory negligence.[20]

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[8] Naudzius v. Lahr, 253 Mich. 216, 234 N. W. 581, 74 A.L.R. 1189.

[9] Potter v. Gilmore, 282 Mass. 49, 184 N. E 373, 87 A.L.R. 1462.

[10] Balian v. Ogassin, 277 Mass. 525, 179 N. E. 232, 78 A.L.R. 1021.

[11] See supra, § 606.

[12] Millsaps v. Brogdon, 97 Ark. 469, 134 S. W. 632, 32 L.R.A.(N.S.) 1177; Osborne v. Charbneau, 148 Wash. 359, 268 P. 884, 64 A.L.R. 251.

In an action to recover for an injury resulting from defendant's bus striking the car in which plaintiff was riding, because of the failure of the brakes in the bus to work where it was shown that a pin on the brake evener had dropped off, but where there was no evidence as to the cause of its dropping, the burden of disproving negligence was upon the defendant under the doctrine of res ipsa loquitur and under a provision of the Motor Vehicle Act that when any injury is caused by a motor vehicle the onus of proof that it did not arise through the negligence of the driver or owner shall be on the owner or driver. Geel v. Winnipeg Electric Co. 16 Manitoba L. R. 18 [1930] 3 D. L. R. 781, 16 B. R. C. 321.

[13] Babbitt, Motor Vehicle Law, 4th ed. p. 1618, § 2235.

[14] McIntyre v. Coote, 19 Ont. L. Rep. 9, 16 Ann. Cas. 395; Mattei v. Gillies, 16 Ont. L. Rep. 558, 12 Ann. Cas. 970.

[15] See NEGLIGENCE [Also 20 R. C. L. p. 195, § 162].

[16] Millsaps v. Brogdon, 97 Ark. 469, 134 S. W. 632, 32 L.R.A.(N.S.) 1177; Waynick v. Walrond, 155 Va. 400, 154 S. E. 522, 70 A.L.R. 1014; Stewart v. Olson, 188 Wis. 487, 206 N. W. 909, 44 A.L.R. 1292.

The Federal rule is definitely settled that the burden of proving such contributory negligence rests, in all cases, upon the defendant. Miller v. Union P. R. Co. 290 U. S. 227, 78 L. ed. 285, 54 S. Ct. 172.

If the negligence of the parent is relied on as a defense to the action, the defendant has the burden of proving it. Gallagher v. Johnson, 237 Mass. 455, 130 N. E. 174, 15 A.L.R. 411.

[17] Heidle v. Baldwin, 118 Ohio St. 375, 161 N. E. 44, 58 A.L.R. 1186, overruled on other points in Morris v. Bloomgren, 127 Ohio St. 147, 187 N. E. 2, 89 A.L.R. 831; Tresise v. Ashdown, 118 Ohio St. 307, 160 N. E. 898, 58 A.L.R. 1476.

§ 615. **Authority of Operator.**—The plaintiff in an action for injuries sustained in an automobile collision has the burden of establishing that the driver of the automobile was the agent of defendant and was acting for defendant's benefit.[1] In many jurisdictions, however, a rebuttable presumption or inference arises from proof of the defendant's ownership of the automobile that it was in his possession, and was being operated by his servant or agent under circumstances which would render defendant liable for the conduct of such servant or agent.[2] Such a presumption, without shifting the burden of proof from plaintiff, imposes upon defendant, the burden of showing that in fact he was in no manner responsible for the acts of the driver,[3] for one seeking to absolve himself from liability for the act of his agent on the ground that he was not at the time acting within the scope of his employment has the burden of proving such fact.[4]

4. ADMISSIBILITY, COMPETENCY, RELEVANCY, AND MATERIALITY

a. IN GENERAL

§ 616. **Generally.**—The elementary rule of evidence that matters offered in evidence must be relevant to the issues of the case—must tend to prove or disprove them[5]—is, of course, applicable to the trial of automobile cases. Any evidence that is explanatory of the conduct of the persons involved, or pertinent in connection with evaluating the degree of care and caution exercised upon a specific occasion, is properly admissible.[1] In an action against an automobile manufacturer, for injuries due to a defect in one of the wheels of a purchased car, evidence as to the practice of manufacturers of automobiles and of the trade concerning the examination of wheels is relevant and admissible.[2] The mere fact, however, that the testimony may be logically relevant does not in all cases render it admissible; it may be rendered inadmissible because of remoteness, or because of some arbitrary rule, such as the rule excluding that which is hearsay or mere opinions of unqualified witnesses. Another applicable general rule is that the evidence must be confined to the issues raised by the pleadings.[3] The purpose here is to discuss the application of these general principles to actual situations within the scope of this article.

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[18] McCracken v. Curwensville, 309 Pa. 98, 163 A. 217, 86 A.L.R. 1379; Stewart v. Olson, 188 Wis. 487, 206 N. W. 909, 44 A.L.R. 1292.

One who, driving upon a highway, fails to turn to the right, as required by statute, when meeting another vehicle, is prima facie negligent and has the burden of justifying his presence on the wrong side of the road. Bragdon v. Kellogg, 118 Me. 42, 105 A. 433, 6 A.L.R. 669.

[19] Babbitt, Motor Vehicle Law, 4th ed. p. 485.

[20] See, for example, Consolidated Laws of New York, Chap. 13, § 120.

[1] Heavilin v. Wendell, 214 Iowa, 844, 241 N. W. 654, 83 A.L.R. 872; Neff v. Brandeis, 91 Neb. 11, 135 N. W. 232, 39 L.R.A.(N.S.) 933; Kohlman v. Hyland, 54 N. D. 710, 210 N. W. 643, 50 A.L.R. 1437; Judson v. Bee Hive Auto Serv. Co. 136 Or. 1, 294 P. 588, 297 P. 1050, 74 A.L.R. 944; Luckett v. Reighard, 248 Pa. 24, 93 A. 773, Ann. Cas. 1916A, 662.

[2] See supra, § 611.

[3] Judson v. Bee Hive Auto Serv. Co. 136 Or. 1, 294 P. 588, 297 P. 1050, 74 A.L.R. 944.

[4] Crowell v. Duncan, 145 Va. 489, 134 S. E. 576, 50 A.L.R. 1425.

Where there is evidence of defendant's ownership of the car, coupled with proof that the driver was in his employment, at the time of the accident, the burden of proof is then placed on the defendant to prove that at the time of the accident the driver was not acting for him, but was using the machine for his own purposes, or outside the scope of the employment. Stumpf v. Montgomery, 101 Okla. 257, 226 P. 65, 32 A.L.R. 1490.

[5] See EVIDENCE [Also 10 R. C. L. p. 925, §§ 87 et seq.]

[1] See NEGLIGENCE.

[2] Cadillac Motor Car Co. v. Johnson (C. C. A. 2d) 221 F. 801, L.R.A.1915E, 287, Ann. Cas. 1917E, 581.

The defendant should be allowed to show what inquiries it made before contracting for wheels, what answers it received, what reputation the company of which it purchased had as manufacturers, whether its wheels were as high priced, or higher priced than, any in the market, and that no similar accident had ever before been heard of. Ibid.

§ 617. To Prove Negligence.—In an action involving an automobile accident, the range or proof that may be introduced to show negligence, or the lack of it, upon the part of the driver or the person injured, is subject only to the general qualification of its competency, and its relevancy and materiality to the issues presented.[4] Evidence as to whether the municipal authorities had received any report of defendant's violating the speed ordinances on the day of the accident is irrelevant,[5] as is a question asked of defendant as to whether he would have run at a high or dangerous rate of speed with young ladies in his automobile.[6] And a question to defendant on cross-examination as to admissions in regard to his method of operating the car is immaterial.[7] The defendant cannot put in evidence his purpose in stopping after the accident, as no purpose, however benevolent, can excuse negligence.[8]

Violation of a statute or ordinance regulating traffic is evidence of negligence.[9] Thus, evidence that the plaintiff crossed an intersection in violation of traffic signals at the time of the accident is admissible as bearing upon the degree of care and caution exercised by him.[10] Generally an ordinance must be pleaded before it is admissible.[11] An ordinance may, however, be admitted in evidence to show negligence, where the action is not founded directly on the ordinance.[12] In many instances a violation of a traffic statute or ordinance is negligence per se, and, if a proximate cause of an accident, establishes negligence or contributory negligence.[13] Testimony that a passenger in an automobile struck by other cars was thrown from the car, struck a building near the second story, and fell to the sidewalk, from which he was picked up and carried into the building, is admissible as giving the jury a picture of the situation as it existed at the time of and shortly after the accident, and, the place where the passenger was found being a part of the same transaction as the accident, such evidence may be considered in determining the speed of the machines.[14]

The court may refuse to permit one who was a passenger in an automobile involved in a collision, when a witness in an action to recover damages for injuries resulting from the collision, to state which car ran into the other, where he states that he was not looking at the machines when they collided.[15]

§ 618. Habit or Custom.—The general rule that evidence of the habits of a person injured through the negligence of another is not admissible to show care, or lack of care, on his part at the time of the accident,[16] is applicable in cases involving automobile accidents.[17] Conversely, particular acts of negligence on the part of the defendant cannot be proved by evidence that he, or the driver for whose act it is claimed that he is responsible, was habitually negligent or had the reputation of being a careless driver;[18] nor is evidence that the defendant's chauffeur drove fast on another occasion admissible as tending to show reckless habits of which the defendant had knowledge.[19] As a general rule evidence which would tend merely to show that the operator charged with the particular act of negligence was ordinarily a careful, skilful, or prudent driver is excluded.[20] Clearly, if witnesses of the accident are available, their statements of what was actually done at the time are the best evidence of the driver's care or negligence,[1] and evidence of his habits will not be admitted on that point.[2] Evidence of the habits or custom of the person injured by the operation of the defendant's vehicle, or of the operator, may, however, become pertinent where there is a lack of witnesses to the accident.[3] The weight of authority inclines to the view that if a person is killed in an accident of which there are no eyewitnesses, evidence of his habits is admissible as tending to indicate his probable conduct at the time of the occurrence.[4] Some courts, however, take a different view[5] and hold that the fact that there is no living eyewitness of an automobile accident does not make competent evidence tendered on behalf of the plaintiff, tending to show the degree of care usually exercised by the decedent in the operation of his motor vehicle.[6] The mere fact that the veracity of alleged eyewitnesses of an accident resulting in death is challenged will not make admissible evidence of the habits of the decedent with respect to care and prudence.[7]

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[3] Washington v. Seattle, 170 Wash. 371, 16 P. (2d) 597, 86 A.L.R. 113.

[4] See Evidence [Also 10 R. C. L. p. 847].

[5] McCown v. Muldrow, 91 S. C. 523, 74 S. E. 386, Ann. Cas. 1914A, 139.

[6] Ibid.

[7] Klein v. Beeten, 169 Wis. 385, 172 N. W. 736, 5 A.L.R. 1237.

[8] Woodhead v. Wilkinson, 181 Cal. 599, 185 P. 851, 10 A.L.R. 291.

[9] Milbury v. Turner Center System, 274 Mass. 358, 174 N. E. 471, 73 A.L.R. 1070.

[10] Railway Exp. Agency v. Little (C. C. A. 3d) 50 F. (2d) 59, 75 A.L.R. 963 (holding that disregard of traffic signals is itself some evidence of negligence).
Annotation: 75 A.L.R. 970.

[11] See supra, § 601.

[12] Jaquith v. Worden, 73 Wash. 349, 132 P. 33, 48 L.R.A.(N.S.) 827.

[13] See supra, § 163.

[14] Judd v. Rudolph, 207 Iowa, 113, 222 N. W. 416, 62 A.L.R. 1174.

[15] Bradley v. Schmidt, 223 Ky. 784, 4 S. W. (2d) 703, 57 A.L.R. 1100.

Admission of evidence that plaintiff's driver had intemperate habits is not prejudicial where he was intoxicated at the time of the accident and the plaintiff must have known it.[8] So, plaintiff's testimony that the defendant drove the automobile as she usually did has been held admissible.[9]

A usage or custom may, according to the issue of a particular case, become relevant and admissible in evidence. Thus, if particular trades or occupations, or localities, are involved, evidence of the general custom or the local usage is competent, though such usages or customs do not furnish an absolute standard of care or negligence.[10]

§ 619. Financial Standing of Parties.—Under the rules of evidence applicable to other kinds of actions,[11] no inquiry may, as a general proposition, be made, or evidence admitted, concerning the wealth, financial responsibility, social standing, business, etc., of either party to an action for damages arising out of an automobile accident.[12]

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[16] See EVIDENCE [Also 10 R. C. L. p. 955, § 127]; NEGLIGENCE.

[17] Tresise v. Ashdown, 118 Ohio St. 307, 160 N. E. 898, 58 A.L.R. 1476.

Annotation: 15 A.L.R. 125, s. 18 A.L.R. 1109.

[18] Babbitt, Motor Vehicle Law, 4th ed. p. 1623, § 2242.

Upon the question whether or not one was negligent in accepting an invitation to ride in an automobile, evidence is not competent as to the past habits of the driver, or his incompetence, as disclosed to the invitee by his past conduct in driving. Marks v. Dorkin, 105 Conn. 521, 136 A. 83, 61 A.L.R. 1224.

[19] Flynn v. Lewis, 231 Mass. 550, 121 N. E. 493, 2 A.L.R. 896.

[20] State v. Goetz, 83 Conn. 437, 76 A. 1000, 30 L.R.A.(N.S.) 458.

[1] Petro v. Hines, 299 Ill. 236, 132 N. E. 462, 18 A.L.R. 1106.

[2] Annotation: 15 A.L.R. 125, s. 18 A.L.R. 1109.

[3] Annotation: 15 A.L.R. 125.

[4] Casey v. Chicago R. Co. 269 Ill. 386, 109 N. E. 984, L.R.A.1916B, 824; Dallemand v. Saalfeldt, 175 Ill. 310, 51 N. E. 645, 48 L.R.A. 753, 67 Am. St. Rep. 214.

Annotation: 15 A.L.R. 138, 144; 18 A.L.R. 1110.

[5] Annotation: 15 A.L.R. 142.

[6] Tresise v. Ashdown, 118 Ohio St. 307, 160 N. E. 898, 58 A.L.R. 1476.

[7] Petro v. Hines, 299 Ill. 236, 132 N. E. 462, 18 A.L.R. 1106.

[8] Lynn v. Goodwin, 170 Cal. 112, 148 P. 927, L.R.A.1915E, 588.

[9] Olson v. Hermansen, 196 Wis. 614, 220 N. W. 203, 61 A.L.R. 1243.

[10] House v. Cramer, 134 Iowa, 374, 112 N. W. 3, 10 L.R.A.(N.S.) 655, 13 Ann. Cas. 461.

§ 620. Infancy of Party.—It being generally held that the youth of the person whose acts or omissions are being scrutinized is a fact to be taken into consideration in determining the reasonableness of his conduct,[13] evidence of the infancy of any of the persons involved in the accident, and whose standard of conduct is being evaluated, is generally admissible at the trial.[14] Since the age of a person is not the sole determinant in an appraisement of his conduct on a particular occasion, but such factors as his intelligence and experience are of equal importance in this connection,[15] any evidence that is pertinent in the explanation or clarification of these matters is also admissible at the trial.[16] It makes no difference in this respect whether the infant was the operator of the vehicle involved in the accident, or the pedestrian injured through its operation; evidence upon the issues above mentioned is admissible in either instance.[17]

§ 621. Lack of Registration or of Operator's License.—In a majority of jurisdictions the fact that a motor vehicle, or the driver of such a vehicle, was not licensed as required by statute, will not, as a matter of law, operate to charge the owner or operator with liability for injury or damage caused by its operation on the highway,[18] and the view has been taken in a number of cases that evidence of lack of proper registration of an automobile involved in an accident,[19] or of the failure of the operator to have the required operator's license,[20] is incompetent for the purpose of showing negligence in the operation of the car. It would seem, however, that under regulations which require as a condition to the granting of an operator's license that the applicant submit to and pass a driver's test, and restrict the right to operate to those shown to be qualified, the lack of such license would have a legitimate bearing upon the question of negligence in the operation of an automobile. Accordingly, in some jurisdictions evidence is admissible to show that the operator of a motor vehicle involved in an accident did not have the required operator's license;[1] and in at least one jurisdiction evidence that the automobile was not duly registered is admissible on the question of negligence.[2]

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[11] See Evidence [Also 10 R. C. L. p. 957].

[12] Story v. Green, 164 Cal. 768, 130 P. 870, Ann. Cas. 1914B, 961; Taulborg v. Andresen, 119 Neb. 273, 228 N. W. 528, 67 A.L.R. 642.

[13] See Infants [Also 14 R. C. L. pp. 259 et seq.]; Negligence [Also 20 R. C. L. pp. 124 et seq.]

[14] Charbonneau v. MacRury, 84 N. H. 501, 153 A. 457, 73 A.L.R. 1266; McCaffrey v. Concord Electric Co. 80 N. H. 45, 114 A. 395, 17 A.L.R. 813.
Annotation: 73 A.L.R. 1277.

[15] See supra, § 470.
See Negligence [Also 20 R. C. L. p. 1].

[16] Charbonneau v. MacRury, 84 N. H. 501, 153 A. 457, 73 A.L.R. 1266; Kambour v. Boston & M. R. Co. 77 N. H. 33, 86 A. 624, 45 L.R.A.(N.S.) 1188; Gulf, C. & S. F. R. Co. v. McWhirter, 77 Tex. 356, 14 S. W. 26, 19 Am. St. Rep. 755.
Annotation: 73 A.L.R. 1277.

[17] Charbonneau v. MacRury, 84 N. H. 501, 153 A. 457, 73 A.L.R. 1266.

[18] See supra, §§ 130 et seq.

[19] Black v. Moree, 135 Tenn. 73, 185 S. W. 682, L.R.A.1916E, 1216.
Annotation: 73 A.L.R. 162, 164.

[20] Lindsay v. Cecchi, 3 Boyce (Del.) 133, 80 A. 523, 35 L.R.A.(N.S.) 699.
Annotation: 73 A.L.R. 163, 164.

[1] Kenyon v. Hathaway, 274 Mass. 47, 174 N. E. 463, 73 A.L.R. 156 (holding that the fact that the driver of an automobile involved in an accident was not licensed in the state in which the automobile was registered and in which the accident occurred should be taken into consideration as bearing on the question of his negligence, and on that of the owner's negligence in allowing him to operate the vehicle, although he had an operator's license issued in another state); Bourne v. Whitman, 209 Mass. 155, 95 N. E. 404, 35 L.R.A.(N.S.) 701; Doherty v. Ayer, 197 Mass. 241, 83 N. E. 677, 14 L.R.A.(N.S.) 816, 125 Am. St. Rep. 355; Johnson v. Boston & M. R. Co. 83 N. H. 350, 143 A. 516, 61 A.L.R. 1178.

[2] Balian v. Ogassin, 277 Mass. 525, 179 N. E. 232, 78 A.L.R. 1021; Koonovsky v.

§ **622. Liability Insurance.**—It is a broad general rule of evidence that the fact that an automobile owner carries liability insurance is not admissible as an admission of negligence, or as a fact tending to show negligence; on such issues it is technically irrelevant, and its admission is carefully guarded against;[3] however, the real reason which prompts the court to guard against admission of such evidence is the prejudicial effect which it is presumed to have upon the jury, because of the suggestion that it carries that an insurance company will have to pay the judgment.[4] And if the plaintiff makes no attempt to show that the defendant is indemnified against loss by an insurance company, it is not proper for the defendant to offer testimony showing that he is not indemnified;[5] if, however, the plaintiff has injected the question of insurance into the case by asking jurymen on the voir dire whether they were interested in insurance companies, the defendant may be permitted to testify that he had no liability insurance.[6] The general rule excluding evidence as to liability insurance is subject to other qualifications and exceptions; it is always competent when it tends to prove some material issue properly in the case.[7] Such evidence may also be admissible to show bias or interest of a witness,[8] and an admission of liability by the defendant may properly be admitted, even though it is developed that, in making it, he stated that he carried liability insurance.[9] Evidence is admissible that when remonstrance was made to the driver of an automobile as to his way of driving, he stated that he carried liability insurance.[10]

§ **623. Motive for Haste.**—Motive for haste furnishes some ground for an inference of overspeeding. Thus, the fact that the automobilist was driving to keep an overdue engagement is an indication of an attempt to hasten to his destination.[11]

§ **624. Previous Acts and Conduct; Caution or Warning as to Danger.**—The fact that the driver of an automobile drove fast on another occasion is not admissible upon the question of his liability for injury to a guest by the overturning of the car.[12] In an action against the owner of a taxicab for an injury inflicted by his driver while the latter was driving the taxicab when intoxicated, evidence that defendant had heard no complaints of the driver's conduct from postoffice authorities, although the driver's duties included the carrying of mail, is properly excluded.[13] Evidence of an exhibition of fright by a witness to an automobile accident is not admissible, in an action to hold the owner of a car liable for an injury caused by its being overturned, to show

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Quellette, 226 Mass. 474, 116 N. E. 243, Ann. Cas. 1918B, 1146 (expressive of Massachusetts rule that unregistered automobiles are absolutely outlawed, and that their occupants are deprived of the ordinary right to sue for another's mere negligence).

To the same effect, see Feeley v. Melrose, 205 Mass. 329, 91 N. E. 306, 27 L.R.A.(N.S.) 1156, 137 Am. St. Rep. 445.

Annotation: 87 A.L.R. 1469.

[3] Watson v. Adams, 187 Ala. 490, 65 So. 528, Ann. Cas. 1916E, 565; Akin v. Lee, 206 N. Y. 20, 99 N. E. 85, Ann. Cas. 1914A, 947; Lytton v. Marion Mfg. Co. 157 N. C. 331, 72 S. E. 1055, Ann. Cas. 1913C, 358; Vasquez v. Pettit, 74 Or. 496, 145 P. 1066, Ann. Cas. 1917A, 439; Birch v. Abercrombie, 74 Wash. 486, 133 P. 1020, 50 L.R.A.(N.S.) 59.

Annotation: 28 A.L.R. 516; 56 A.L.R. 1419, s. 74 A.L.R. 850; Ann. Cas. 1914A, 948.

[4] Annotation: 56 A.L.R. 1421, 1422.

[5] Taulborg v. Andresen, 119 Neb. 273, 228 N. W. 528, 67 A.L.R. 642.

Annotation: 56 A.L.R. 1431, 1432, s. 74 A.L.R. 853.

[6] Stehouwer v. Lewis, 249 Mich. 76, 227 N. W. 759, 74 A.L.R. 844.

[7] Annotation: 56 A.L.R. 1432, s. 74 A.L.R. 854.

[8] Annotation: 56 A.L.R. 1439, s. 74 A.L.R. 855.

[9] Annotation: 56 A.L.R. 1448, s. 74 A.L.R. 856.

[10] Herschensohn v. Weisman, 80 N. H. 557, 119 A. 705, 28 A.L.R. 514.

[11] Deputy v. Kimmell, 73 W. Va. 595, 80 S. E. 919, 51 L.R.A.(N.S.) 989, Ann. Cas. 1916E, 656.

[12] Flynn v. Lewis, 231 Mass. 550, 121 N. E. 493, 2 A.L.R. 896.

[13] Crowell v. Duncan, 145 Va. 489, 134 S. E. 576, 50 A.L.R. 1425.

negligence on the part of the chauffeur.[14] However, evidence that the driver had been cautioned by the occupants of the car against fast driving, as to the condition of the road, etc., has been held to be competent on the question of his negligence or of the contributory negligence of a guest in the car.[15] In an action for damages for the killing of a pedestrian walking upon a public highway at night, testimony of one who was his companion at the time of the accident, to the effect that deceased kept warning him to keep off the paved portion of the highway, is admissible.[16]

§ 625. **Report of Accident.**—The report of an automobile accident, made to a public official by the driver of an automobile involved therein, in pursuance of a statutory duty, is generally not admissible in evidence at the trial.[17] There is, however, a wide difference between a report made by a private citizen to a public officer, though made compulsory by statute, and one made by a public official in the performance of his duty; reliance can safely be placed on the action of the latter, taken under the sanction of his office, which cannot be had on a report made by a private citizen.[18]

b. Surrounding Circumstances

§ 626. **Generally.**—It may be stated generally that in an action growing out of an automobile accident any evidence of the conditions and circumstances leading up to and surrounding the accident which will throw light upon the conduct of the parties and the care, or lack of care, exercised by them, is admissible. It is proper to admit testimony showing the position of the wheel tracks of the vehicle or vehicles involved in the accident,[19] and testimony concerning the testing of the brakes shortly after the accident is admissible, their condition being substantially unchanged.[20] Evidence that occupants of an automobile were hurled out of it is always competent, as bearing on the force of the collision.[1] Evidence that the defendant's car, on hitting another car, lifted it bodily in the air, hurled it 20 or 25 feet, and turned it around, contradicts evidence that defendant's car was going only from 12 to 20 miles an hour.[2] In a collision case the driver of one car may testify that he could not see signals given by the driver of the other car because of the darkness and inability to see back of the headlights.[3] Failure to look for approaching automobiles in attempting to cross a city street having considerable automobile traffic is evidence of negligence.[4]

In an action by one who had been adjudged insane, to recover damages for personal injuries alleged to have resulted from negligent collision with an automobile which he was driving, evidence is admissible as to his sanity at and after the time of the accident.[5]

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[14] Flynn v. Lewis, 231 Mass. 550, 121 N. E. 493, 2 A.L.R. 896.

[15] Herschensohn v. Weisman, 80 N. H. 557, 119 A. 705, 28 A.L.R. 514.

[16] Hatzakorzian v. Rucker-Fuller Desk Co. 197 Cal. 82, 239 P. 709, 41 A.L.R. 1027.

[17] Voegeli v. Waterbury Yellow Cab Co. 111 Conn. 407, 150 A. 303, 69 A.L.R. 902 (not admissible to prove the agency of the driver).
Annotation: 69 A.L.R. 905.

[18] Annotation: 69 A.L.R. 905.

[19] Opecello v. Meads, 152 Md. 29, 135 A. 488, 50 A.L.R. 1385; Haley v. State, 84 Tex. Crim. Rep. 629, 209 S. W. 675, 3 A.L.R. 779.

[20] Ragan v. MacGill, 134 Or. 408, 292 P. 1094, 72 A.L.R. 860.

[1] Judd v. Rudolph, 207 Iowa, 113, 222 N. W. 416, 62 A.L.R. 1174.

[2] Schultz v. State, 89 Neb. 34, 130 N. W. 972, 33 L.R.A.(N.S.) 403, Ann. Cas. 1912C, 495.

[3] Webber v. Park Auto Transp. Co. 138 Wash. 325, 244 P. 718, 47 A.L.R. 590.

[4] Day v. Cunningham, 125 Me. 328, 133 A. 855, 47 A.L.R. 1229.

[5] Criez v. Sunset Motor Co. 123 Wash. 604, 213 P. 7, 32 A.L.R. 627.

§ 627. **Other Accidents.**—In certain classes of actions, such as actions arising out of injuries caused by the defective and dangerous condition of public thoroughfares, evidence of other accidents at the same place, suffered by persons other than the plaintiff, and at other and different times, has been held admissible.[6] And many cases have held that evidence of the occurrence of other automobile accidents at the same place at which the particular accident occurred is admissible to show the dangerous condition of the place and notice to the defendant of the condition.[7] The view has been expressed, however, with reference to actions involving automobile accidents, that evidence of a previous accident at the same place is generally incompetent upon the investigation of the cause of a second one, at least in the absence of a showing that it happened at the same place and under practically similar circumstances and conditions.[8] Cases involving injuries to pedestrians by reason of the unsafe condition of sidewalks are said not to be similar to automobile accident cases, inasmuch as it is a matter of common knowledge that pedestrians walking on the sidewalk proceed ordinarily at about the same speed and in the same manner.[9]

It has been held that testimony that the person suing for personal injuries arising out of an automobile collision had previously had an accident was irrelevant and properly excluded.[10]

§ 628. **Position of Automobile.**—Proof which tends to fix the relative positions of vehicles at the time of the accident is generally viewed as pertinent to the question of the degree of care properly exercisable at that time and is admissible, subject only to the broad rules of relevancy and competency applicable to other situations.[11] Evidence tending to show the positions of vehicles immediately after the accident tends to throw light on the issue of speed and direction of the vehicles' movements prior to, and at the time of, the accident.[12] An eyewitness may describe the position of the vehicles with respect to each other and with relation to a street intersection.[13]

Evidence that one of the vehicles was improperly parked upon the road is admissible.[14]

§ 629. **Atmospheric Conditions.**—Evidence of bad atmospheric conditions existing at the time of the accident, such as fog, dust, smoke, etc., is generally admissible at the trial, as bearing upon the range and extent of visibility, as well as upon the degree of care and caution properly exercisable by motorists and pedestrians under such conditions.[15] For this same purpose, the records of the weather bureau, duly authenticated, are admissible in evidence.[16]

§ 630. **Speed.**—Competent evidence[17] as to the rate of speed at which an automobile was traveling just prior to, and a short distance away from the scene of, an accident, bears upon the rate of speed at which it was traveling at the time of the accident,[18] and is admissible when the speed of a motor vehicle is charged as negligence,[19] or in support of a claim that the defendant's speed was lawful, or reasonable and proper under the circumstances. Statements based upon observation of witnesses who saw the progress of the car do not constitute the sole medium of proof upon this point. Various factors, such as skid marks,[20] distance traveled after impact, force of impact, etc.,[1] are pertinent in arriving at an estimate of the rate of speed of an automobile. The proof in this connection should relate to the speed of the vehicle at a reasonable time before, and at a reasonable distance from the place of, the accident.[2] Precisely what will constitute a distance or time so far removed from the occurrence as to make an estimate of the automobile's speed inadmissible is a question resting largely in the discretion of the trial court.[3]

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[6] See EVIDENCE [Also 10 R. C. L. p. 940, § 110].

[7] Babbitt, Motor Vehicle Law, p. 1637, § 2263.

[8] Louisville & N. R. Co. v. Loesch, 215 Ky. 452, 284 S. W. 1097, 47 A.L.R. 347.

[9] Ibid.

[10] Alaga Coach Line v. McCarroll, 227 Ala. 686, 151 So. 834, 92 A.L.R. 470.

[11] Milbury v. Turner Center System, 274 Mass. 358, 174 N. E. 471, 73 A.L.R. 1070.

[12] People v. Benson, 321 Ill. 605, 152 N. E. 514, 46 A.L.R. 1056; West v. Jaloff, 113 Or. 184, 232 P. 642, 36 A.L.R. 1391.

[13] West v. Jaloff, 113 Or. 184, 232 P. 642, 36 A.L.R. 1391.

[14] Annotation: 73 A.L.R. 1077.

[15] Annotation: 73 A.L.R. 1020.

[16] Mears v. New York, N. H. & H. R. Co. 75 Conn. 171, 52 A. 610, 56 L.R.A. 884, 96 Am. St. Rep. 192; Hufnagle v. Delaware & H. Co. 227 Pa. 476, 76 A. 205, 40 L.R.A. (N.S.) 982, 19 Ann. Cas. 850.

See EVIDENCE [Also 10 R. C. L. p. 1129].

[17] As to opinion evidence as to speed, see infra, § 651.

Although direct testimony as to speed is generally admitted where the witness saw the automobile in motion at the time in question, evidence as to the noise caused by the operation of an automobile on the occasion of an accident, supplemented by evidence that the particular machine when running at a high rate of speed usually made practically no noise, making much more noise when running at low speed, has been held to be too indirect, and therefore inadmissible upon the question of the speed of the machine at the time of an accident.[4]

§ 631. Condition of Brakes.—The fact that the brakes of an automobile were defective undoubtedly is a material element in the determination of the question of negligence or contributory negligence, in a case involving a collision with or by such machine; at least, where the driver knew, or should by the exercise of proper care have known, of the defect.[5] Evidence that the brakes on an automobile involved in a collision were defective is generally admissible at the trial.[6] It should be noted, however, that liability for an accident involving motor vehicles may not be predicated upon such evidence alone, it being essential to establish some causal relationship between the defective condition of the brakes and the accident.[7]

§ 632. Skidding.—An important, and sometimes decisive, factor in the trial of an automobile accident case is proof of the skidding of a vehicle involved in the accident. While evidence that the car skidded immediately before the accident is admissible,[8] it should be noted that the mere skidding of an automobile is not an occurrence of such an uncommon or unusual character that, unexplained, the jury can say that it furnishes evidence of the driver's negligence.[9] Although in some instances proof may amount to showing an intervening cause which will relieve what would be negligence in other respects, of its character as a proximate cause of the injury and an actionable wrong. In conjunction with such proof, and as explanatory thereof, evidence of the conditions surrounding the accident should be adduced, such as the character of the road, whether slippery or dry,[10] the presence of skid chains,[11] and any pertinent statutory provisions.[12]

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[18] McCown v. Muldrow, 91 S. C. 523, 74 S. E. 386, Ann. Cas. 1914A, 139.

[19] Schwarting v. Ogram, 123 Neb. 76, 242 N. W. 273, 81 A.L.R. 769.

[20] Evidence of skid marks admissible under certain circumstances. Annotation: 92 A.L.R. 475.

[1] See infra, § 633.

[2] Schwarting v. Ogram, 123 Neb. 76, 242 N. W. 273, 81 A.L.R. 769; Pease v. Cochran, 42 S. D. 130, 173 N. W. 158, 5 A.L.R. 936.

[3] Schwarting v. Ogram, 123 Neb. 76, 242 N. W. 273, 81 A.L.R. 769.

Upon the question of liability for frightening a horse by the excessive speed at which an automobile was driven, evidence is not admissible of the speed at which the car was driven some time before the accident and before it stopped to await its turn to cross a bridge, before meeting the frightened horse, if there is nothing to show its speed after it crossed the bridge, when it was first seen by the horse. Pease v. Cochran, 42 S. D. 130, 173 N. W. 158, 5 A.L.R. 936.

[4] Annotation: 4 L.R.A.(N.S.) 1131.

[5] Annotation: 14 A.L.R. 1339.

[6] Allen v. Schultz, 107 Wash. 393, 181 P. 916, 6 A.L.R. 676; Puhr v. Chicago & N. W. R. Co. 171 Wis. 154, 176 N. W. 767, 14 A.L.R. 1334.

Annotation: 14 A.L.R. 1339, s. 63 A.L.R. 403.

[7] Landry v. Hubert, 101 Vt. 111, 141 A. 593, 63 A.L.R. 396.

The jury must determine whether or not one discovering that the brakes of an automobile, which he had taken upon a public highway were not working properly was negligent in continuing to use the car, so as to be liable for a resulting accident, where the statute makes it negligence to have such a car upon the public highway, whether in motion or at rest.

§ 633. —Tire Tracks and Skid Marks.—Evidence as to tracks or other marks made by motor vehicles on the pavement or roadway is generally admissible in civil actions fcr injury or damage, where the witness testifying had an opportunity to make an observation of the marks before any change had taken place.[13] A proper foundation for the introduction of such evidence should first be laid, however, by showing how soon after the accident the witness observed the markings,[14] his opportunities for accurate observation,[15] and any other factors explanatory of the skid marks or tracks, and the conditions under which they were made.[16] It has been held that the testimony of a witness who saw an automobile collision, and afterwards examined the marks made in the road by one of the cars involved, as to the position of the cars when they collided, was not objectionable as involving an expression of an opinion based on statements of others, or on an assumption of fact.[17]

§ 634. Type, Size, and Weight of Vehicle.—Evidence as to the weight and size of the vehicles involved in the accident is frequently pertinent in connection with proof of negligence. It is the present tendency to increase the size and weight of motor vehicles used on the highways. Drivers of these vehicles have knowledge of their width and length; and, as they owe other travelers on the highway the duty to take these elements into consideration in the operation of their vehicles,[18] it is clear that the size and weight of such vehicles may become important factors in determining questions of negligence and contributory negligence in cases arising from collisions.[19]

§ 635. Physical Defect or Illness.—Evidence of any physical defect or illness existing at the time of the accident, upon the part of either the motorist or pedestrian, is admissible at the trial.[20] Respecting the motorist, such evidence is pertinent upon the issue as to whether due care was exercised in the operation of the vehicle while he was so disabled or affected, and to what extent, if any, such factor contributed to the accident.[1] Similarly as to the pedestrian, proof of a physical defect or illness is relevant to the question of the proper degree of care and caution required under the circumstances existing at the time of the accident,[2] as well as to the corresponding degree of care exacted of the motorist.[3]

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[8] Rozycki v. Yantic Grain & Products Co. 99 Conn. 711, 122 A. 717, 37 A.L.R. 582; Nordby v. Sorlie, 35 N. D. 395, 160 N. W. 70, L.R.A.1917B, 753; Linden v. Miller, 172 Wis. 20, 177 N. W. 909, 12 A.L.R. 665.
Annotation: 58 A.L.R. 264.

[9] See supra, § 610.

[10] Lambert v. Eastern Massachusetts Street R. Co. 240 Mass. 495, 134 N. E. 340, 22 A.L.R. 1291.

[11] Annotation: 58 A.L.R. 268.

[12] Any statutory provisions relating to skidding should be consulted. Annotation: 58 A.L.R. 268.
See also section immediately following.

[13] Alaga Coach Line v. McCarroll, 227 Ala. 686, 151 So. 834, 92 A.L.R. 470; Lange v. Affleck, 160 Md. 695, 155 A. 150, 79 A.L.R. 1274; Opecello v. Meads, 152 Md. 29, 135 A. 488, 50 A.L.R. 1385; Carson v. Turrish, 140 Minn. 445, 168 N. W. 349, L.R.A.1918F, 154.
Annotation: 92 A.L.R. 475.

[14] Carson v. Turrish, 140 Minn. 445, 168 N. W. 349, L.R.A.1918F, 154 (testimony as to observation of wheel marks made morning after accident held admissible).

[15] Opecello v. Meads, 152 Md. 29, 135 A. 488, 50 A.L.R. 1385.

[16] Lange v. Affleck, 160 Md. 695, 155 A. 150, 79 A.L.R. 1274.

[17] Lange v. Affleck, 160 Md. 695, 155 A. 150, 79 A.L.R. 1274.

[18] Annotation: 85 A.L.R. 1173.
See supra, § 258.

[19] Baldwin v. Bell [1933] (Can.) S. C. R. 1, 85 A.L.R. 1166.
Annotation: 85 A.L.R. 1173.

c. STATEMENTS, ADMISSIONS, AND DECLARATIONS

§ 636. Generally.—Trials of actions involving automobile accidents call for frequent applications of the broad general principle of evidence excluding extrajudicial declarations and statements and the various exceptions thereto,[4] such as the exception which admits statements or exclamations uttered by those involved in an accident, and contemporaneous therewith, under the res gestæ doctrine.[5] Mere statements of an occupant of an automobile which collided with another automobile as to both parties being at fault are inadmissible in an action by another occupant.[6] Admissions made by one of the parties involved may be used against him.[7] Such admissions may be shown in evidence without laying a foundation in the nature of impeachment.[8] Evidence that, immediately after an automobile collision said to have been caused by the defendant's car, the defendant transferred all of his real estate is admissible on the theory of an admission.[9] However, an admission by one injured in a collision with an automobile, that the accident was his own fault, is susceptible of explanation.[10]

§ 637. Admissions by Silence.—Evidence of conversations between the driver of an automobile and his guests therein concerning the necessity of hurrying to get to their common destination, and that there was no fear on the part of anyone about the manner in which the car was being driven or operated, shows a clear acquiescence on the part of all concerning the rate of speed at which the car was being driven at the time of an accident resulting in the death of one of the guests and injuries to another.[10a] The rule that a statement made in the hearing of another in regard to facts affecting his rights, to which he makes no reply, may be taken as a tacit admission of the facts stated, where he hears and understands the statement, comprehends its bearing, and has an opportunity to act freely,[11] has been applied in a number of cases where a person involved in an automobile accident remained silent in the face of statements made by another in his presence regarding the circumstances of the accident.[12]

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[20] Wilson v. Bittner, 129 Or. 122, 276 P. 268, 64 A.L.R. 132.
Annotation: 64 A.L.R. 136.

[1] Annotation: 64 A.L.R. 136.

[2] See supra, § 617.

[3] Meyers v. Tri-State Auto Co. 121 Minn. 68, 140 N. W. 184, 44 L.R.A.(N.S.) 113; Wilson v. Bittner, 129 Or. 122, 276 P. 268, 64 A.L.R. 132.

[4] See EVIDENCE [Also ADMISSIONS AND DECLARATIONS, 1 R. C. L. p. 462].

[5] See infra, § 639.

[6] Lowery v. Jones, 219 Ala. 201, 121 So. 704, 64 A.L.R. 553.

[7] In Voegeli v. Waterbury Yellow Cab Co. 111 Conn. 407, 150 A. 303, 69 A.L.R. 902, it is held that evidence of a person injured in a collision between the automobile in which he was riding and a taxicab, that the manager of the taxicab company called upon him shortly after the accident, discussed it with him, and admitted that the defendant company owned the cab that was in the accident, is properly admitted in an action for damages occasioned by such collision.

Rejection of evidence of defendant as to admissions with respect to his method of driving, in an action to hold him liable for injury to a passenger by the overturning of an automobile, is nonprejudicial where he had already denied the facts assumed in the question, and the persons to whom the admission was alleged to have been made were not questioned with regard to it. Klein v. Beeten, 169 Wis. 385, 172 N. W. 736, 5 A.L.R. 1237.

[8] Klein v. Beeten, 169 Wis. 385, 172 N. W. 736, 5 A.L.R. 1237.

[9] Harmon v. Haas, 61 N. D. 772, 241 N. W 70, 80 A.L.R. 1131.

The fact that shortly after the accident deeds were placed on record from the defendant to his children is admissible to prove consciousness of liability and an intention to evade payment. Cusick v. Miller, 102 Kan. 663, 171 P. 599, L.R.A.1918D, 1086.

[10] Marton v. Pickrell, 112 Wash. 117, 191 P. 1101, 17 A.L.R. 68.

[10a] Olson v. Hermansen, 196 Wis. 614, 220 N. W. 203, 61 A.L.R. 1243.

However, to render any such statements admissible upon the ground that silence amounts to an admission of the truth, they must have been made under such circumstances as to call for a reply.[13] Other elements of the rule are that the truth of the facts embracing the statement must be within the knowledge of the person against whose interest the statement is made, and that the statement must be made under such circumstances and by such persons as naturally to call for a reply, if he does not intend to admit what is said.[14] But where such conditions remain unsatisfied, the rule does not apply.[15] Thus, statements in regard to the circumstances of an automobile accident made by a stranger to a member of the highway police, in the physical presence of the person injured, cannot be taken as admissible against the latter upon the ground that his silence amounts to admission, where the situation is one of confusion and traffic congestion, and he is suffering severely from shock and injury.[16] It has been held that the conduct of the defendant's chauffeur after an accident was not relevant unless it was a part of the res gestæ.[17]

§ 638. Of Agent.—In accordance with the general rule that admissions or declarations of an agent with respect to an act, made after its occurrence, are not provable against the principal,[18] it has been held that statements by a servant or agent pertaining to an automobile accident in which he was a participant, and which were made after the occurrence, are not properly considered in determining the liability of the principal, or owner of the vehicle.[19] To be admissible, the agent's declaration must be spontaneous and sufficiently contemporaneous with the time and place of accident to bring it within the res gestæ doctrine.[20] Where both the driver and the owner of the automobile involved in the accident are joined as defendants in the action, the court should instruct the jury that such admissions or declarations so admitted in evidence should be considered only in determining the liability of the defendant actually causing the injuries or damages, and not in determining the liability of the defendant constructively liable for the fault or negligence of the other defendant.[1]

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[11] See Evidence [Also Admissions and Declarations, 1 R. C. L. p. 478, § 15].

[12] Annotation: 76 A.L.R. 1391.

[13] Gerulis v. Viens, 130 Me. 378, 156 A. 378, 76 A.L.R. 1387.

Uncontradicted statements made by a companion or relative of the defendant or the person injured, by a stranger, or even by the injured person, to the adversary or the latter's representative, when made under the conditions stated, have been regarded as admissions. Annotation: 76 A.L.R. 1394–1397.

[14] See Evidence [Also Admissions and Declarations, 1 R. C. L. p. 478, § 15].

[15] Annotation: 76 A.L.R. 1392.

[16] Gerulis v. Viens, 130 Me. 378, 156 A. 378, 76 A.L.R. 1387.

[17] Minor v. Stevens, 65 Wash. 423, 118 P. 313, 42 L.R.A.(N.S.) 1178.

[18] See Evidence [Also Admissions and Declarations, 1 R. C. L. p. 510].

[19] Broderick v. Barry, 212 Iowa, 672, 237 N. W. 481, 75 A.L.R. 1530. Failure of the court to restrict the application of testimony in negligence action against the driver and owners of an automobile, where a statute made the owners liable for the driver's negligence, as to a statement not part of the res gestæ, made by the driver, to the question of the driver's personal liability is erroneous.

See Illinois C. R. Co. v. Houchins, 121 Ky. 526, 89 S. W. 530, 1 L.R.A.(N.S.) 375, 123 Am. St. Rep. 205; State ex rel. Vesper-Buick Auto. Co. v. Daues, 323 Mo. 388, 19 S. W. (2d) 700, 67 A.L.R. 157.

Annotation: 75 A.L.R. 1534.

Statements by the driver of an automobile, made at the police station at least an hour after the accident, that he was employed by an automobile company as a mechanic, that he received a commission on cars sold, and that he had the car in question out for demonstration and was on his way to his employer's place of business when the accident occurred, were not made while engaged in the performance of any duty or service to his employer, so as to make such declarations admissible in an action against the employer. State ex rel. Vesper-Buick Auto. Co. v. Daues, 323 Mo. 388, 19 S. W. (2d) 700, 67 A.L.R. 157.

[20] See infra, §§ 639, 641.

§ 639. Statements and Declarations Forming Part of Res Gestæ.—Under the broad rule that statements or exclamations uttered by those involved in an accident, which are contemporaneous with, and a part of, the occurrence, and are made under such circumstances as indicate their spontaneous character, may in a proper case become admissible in evidence as part of the res gestæ,[2] it is generally held that any statements of a motorist or other person involved in an automobile accident, made spontaneously at or near the time and place of such accident, are properly received in evidence.[3] The same requirements apply to statements made under other circumstances, and which are sought to be admitted under the res gestæ rule.[4] Statements which are expressions of opinion rather than statements of facts, even though sufficiently spontaneous, and made near enough to the time and place of the accident, to satisfy the requirements of the res gestæ rule, are not admissible.[5] The relaxation of the hearsay rule so as to admit spontaneous contemporaneous statements as part of the res gestæ does not extend to expressions of opinion or statements about the accident which do not serve in some way to elucidate, clarify, or explain the occurrence.[6]

§ 640. —By Nondriving Occupants.—In some instances, statements made by nondriving occupants of cars involved in a collision, such as an exclamation as to the speed at which another car is approaching, may become admissible in evidence as part of the res gestæ, it must appear, however, that the statement or exclamation offered was a spontaneous one, proceeding from impulse consequent upon the natural impression made by the acts of the parties in controversy, and in many instances declarations of such person have been excluded.[7]

§ 641. —By Driver.—Statements of the driver of an automobile directly involved in an accident, explanatory of his conduct or of other facts and circumstances surrounding the accident, whether they relate to the speed of the vehicle at the time of the accident, a defect in brakes, or other matters relevant to the issue, spontaneously made at or near the time and place of the accident, are generally held admissible against the employer as a part of the res gestæ.[8]

The rulings as to admissibility, in the cases in which drivers' statements have been regarded as part of the res gestæ as against principals or employers, presuppose that the driver had authority to make the statement, or at least that he was authorized to drive the car at the time and place of the accident.[9] Mere statements of opinion, however, are not admissible. Thus, a statement by a driver of an automobile that it was a good thing that he had run off the highway, or he would have had a head-on collision, is, even if sufficiently coincident in time and place with the accident to satisfy the requirements of the res gestæ rule, inadmissible as part of the res gestæ.[10]

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[1] Annotation: 75 A.L.R. 1534.

[2] See EVIDENCE [Also 10 R. C. L. p. 974, §§ 157 et seq.]

[3] State ex rel. Vesper-Buick Auto. Co. v. Daues, 323 Mo. 388, 19 S. W. (2d) 700, 67 A.L.R. 157; Batchelor v. Atlantic Coast Line R. Co. 196 N. C. 84, 144 S. E. 542, 60 A.L.R. 1091.

Annotation: 76 A.L.R. 1121.

[4] Annotation: 67 A.L.R. 170; 76 A.L.R. 1121.

[5] Field v. North Coast Transp. Co. 164 Wash. 123, 2 P. (2d) 672, 76 A.L.R. 1114.

[6] See EVIDENCE [Also 10 R. C. L. p. 977, § 160].

[7] Annotation: 76 A.L.R. 1128.

[8] Annotation: 76 A.L.R. 1122, 1123.

[9] Annotation: 76 A.L.R. 1122.

§ 642. —By Bystanders or Occupants of Other Cars.—The mere fact that a declaration, otherwise admissible under the rule of res gestæ, was made by one not an actor or participant in the accident, will not necessarily operate to exclude it. Involuntary spontaneous exclamations or statements of a bystander who observed an automobile accident, which are sufficiently coincident in time and place, may be admissible in evidence as part of the res gestæ.[11] Thus, a bystander's remark to a driver, immediately after an accident, that he did not blow his horn, was held properly admissible as part of the res gestæ.[12] The statement made must, however, be something more than a mere expression of opinion. For example, a statement made to the driver of an automobile which collided with another car, immediately after the accident, criticizing the manner in which the car was driven, even if made sufficiently near the time and place, and sufficiently spontaneous, to satisfy the requirements of the res gestæ rule, is not admissible.[13]

5. TESTS AND EXPERIMENTS; PHOTOGRAPHS, MAPS, ETC.

§ 643. Generally.—In accordance with the broad rule that it is within the discretion of the trial court to admit any testimony relating to experiments, or similar occurrences, provided the conditions are substantially the same,[14] it has been held proper in some instances to show the results of tests or experiments made upon a vehicle involved in a collision.[15] The admissibility of experimental evidence rests largely in the discretion of the trial court.[16] If the essential conditions under which the experiment or observation is made are substantially the same as those surrounding the actual occurrence which is being investigated, any departure or minor variation goes to the weight rather than the admissibility of the evidence.[17]

§ 644. Distance within Which Car Can Be Stopped.—Testimony showing tests and experiments as to the distance within which an automobile of the type involved in the accident could be stopped, when traveling at various rates of speed, has been admitted, when such tests were shown to have been made under proper circumstances.[18]

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[10] Field v. North Coast Transp. Co. 164 Wash. 123, 2 P. (2d) 672, 76 A.L.R. 1114.

[11] Annotation: 76 A.L.R. 1129; 20 L.R.A. (N.S.) 133; 42 L.R.A.(N.S.) 917.

In an action for damages for the killing of a pedestrian walking upon a public highway at night, it was held that testimony of one who was his companion at the time of the accident, to the effect that deceased kept warning him to keep off the paved portion of the highway, is admissible. Hatzakorzian v. Rucker-Fuller Desk Co. 197 Cal. 82, 239 P. 709, 41 A.L.R. 1027.

[12] Annotation: 76 A.L.R. 1129.

[13] Field v. North Coast Transp. Co. 164 Wash. 123, 2 P. (2d) 672, 76 A.L.R. 1114.

[14] See EVIDENCE [Also 10 R. C. L. p. 1001, §§ 188-190].

[15] Ragan v. MacGill, 134 Or. 408, 292 P. 1094, 72 A.L.R. 860. The testimony of a traffic officer as a witness for plaintiff, who was injured in an automobile accident, that within about an hour and a half after the accident he went to the place of the accident and tested the brakes, that in making the test he drove the car at the rate of 25 miles an hour and applied the brakes, and stopped the car at a distance of about 8 feet, and that the brakes held evenly, is admissible, there having been no change in the condition of the brakes in the meantime.

Oral evidence as to the conditions of visibility most probably existing at the time and place of the accident, as indicated by the results of tests and experiments made subsequent thereto, is admissible where there has been a reasonably accurate reproduction of the conditions that prevailed at the time of the occurrence.

Annotation: 72 A.L.R. 866.

[16] Washington v. Seattle, 170 Wash. 371, 16 P. (2d) 597, 86 A.L.R. 113.

There is no abuse of discretion on the part of the court in excluding testimony as to an experiment made by a witness to show in what time he could stop an automobile going at a given speed, at the place where it was claimed the accident occurred. Annotation: 8 A.L.R. 33.

[17] Annotation: 8 A.L.R. 26 et seq.

The variation of the conditions of the experiment from those of the occurrence must not extend to a point where it is liable to confuse or mislead the jury. Kohlhagen v. Cardwell, 93 Or. 610, 184 P. 261, 8 A.L.R. 11.

§ 645. Photographs, Maps, and Diagrams.—The general rule that photographs are admissible in evidence when they appear to have been accurately taken and are proved to be a clear representation of the subject, which cannot itself be produced, and of such nature as to throw light upon a disputed point,[19] applies in automobile accident cases.[20] Photographs should, of course, be proved to have been taken at or near the time of the occurrence of the event in aid of which it is offered, and before there has been any change in the condition or position of affairs.[1] Thus, in an action based upon the operation of an automobile at an alleged improper speed at a street intersection, a photograph of the place where the accident occurred, which is a fair representation of the general conditions, is admissible.[2] A photograph of the scene of an automobile accident, which is obscure and indefinite in its details, and was taken when the foliage, shrubbery, and lighting conditions were different from those existing at the time of the accident, is not admissible.[3] Nor are photographs admissible that were taken at the instance of the witness to show his recollection of the location of the moving automobiles involved in the accident.[4] And a number of courts have looked with disfavor upon the admission of photographs of an attempted reproduction of the scene of an accident, showing the position according to the theory or contention of the party offering them, as recalled by his witnesses, of movable or moving objects.[5] Other cases, however, permit the introduction of posed photographs based upon a recollection as to the position of moving objects when proper foundation has been laid by preliminary testimony showing that the objects and situations portrayed are faithfully represented as to position.[6] Whether a photograph is sufficiently verified is a preliminary question of fact to be determined by the trial judge.[7]

It is also a well-established rule that diagrams and maps illustrating the scene of an accident and the relative location of objects, if proved to be correct, are admissible in evidence to enable the jury to understand and apply the established facts to the particular case, and to illustrate the position of the automobile involved.[8]

6. Opinion Evidence

§ 646. Generally.—The fundamental principle of the law of evidence, that a witness must state facts and not opinions or conclusions, is as fully applicable to automobile accident cases as to any other kind of action.[9] This rule precludes one from testifying that he did his best and all that could be done to avoid an accident,[10] or that the occupant of a car showed signs of fright when she saw the defendant's car,[1] or from giving an opinion that the condition of a wheel of a motor truck was such that defects therein could have been discovered by reasonable inspection.[2] Testimony that at the time of an accident an automobile driver was careful or negligent is a mere conclusion of the witness, and not admissible.[3] Opinion evidence in its proper sense is admissible only under some exception to the general law of evidence,[4] although of necessity testimony must at times be compounded of fact and opinion.[5] Moreover, it is often difficult to distinguish in the testimony of a witness facts within his knowledge or observation from his opinions on facts. A question propounded to the owner of the automobile which struck the plaintiff as to whether the car was being used in connection with his business is not objectionable as calling for a conclusion from the witness,[6] and a witness may testify as to the method by which defects in the wheel of a motor truck could be ascertained.[7]

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[18] Ragan v. MacGill, 134 Or. 408, 292 P. 1094, 72 A.L.R. 860.
Annotation: 72 A.L.R. 865.

[19] See Evidence [Also 10 R. C. L. p. 1153, § 356].

[20] Annotation: 55 A.L.R. 1343.

[1] Babbitt, Motor Vehicle Law, 4th ed. p. 1676, § 2314.

[2] Washington v. Seattle, 170 Wash. 371, 16 P. (2d) 597, 86 A.L.R. 113.

[3] Snibbe v. Robinson (Surratt v. Robinson) 151 Md. 658, 135 A. 838, 50 A.L.R. 280.

[4] Nunnelley v. Muth, 195 Ky. 352, 242 S. W. 622, 27 A.L.R. 910.

[5] Annotation: 27 A.L.R. 913.

[6] Annotation: 27 A.L.R. 916.

[7] McKarren v. Boston & N. Street R. Co. 194 Mass. 179, 80 N. E. 477, 10 Ann. Cas. 961.

[8] Babbitt, Motor Vehicle Law, p. 1675, § 2313.
For general discussion, see Evidence [Also 10 R. C. L. p. 1153, §§ 355, 356].

[9] Demarais v. Johnson, 90 Mont. 366, 3 P. (2d) 283, 77 A.L.R. 553.

§ 647. Limitations upon General Rule.—Of necessity, testimony must at times be compounded of facts and opinions, and exceptions to the general rule that witnesses must testify to facts have been found to be necessary to the due administration of justice. It must be noted also that a witness may testify directly to a composite fact though in a sense his testimony may be the result of his conclusions from other facts, and may, where it is not practicable to place before the jury all the primary facts on which they are founded, state his opinion formed from such facts.[8] Testimony that an automobile, when struck by one car, was headed right into another car, is a conclusion of fact which the driver of the automobile is permitted to give.[9] Also, a witness who saw an automobile collision, and afterwards examined the marks made in the road by one of the cars involved, may testify as to the position of the cars when they collided.[10] Opinion evidence is not as a rule admissible when facts can be reproduced before the jury so as to show the conditions upon which the opinion is desired.[11]

Expert witnesses who have skill, learning, or experience in a particular science or trade may give an opinion in a proper case upon a given state of facts relating thereto.[12] Nor is the giving of opinion evidence limited to experts; in matters more within the common observation and experience of men, nonexperts may, in cases where it is not practicable to place before the jury all the primary facts upon which they are founded, state their opinions from such facts, where such opinions involve conclusions material to the subject of inquiry.[13]

As in other kinds of actions, the proper method of securing the opinion of a properly qualified expert witness is by hypothetical questions based upon facts assumed to have been proved at the trial, though no such question is necessary if the witness is personally acquainted with the material facts of the case.[14]

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[10] State v. Campbell, 82 Conn. 671, 74 A. 927, 135 Am. St. Rep. 293, 18 Ann. Cas. 236.

[1] Flynn v. Lewis, 231 Mass. 550, 121 N. E. 493, 2 A.L.R. 896.

[2] Demarais v. Johnson, 90 Mont. 366, 3 P. (2d) 283, 77 A.L.R. 553.

[3] Annotation: 66 A.L.R. 1117.

[4] See Evidence [Also Expert and Opinion Evidence, 11 R. C. L. p. 564, § 3].

[5] See infra, § 647.

[6] Brown v. Woolverton, 219 Ala. 112, 121 So 404, 64 A.L.R. 640.

[7] Demarais v. Johnson, 90 Mont. 366, 3 P. (2d) 283, 77 A.L.R. 553.

[8] See Evidence [Also Expert and Opinion Testimony, 11 R. C. L. pp. 568, 571, §§ 5, 6]. One injured in an automobile collision may testify that he is not able to work and has suffered pain since the accident. Judd v. Rudolph, 207 Iowa, 113, 222 N. W. 416, 62 A.L.R. 1174.

[9] Judd v. Rudolph, 207 Iowa, 113, 222 N. W. 416, 62 A.L.R. 1174.

[10] Lange v. Affleck, 160 Md. 695, 155 A. 150, 79 A.L.R. 1274.

[11] McCown v. Muldrow, 91 S. C. 523, 74 S. E. 386, Ann. Cas. 1914A, 139.

[12] See infra, § 648.

[13] See Evidence [Also Expert and Opinion Evidence, 11 R. C. L. p. 568, § 5].

§ **648. Expert Opinion.**—As in other civil actions,[15] a witness in an automobile accident case, who possesses special skill or knowledge of the subject-matter, may state an opinion, where the facts are such that inexperienced persons are likely to prove incapable of forming a correct judgment without the assistance of such opinion.[16] The question whether admission of an opinion of an expert is proper, and whether he is qualified,[17] and the determination of the competency or incompetency of nonexpert opinion evidence, rest largely in the judicial discretion of the trial judge.[18] The necessity for opinion evidence exists only where the facts in controversy are incapable of being detailed and described so as to give the jury an intelligible understanding concerning them.[19] An expert may give his opinion when the facts upon which it is based are within his own knowledge, but if they are in issue he may only state his opinion hypothetically.[20]

§ **649. Matters as to Which Opinion May Be Given.**—Broadly speaking, expert opinion is admissible if the inquiry involves a question of science, art, mechanical skill, etc., while nonexperts may state their opinions as to matters of common observation or where it is not practicable to place all the primary facts before the jury.[21] It is generally held that any intelligent person who has had opportunity for adequate observation may be permitted to give an opinion as to the rate of speed at which an automobile was traveling at a particular time.[1] After a proper showing of the conditions existing at the time of an automobile collision, properly qualified witnesses may testify as to the distance in which a given car can be stopped,[2] and one familiar with automobiles and their operation may testify as to wheel marks found on the pavement after the accident, and give his opinion as an expert as to what they indicated as to the movements of the defendant's car.[3] One giving special attention to tracking automobiles by their tires may give his opinion as to the identity of an automobile which he tracked.[4] But an expert witness cannot give his opinion that an injury was inflicted in a certain manner, if the manner in which it was inflicted, or its extent, is controverted.[5]

Witnesses should not be permitted to testify that the lights on an automobile complied with the state law when they admit that they do not know the requirements of that law, or disclose a want of knowledge on the subject.[5a]

§ **650. —As to Care Exercised.**—The cases are generally agreed that direct testimony as to whether, at the time of an accident, an automobile driver was careful or otherwise, is inadmissible.[6] It is improper to receive in evidence any direct characterizations respecting the care, or lack of care, of a person involved in an automobile accident, whether it be the driver of the vehicle or a pedestrian. Descriptions of a person's conduct as "careless," "proper," or "safe and cautious," are improperly admitted.[7] The reason uniformly assigned for the exclusion of such testimony is that it invades the province of the jury. It is for the witness to the automobile accident to state the facts and circumstances surrounding the occurrence as he observed them, and then leave it to the jury to draw such inferences therefrom as it deems warranted by the evidence.[8] However, in an action to hold the host liable for an injury to a guest, where the rule is that a guest accepts whatever risks attend the degree of proficiency of such driver and his usual and customary habits of driving,[9] testimony that the host, who was driving, handled the car as he usually did, and that he was not to be blamed for the manner in which he drove, is proper.[10]

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[14] McCown v. Muldrow, 91 S. C. 523, 74 S. E. 386, Ann. Cas. 1914A, 139.

[15] See EVIDENCE [Also EXPERT AND OPINION EVIDENCE, 11 R. C. L. p. 572, § 7].

[16] Demarais v. Johnson, 90 Mont. 366, 3 P. (2d) 283, 77 A.L.R. 553.

[17] McCown v. Muldrow, 91 S. C. 523, 74 S. E. 386, Ann. Cas. 1914A, 139.

[18] Wolfe v. Ives, 83 Conn. 174, 76 A. 526, 19 Ann. Cas. 752.

[19] Demarais v. Johnson, 90 Mont. 366, 3 P. (2d) 283, 77 A.L.R. 553.

[20] McCown v. Muldrow, 91 S. C. 523, 74 S. E. 386, Ann. Cas. 1914A, 139.

[21] See EVIDENCE [Also EXPERT AND OPINION EVIDENCE, 11 R. C. L. p. 590, §§ 19 et seq.]

[1] See infra, § 651.

[2] Judd v. Rudolph, 207 Iowa, 113, 222 N. W. 416, 62 A.L.R. 1174; Elmendorf v. Clark, 143 La. 971, 79 So. 557, L.R.A.1918F, 802.
Annotation: 8 A.L.R. 33.

[3] Carson v. Turrish, 140 Minn. 445, 168 N. W. 349, L.R.A.1918F, 154.

[4] Ibid.

[5] McCown v. Muldrow, 91 S. C. 523, 74 S. E. 386, Ann. Cas. 1914A, 139.

[5a] Louisville & N. R. Co. v. Loesch, 215 Ky. 452, 284 S. W. 1097, 47 A.L.R. 347.

The cases are not in agreement as to whether a witness may be allowed to testify as to whether there was anything the driver of an automobile should have done that he did not do to avoid an accident; some cases allow [11] and others reject such testimony.[12] The driver of an automobile may properly be permitted to testify that he knew of nothing he could have done that he did not do to avoid hitting a child, where the evidence for the defense tended to show that the child was hidden from sight by a car backing from a driveway, and ran suddenly out as the defendant was passing, and too close to enable him to avoid the accident.[13]

§ 651. —As to Speed.—Under the prevailing rule that any person, not necessarily an expert, or possessed of any particular qualifications, who has had an opportunity for adequate observation, is competent to testify as to the rate of speed of a moving object,[14] it is generally held that one of reasonable intelligence and ordinary experience in life is presumed to be capable, without proof of further qualification, to express an opinion as to how fast an automobile which came under his observation was going at a particular time.[15] A bystander, not possessed of technical or scientific knowledge, may give his opinion as to the speed of an automobile which ran down and injured a person in the highway.[16] The fact that the witness had not owned or operated an automobile does not preclude him from so testifying.[17]

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[6] Annotation: 66 A.L.R. 1117.

[7] Annotation: 66 A.L.R. 1117.

[8] Annotation: 66 A.L.R. 1118.

[9] See supra, § 236.

[10] Olson v. Hermansen, 195 Wis. 614, 220 N. W. 203, 61 A.L.R. 1243.

[11] Annotation: 66 A.L.R. 1117, 1119.

An adequate foundation is laid for asking one who was riding in an automobile which struck a child whether anything might have been done which was not done to avoid hitting the child, where the witness had described the manner in which defendant was driving, his control of the car, the surrounding circumstances, and the suddenness with which the child appeared in the road, and also had testified to his own familiarity with the operation of an automobile. Merrihew v. Goodspeed, 102 Vt. 206, 147 A. 346, 66 A.L.R. 1109.

[12] Annotation: 66 A.L.R. 1119.

[13] Merrihew v. Goodspeed, 102 Vt. 206, 147 A. 346, 66 A.L.R. 1109.

[14] See Evidence [Also Expert and Opinion Evidence, 11 R. C. L. 560].

[15] Wolfe v. Ives, 83 Conn. 174, 76 A. 526, 19 Ann. Cas. 752; McIntyre v. Orner, 166 Ind. 57, 76 N. E. 750, 4 L.R.A.(N.S.) 1130, 117 Am. St. Rep. 359, 8 Ann. Cas. 1087; Judd v. Rudolph, 207 Iowa, 113, 222 N. W. 416, 62 A.L.R. 1174; Seager v. Foster, 185 Iowa, 32, 169 N. W. 681, 8 A.L.R. 690; Miller v. Jenness, 84 Kan. 608, 114 P. 1052, 34 L.R.A.(N.S.) 782; Lewis v. Miller, 119 Neb. 765, 230 S. W. 769, 70 A.L.R. 532; Kelly v. Weaver, 77 Or. 267, 150 P. 166, 151 P. 463, Ann. Cas. 1917D, 611; Dugan v. Arthurs, 230 Pa. 299, 79 A. 626, 34 L.R.A.(N.S.) 778.

Annotation: 70 A.L.R. 540; L.R.A.1918A, 705; 34 L.R.A.(N.S.) 778; 4 L.R.A.(N.S.) 1130; 19 Ann. Cas. 754; Ann. Cas. 1917D, 613.

A witness need not qualify as an expert in order to testify as to the rate of speed at which a vehicle was going, provided he is fully interrogated as to the knowledge on which his judgment is based, so that a jury can determine what weight should be given to his statement. Stehouwer v. Lewis, 249 Mich. 76, 227 N. W. 759, 74 A.L.R. 844.

Police officers, a part of whose business is to apprehend violators of speed ordinances, from observing the movement of vehicles within a given distance when compared with the time required in passing over the intervening space, can very closely estimate the speed of an automobile by seeing it pass. Kelly v. Weaver, 77 Or. 267, 150 P. 166, 151 P. 463, Ann. Cas. 1917D, 611.

The question as to the opportunity of the witness to judge, under the particular circumstances, the speed of an automobile, has been held, as a general rule, to go to the weight of his testimony rather than to its admissibility.[18] Thus, a witness who had shown himself otherwise qualified to give an opinion as to the speed of a moving automobile was permitted to express an opinion on this point, even though the vehicle was moving directly toward him;[19] such fact being viewed as affecting not his competency, but rather the weight to be given his opinion.[20] But where a witness has had no reasonable opportunity to judge the speed of an automobile, it is error to permit him to testify in regard thereto.[1] An estimate of speed may not be based upon the exhaust of the automobile, or the noise made by it as it approached the scene of the accident.[2]

The weight to be given to the testimony of a witness as to the speed of an automobile is a question for the jury,[3] whose exclusive province it is to determine whether or not his means of observation were such as to entitle his testimony to belief.[4] Experts have been allowed to give opinions as to the rate of speed of an automobile, based upon skid marks or other impressions made just before or at the time of the accident in question.[5] Nonexperts have also been allowed to give an opinion as to the speed of a car, based upon an examination of the marks left by it when it skidded, although there is a difference of opinion on this point.[6] In order to be competent to testify, the witness must have had reasonable opportunity to judge the speed of the automobile.[7] But where a witness testifies that he could not judge the rate of speed at which the car in question was moving, he should not be allowed to give an opinion as to whether it was traveling fast or slow.[8] Nor can a witness be permitted to state whether or not one of two automobiles involved in a collision was going faster than the other; he must state the speed of each and permit the jury to make the comparison.[9]

§ 652. —Form of Opinion as to Speed.—An opinion as to the speed of an automobile may be expressed by the witness in various forms. Such characterizations as "fast," "at a high rate of speed,"[10] "going fast," "pretty fast," or "awful fast" have been held proper.[11] But until it is shown that the witness had a reasonable opportunity to judge the speed of an automobile, any such estimates are improperly received in evidence.[12]

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[16] Kelly v. Weaver, 77 Or. 267, 150 P. 166, 151 P. 463, Ann. Cas. 1917D, 611; Dugan v. Arthurs, 230 Pa. 299, 79 A. 626, 34 L.R.A. (N.S.) 778.

[17] Hiscock v. Phinney, 81 Wash. 117, 142 P. 461, Ann. Cas. 1916E, 1044.

[18] Kelly v. Weaver, 77 Or. 267, 150 P. 166, 151 P. 463, Ann. Cas. 1917D, 611.
Annotation: 70 A.L.R. 543.

[19] Lewis v. Miller, 119 Neb. 765, 230 N. W. 769, 70 A.L.R. 532.
In Judd v. Rudolph, 207 Iowa, 113, 222 N. W. 416, 62 A.L.R. 1174, it is held that the driver of an automobile, injured in a collision with two other cars, may testify, when he shows himself properly qualified, concerning the speed of the two cars as they approached his car.

[20] Lewis v. Miller, 119 Neb. 765, 230 N. W. 769, 70 A.L.R. 532.

[1] Annotation: 70 A.L.R. 547.

[2] Annotation: 70 A.L.R. 547.

[3] Lewis v. Miller, 119 Neb. 765, 230 N. W. 769, 70 A.L.R. 532; Hiscock v. Phinney, 81 Wash. 117, 142 P. 461, Ann. Cas. 1916E, 1044.

[4] Kelly v. Weaver, 77 Or. 267, 150 P. 166, 151 P. 463, Ann. Cas. 1917D, 611.

[5] Annotation: 70 A.L.R. 544.

[6] Annotation: 70 A.L.R. 544.

[7] Annotation: 70 A.L.R. 547.

[8] Seager v. Foster, 185 Iowa, 32, 169 N. W. 681, 8 A.L.R. 690.

[9] Ibid.

[10] Annotation: 70 A.L.R. 542.

[11] Zoltovski v. Gzella, 159 Mich. 620, 124 N. W. 527, 26 L.R.A.(N.S.) 435, 134 Am. St. Rep. 752; Lewis v. Miller, 119 Neb. 765, 230 N. W. 769, 70 A.L.R. 532.
A witness who saw an automobile at the

§ 653. —Condition of Vehicle.—The authorities generally have adhered to the rule that expert opinion as to the condition of an automobile or truck is admissible where the facts are such that the opinion of an expert can be of material assistance to the jury in weighing them.[13] The specific factors upon which the expert may render an opinion in this connection are not circumscribed; such opinion may embrace a wide variety of matters. He may, for example, properly testify that in his opinion the collapse of a wheel of a motor truck was due to loose spokes,[14] or that skid marks on the paving indicated that the brakes of the automobile making the same were holding on one side only,[15] or as to whether a steering gear was defective.[16] The rule governing the admissibility of expert opinion evidence as to the condition of a motor vehicle, not unlike the broad rules applicable to other situations on the same point,[17] indicates the standard by which the qualifications of an expert shall be determined. If the expert is to be of any assistance to the jury, it must be because he has acquired a special knowledge of the subject-matter, either by study of the recognized authorities or by practical experience.[18] Where it appears that a witness knows practically nothing about the mechanical construction of a car, it is error to permit him to state that a car is defective.[19] In the case of nonexpert or lay witnesses, the necessity or exigency of the occasion may render opinion evidence admissible, notwithstanding the fact that its admission involves a departure from the rule that conclusions from evidential facts are to be drawn by the jury; such testimony may be admissible also under the rule that a witness may give his testimony in the form of an opinion, where he cannot adequately present the facts in any other manner.[20] But an opinion of a witness that the condition of a wheel of a motor vehicle was such that defects therein could have been discovered by reasonable inspection is incompetent as invading the province of the jury.[1]

7. Weight and Sufficiency; Degree of Proof

§ 654. Generally.—Throughout this article it has been necessary, for a full understanding of various particular matters, to discuss the weight, effect, and sufficiency of evidence relative thereto. The purpose at this point is to discuss the general principles which govern the weight and sufficiency of evidence in automobile accident cases, giving illustrations of the application of these general principles to particular facts. No attempt is made to give exhaustive reference to the many cases in which the reviewing courts considering the weight and sufficiency of evidence have sustained the findings of the jury.

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time of the accident in which it was involved may testify as to whether it was going fast or slow, even though the terms "fast" and "slow" are relative. The precise meaning of the witness may be drawn out on cross-examination. Annotation: 70 A.L.R. 548.

[12] Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537, 31 Am. Rep. 321.
Annotation: 70 A.L.R. 546; 25 L.R.A. (N.S.) 42.

[13] Demarais v. Johnson, 90 Mont. 366, 3 P. (2d) 283, 77 A.L.R. 553; Ragan v. MacGill, 134 Or. 408, 292 P. 1094, 72 A.L.R. 860.
Annotation: 77 A.L.R. 559.

[14] Demarais v. Johnson, 90 Mont. 366, 3 P. (2d) 283, 77 A.L.R. 553.

[15] Ragan v. MacGill, 134 Or. 408, 292 P. 1094, 72 A.L.R. 860.

[16] Annotation: 77 A.L.R. 562.

[17] See Evidence [Also Expert and Opinion Evidence, 11 R. C. L. pp. 574 et seq.].

[18] Annotation: 77 A.L.R. 562.

[19] Annotation: 77 A.L.R. 563.

[20] Annotation: 77 A.L.R. 564.

[1] Demarais v. Johnson, 90 Mont. 366, 3 P. (2d) 283, 77 A.L.R. 553.
Annotation: 77 A.L.R. 565.

The weight which will be given to any evidence depends, of course, upon its reliability. This is a matter for the jury to pass upon, though its competency or admissibility is a question of law for the court.[2]

It is not absolutely essential in automobile cases that there be proof of an accident by eyewitnesses.[3]

Testimony that attempts to establish something physically impossible, or something utterly inconsistent with physical facts of nature within the knowledge of common experience, must be disregarded.[4]

However, evidence of witnesses contradicting infallible physical facts cannot be accepted.[5] As in other cases, proof as to any particular fact may be direct or circumstantial,[6] and may be negative in character as well as positive.[7] The mere number of witnesses who may support the claim of one of the parties to an action is not to be taken as the basis for solving disputed facts,[8] although in automobile cases as in other cases where the evidence is conflicting, some consideration should be given to the numerical preponderance of witnesses.

§ 655. Degree of Proof; Preponderance of Evidence.—Preponderance of evidence signifies the degree of proof ordinarily required in civil actions to sustain the burden of any particular case, or of the entire issue.[9]

In actions arising out of automobile accidents the plaintiff must discharge the burden imposed upon him, on making out his case, by proving every material allegation in his declaration, complaint, or petition by a preponderance of the evidence.[10] In automobile accident cases, as in other civil actions, particularly negligence actions,[11] the party who has the affirmative of an issue and the burden of proof[12] must establish such issue by a preponderance of the evidence. Thus, the person alleging that he has sustained an injury through negligence in the operation of an automobile has the burden of establishing, by a preponderance of the evidence, negligence on the part of the defendant,[13] and the burden rests upon the defendant to show the plaintiff's contributory negligence by a preponderance of the evidence.[14] A gratuitous bailee of an automobile, injured by a defect in it, must, in order to hold the bailor liable for the injury, prove by a preponderance of the evidence that the bailor had knowledge of the defect.[15]

§ 656. Positive and Negative Testimony.—As in other civil actions, evidence in automobile accident cases is not to be ignored merely because it is negative in character.[16] The testimony of a witness in such cases is not confined to what he saw or heard; he may state what he did not see or hear.[17] Negative testimony by persons who at the time of the accident were awaiting an opportunity to cross a street, that standing automobiles gave no signal before starting, may outweigh the positive testimony of the occupants of the cars that such signals were given.[18] Testimony by occupants of an automobile hit by a railroad car at a crossing that they did not hear any signals given is merely negative, where the evidence shows that none of them was giving any heed to the railroad until the automobile was too close to the track to be stopped.[19]

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[2] See infra, § 671.

[3] Babbitt, Motor Vehicle Law, 4th ed. p. 1654, § 2286.

[4] Babbitt, Motor Vehicle Law, 4th ed. p. 1665, § 2289.

[5] Lamp v. Pennsylvania R. Co. 305 Pa. 520, 158 A. 269, 84 A.L.R. 1217.

[6] Rodgers v. Saxton, 305 Pa. 479, 158 A. 166, 80 A.L.R. 280; O'Malley v. Eagan, 43 Wyo. 233, 2 P. (2d) 1063, 77 A.L.R. 582, rehearing denied in 43 Wyo. 350, 5 P. (2d) 276, 77 A.L.R. 597.

[7] See infra, § 656.

[8] See EVIDENCE [Also 10 R. C. L. p. 1005, § 193].

[9] See EVIDENCE [Also 10 R. C. L. p. 1012, §§ 204 et seq.].

[10] West v. Kern, 88 Or. 247, 171 P. 1050, L.R.A.1918D, 920.

[11] See EVIDENCE [Also 10 R. C. L. p. 1012, § 204]; NEGLIGENCE.

[12] See infra, § 613.

[13] Osborn v. Charbneau, 148 Wash. 359, 268 P. 884, 64 A.L.R. 251.

[14] McCracken v. Curwensville, 309 Pa. 98, 163 A. 217, 86 A.L.R. 1379; Waynick v. Walrond, 155 Va. 400, 154 S. E. 522, 70 A.L.R. 1014.

[15] Johnson v. H. M. Bullard Co. 95 Conn. 251, 111 A. 70, 12 A.L.R. 766.

[16] See EVIDENCE [Also 10 R. C. L. p. 1010, §§ 201–203].

[17] Elias v. Collins, 237 Mich. 175, 211 N. W. 88, 52 A.L.R. 1118; Webber v. Park Auto

§ 657. Sufficiency of Evidence as to Negligence.—The plaintiff must prove negligence of the defendant against whom an action is brought for injuries arising out of an automobile accident by a preponderance of the evidence.[20] It is not negligence per se to use an automobile on a public highway,[21] and the mere fact that one is struck by an automobile on a public street is not sufficient to prove negligence on the part of the driver,[1] unless the circumstances of the accident are sufficient to call into operation the doctrine of res ipsa loquitur.[2] The maxim, "res ipsa loquitur," will carry a case to the jury only where the circumstances leave no room for a different presumption from that raised thereby.[3] It is essential that the plaintiff produce proof from which reasonable minds may draw an inference that his injury was due proximately[4] to the negligent manner in which the defendant operated his automobile.[5] It is only necessary, however, to establish a charge of negligence by a preponderance or greater weight of the evidence.[6] Where there is substantial evidence of negligence on the part of the operator of the automobile at the time and place of the injury complained of, the reviewing court will not disturb a finding of negligence, even though it might have arrived at a different conclusion had the question been left to it for determination.[7] A motorist may be found guilty of negligence, notwithstanding his testimony that he did not see or hear the approaching locomotive which struck his automobile and injured his guest, that he was intently watching the

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Transp. Co. 138 Wash. 325, 244 P. 718, 47 A.L.R. 590.

[18] Richter v. Dahlman & I. Co. 179 Wis. 7, 190 N. W. 841, 30 A.L.R. 747.

[19] Elias v. Collins, 237 Mich. 175, 211 N. W. 88, 52 A.L.R. 1118.

[20] See supra, § 655.

[21] Indiana Springs Co. v. Brown, 165 Ind. 465, 74 N. E. 615, 1 L.R.A.(N.S.) 238, 6 Ann. Cas. 656.

[1] Beyrent v. Kaplan, 315 Pa. 353, 172 A. 651, 92 A.L.R. 1515.

[2] See supra, § 607.

[3] Klein v. Beeten, 169 Wis. 385, 172 N. W. 736, 5 A.L.R. 1237.

[4] See infra, § 659.

[5] Reader v. Ottis, 147 Minn. 335, 180 N. W 117, 16 A.L.R. 463; O'Malley v. Eagan, 43 Wyo. 233, 2 P. (2d) 1063, 77 A.L.R. 582, rehearing denied in 43 Wyo. 350, 5 P. (2d) 276, 77 A.L.R. 597.

A jury is not warranted in finding that the defendant in an action for personal injuries resulting from a collision between an automobile driven by him on the proper side of the road and one proceeding in the opposite direction on the wrong side of the road was negligent in not sooner turning to the left side of the road, or in not stopping, where it only became apparent that the other automobile was not going to turn to its proper side of the road when the cars were so near together that at the speed at which they were traveling collision was inevitable. O'Malley v. Eagan, 43 Wyo. 233, 2 P. (2d) 1063, 77 A.L.R. 582, rehearing denied in 43 Wyo. 350, 5 P. (2d) 276, 77 A.L.R. 597.

[6] **That an automobile traveling at night was being driven at an excessive speed** may be established by proof that it struck and killed animals in the road, one of which it threw 57 feet, and then traveled 40 or 50 feet and buried its front end in a bank. Bombard v. Newton, 94 Vt. 354, 111 A. 510, 11 A.L.R. 1402.

[7] McFarlane v. Winters, 47 Utah, 598, 155 P. 437, L.R.A.1916D, 618; Walker v. Kroger Grocery & Baking Co. 214 Wis. 519, 252 N. W. 721, 92 A.L.R. 680.

Negligence of one driving an automobile at night in not discovering an animal on the road until within 15 feet of it may be found from the fact that his headlights were in good condition and lighted the whole road for a distance of 18 or 20 rods. Bombard v. Newton, 94 Vt. 354, 111 A. 510, 11 A.L.R. 1402.

A finding of negligence on the part of an automobile driver in striking one engaged in directing traffic at a street intersection is warranted by the fact that the person struck was wearing a policeman's cap and badge, had taken his station at the intersection about twenty minutes before, and might have been seen from the approaching car when 150 feet away. Beyrent v. Kaplan, 315 Pa. 353, 172 A. 651, 92 A.L.R. 1515.

highway in front of him, that his vision was obscured by the sun shining in his face, and that he did not see the railway signs as he approached the crossing, where the evidence showed the crossing to be an obstructed grade crossing which a statute made it unlawful to cross at a greater speed than 15 miles per hour, and by his own admission he was traveling at least 30 miles an hour at the time of the accident;[8] upon evidence that on approaching from the rear a car standing on the roadside he did not apply his brakes, traveled 68 feet after striking an occupant of the car, who was attempting to cross the road, turned a right angle, and tore up the turf of the adjoining yard over a space of 2½ feet in circumference;[9] in failing to give adequate warning on a dark and foggy evening to other motorists approaching from the rear, of the presence of his automobile or truck standing on the paved portion of the highway, where there is evidence that the tail light, which was the only warning signal, was obscured by dirt which had accumulated upon it, notwithstanding such evidence was contradicted by testimony that the light was clean and visible;[10] in "stopping" a motor truck on a highway where there is evidence of negligent failure to remove it from the traveled portion of the highway, though the mere bringing it to a halt was not negligence.[11]

The trial court is warranted in finding that defendant's negligence, and not that of the driver of another automobile which collided with his, was the cause of injury to a pedestrian who was struck when defendant's automobile ran up on the sidewalk, where the evidence offered was capable of sustaining the inference that defendant was negligent in attempting to pass in front of the other automobile, or in not stopping after being hit by the other car.[12]

A violation of traffic regulations is prima facie evidence of negligence,[13] and a violation of the statutory rules of the road by one driving an automobile is some evidence of negligence, though not conclusive.[14] However, a finding of negligence on the part of the driver of an automobile that collided with another at a street intersection is warranted by evidence that he was driving in the center of the highway, instead of on the right-hand side, and at a speed in excess of that fixed by statute.[15] Testimony that one driving an automobile at the time of an accident could stop a car going 18 miles an hour in 50 feet does not show that he could stop the car which he was driving within that distance.[16]

§ 658. Sufficiency of Evidence as to Freedom from Contributory Negligence.—If substantial evidence in support of the finding of the plaintiff's freedom from contributory negligence at the time and place of an automobile accident is submitted to the jury, their findings on this fact will not be disturbed even though the reviewing court, had the question been left to it for determination, might have arrived at a different conclusion.[17]

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[8] Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A.L.R. 1327.

[9] Daughraty v. Tebbets, 122 Me. 397, 120 A. 354, 34 A.L.R. 1507.

[10] Walker v. Kroger Grocery & Baking Co. 214 Wis. 519, 252 N. W. 721, 92 A.L.R. 680.

[11] Walker v. Kroger Grocery & Baking Co. 214 Wis. 519, 252 N. W. 721, 92 A.L.R. 680 (holding that a jury may find the driver of a truck left standing on the paved portion of a highway pending repairs to a wheel to have been equally negligent with his employer, where the practicability of removing the truck from the traveled portion of the highway was shown, though the employer could also be considered negligent because another employee did not make repairs as quickly as he might have done).

[12] Linberg v. Stanto, 211 Cal. 771, 297 P. 9, 75 A.L.R. 555.

[13] Rowley v. Cedar Rapids, 203 Iowa, 1245, 212 N. W. 158, 53 A.L.R. 375.

[14] Riccio v. Ginsberg, 49 R. I. 32, 139 A. 652, 62 A.L.R. 967.
See supra, § 654.

[15] Garrett v. Byerly, 155 Wash. 351, 284 P. 343, 68 A.L.R. 254.

[16] Philadelphia & R. R. Co. v. Dillon, 31 Del. 247, 114 A. 62, 15 A.L.R. 894.

[17] McFarlane v. Winters, 47 Utah, 598, 155 P. 437, L.R.A.1916D, 618.

One may be found to have been in the exercise of due care in crossing a road from a standing automobile, in front of an approaching car, if he had crossed the paved part of the road in safety, and was struck outside of it, and there was ample room for the approaching car to have passed between him and the standing car had such approaching car been under control.[18]

A finding that a motorist injured by running into an excavation across a highway used reasonable diligence is not against the weight of evidence where it appeared that the accident occurred early in the morning while it was dark and misty, that the barrier which he passed 180 feet from the excavation was of a character similar to other local barriers indicating repair spots, that the excavation was unmarked by lights, that his first intimation of its presence was on seeing an excavating machine, when 60 feet from the excavation, on the opposite side thereof, and that he immediately put on his brakes, but on account of the slippery condition of the pavement was unable to bring his car to a stop before reaching the excavation.[19] No inference of contributory negligence on the part of the driver of an automobile can be conclusively drawn from the fact that the car skidded on an icy pavement.[20] The fact that one drove an automobile onto a railroad track in front of a train without excitement, attempt to turn aside, or special effort to apply the brakes, is evidence that he did not see the train.[1]

§ 659. Proof of Causal Connection; Proximate Cause.—It is, of course, necessary that the plaintiff establish that the accident in which he claims to have suffered injury was caused by the defendant's act and not by some other act. However, the inference that plaintiff was struck by defendant's motor vehicle is warranted where there was testimony that she was found lying beneath it, and that there were no other cars in motion in the immediate vicinity.[2] It is necessary also to prove that the defendant failed to exercise care toward the plaintiff—that he was negligent.[3] Furthermore, the plaintiff's evidence must be sufficient to show that the defendant's negligence was the proximate cause of the injury.[4] Notwithstanding proof that the driver of an automobile was negligent at the time of the accident, his negligence may not have been the proximate cause thereof, since under the particular circumstances the accident might have happened even though he drove carefully; or other factors may have had a closer causal relation, or at least have proximately contributed, to the accident.[5] Thus, unless the evidence introduced at the trial is such as will establish defendant's excessive speed as the proximate cause of the accident, no finding of negligence may be made on that ground alone.[6] Nor does the proof of violation of a statute or ordinance in itself establish actionable negligence unless the violation can be shown to have been actually a proximate cause contributing to the injury suffered.[7]

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[18] Daughraty v. Tebbets, 122 Me. 397, 120 A. 354, 34 A.L.R. 1507.

[19] Martin v. J. A. Mercier Co. 255 Mich. 587, 238 N. W. 181, 78 A.L.R. 520.

[20] McCracken v. Curwensville, 309 Pa. 98, 163 A. 217, 86 A.L.R. 1379.

[1] Puhr v. Chicago & N. W. R. Co. 171 Wis. 154, 176 N. W. 767, 14 A.L.R. 1334.

[2] Railway Exp. Agency v. Little (C. C. A. 3d) 50 F. (2d) 59, 75 A.L.R. 963 (holding that there was sufficient evidence to sustain a finding that plaintiff sustained a fracture of the skull through being struck by a motor truck while crossing the street, rather than through slipping or stumbling and falling, notwithstanding there was no mark or bruise on her body, where her companion testified to seeing the truck bearing down upon them, of jumping to save herself, and of hearing a scream, and another witness testified to seeing plaintiff lying underneath the truck).

[3] See supra, § 614.

[4] Babbitt, Motor Vehicle Law, 4th ed. p. 1652, § 2283.

[5] Annotation: 77 A.L.R. 599.

[6] O'Malley v. Eagan, 43 Wyo. 233, 2 P. (2d) 1063, 77 A.L.R. 582, rehearing denied in 43 Wyo. 350, 5 P. (2d) 276, 77 A.L.R. 597. Excessive speed cannot be said to have necessarily contributed to a collision between an automobile traveling at such speed on its proper side of the highway and a car proceeding in the opposite direction, not on its proper side of the highway.

Proximate cause need not, however, be shown by direct testimony, but may be determined from the circumstances of the case.[8] The act of one driving an automobile in a line of traffic, in looking at an object in a field at the side of the road, may be found to have been the proximate cause of injury to a guest from a collision with a preceding car, from the facts that the preceding car had stopped, and that, while he was so looking, the driver crashed into it.[9]

The stopping of a motor truck on the paved portion of the highway because some of the studs fastening the right rear wheels together had become broken may properly be found to have been the cause of the collision of an automobile therewith some hours later, where there was evidence showing that, notwithstanding its condition, the truck might have been moved to a private driveway 10 rods further on.[10]

Failure to remove dirt from the tail light of a motor truck may be found to have been the proximate cause of the collision of an automobile with it while it was standing upon the paved portion of the highway on a dark and foggy evening, where there was evidence that the tail light, which was the only warning signal, was so obscured that it was not seen by the occupants of the car which collided with the truck until they were within 60 feet of it, though they had observed tail lights of other vehicles 200 or 300 feet away.[11] That an automobile turned over on its left side upon the highway when running 25 or 30 miles an hour is not sufficient to show that the cause of the accident was not its being struck on its left front by a car passing from the rear.[12]

§ 660. Identity of Owner and Authority of Driver.—Where the defendant's car at the time and place of the injury complained of was being operated by another, the plaintiff's evidence must be sufficient to establish liability of the owner for its negligent operation by such other person.[13] However, in many jurisdictions, proof of the defendant's ownership of an automobile constitutes a prima facie case of the driver's agency for the owner.[14] That a taxicab involved in a collision was owned by the defendant and was being operated by its servant is established by testimony of the plaintiff that the car with which he collided had on it the name of the defendant, and that the defendant's manager, shortly after the accident, called on the plaintiff and discussed the matter with him.[15] Where the evidence permitted of the inference that the defendant (a merchant), for business reasons, adopted the practice of having the driver of his delivery automobile take customers and their companions to the customers' homes with packages purchased, it was open to the jury to find that the driver was authorized by the defendant to invite the plaintiff, a companion of a customer, to ride to the customer's house with the packages purchased, and hence to find that the defendant was liable for an injury to the plaintiff resulting proximately from want of reasonable care in driving the car.[16] That a man was acting under his wife's authority in driving her automobile at the time he caused injury with it may be found from the fact that he had general authority to use the car, and that she refrained from testifying that he was not acting under such authority at the time of the injury.[17] The testimony of the owner of an automobile which had been used as a taxicab, and of the driver, that the relation of master and servant had ceased at a specified time because business was discontinued at that time, is not conclusive, if other witnesses testify to employing the taxicab and to seeing it on the stand with the taxi sign on it subsequently to that time.[18] A finding that defendant knew that it was the practice of its truck drivers to use the trucks for the purpose of going to lunch, and never discharged any of them for so doing, is not justified by the statement of defendant's manager, in replying to the question as to whether truck drivers were permitted to take their trucks home to lunch, "No, they are not supposed to, but I guess they do;" such reply being a mere guess or surmise on his part, falling short of being testimony as to the practice.[19] A finding that a truck driver was, at the time when his truck collided with a pedestrian, on his way from a branch store of his employer to the main store, on the business of his employer and in the course of his employment, is not warranted by evidence that the driver, on leaving the branch store either to go immediately to the main store or to his lunch, it being his lunch hour, and his truck being empty, took with him, in violation of his employer's instructions, a fellow employee who wished to go down town, and, upon ascertaining that she was planning to go to a place about 2 miles off his route, turned off from the route to the store and, upon being asked by the fellow employee where he was going, replied that he was going to take her to such place, whereupon she rejoined that he was not, and requested to be let off at the next corner, and he, without replying, kept on up the street to the place of the accident.[20] No abandonment by a truck driver of his declared purpose of taking to a place 2 miles off his route, a fellow employee whom, in violation of instructions, he has permitted to ride with him, so as to render his negligent driving an act in the course of his employment for which his employer is responsible, can be inferred from the fact that, upon learning of his intention, after he had passed the corner where he should have turned in order to continue on the route to his employer's place of business, the fellow employee told him that he should not do so, and requested to be left at the next corner.[1]

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[7] Milbury v. Turner Center System, 274 Mass. 358, 174 N. E. 471, 73 A.L.R. 1070.

[8] O'Malley v. Eagan, 43 Wyo. 233, 2 P. (2d) 1063, 77 A.L.R. 582, rehearing denied in 43 Wyo. 350, 5 P. (2d) 276, 77 A.L.R. 597.

A malignant tumor affecting the lower part of the spine of a person who had been struck in the lower part of the back by an automobile fender may properly be found to have been caused by the accident, where, although medical expert testimony to that effect was contradicted, it appeared that prior to the accident the person injured had been in good health, but about three weeks thereafter began to fail, and continuously lost ground, that about a month after the accident a pain developed in his back, which grew more intense, and a physician testified that the pain was due to the growth of the tumor. Loveless v. Red Top Cab Co. 158 Wash. 474, 291 P. 344, 79 A.L.R. 347.

[9] Silver v. Silver, 108 Conn. 371, 143 A. 240, 65 A.L.R. 943, affirmed in 280 U. S. 117, 74 L. ed. 221, 50 S. Ct. 57, 65 A.L.R. 939.

[10] Walker v. Kroger Grocery & Baking Co. 214 Wis. 519, 252 N. W. 721, 92 A.L.R. 680.

[11] Ibid.

[12] People v. Benson, 321 Ill. 605, 152 N. E. 514, 46 A.L.R. 1056.

[13] Tice v. Crowder, 119 Kan. 494, 240 P. 964, 42 A.L.R. 893; Ferris v. Sterling, 214 N. Y. 249, 108 N. E. 406, Ann. Cas. 1916D, 1161.

To sustain a recovery for injuries caused by being run down by an automobile owned by the defendant while being operated by another, the plaintiff must show by a preponderance of the evidence that the person in charge of the machine was the defendant's servant and was, at the time of the accident, engaged in the master's business or pleasure with the master's knowledge and direction. Neff v. Brandeis, 91 Neb. 11, 135 N. W. 232, 39 L.R.A.(N.S.) 933.

[14] See infra, § 662.

An intention on the part of a truck driver to transport a fellow employee riding with him to her destination may be inferred from the fact that he turned off from the route leading to his employer's store, and in response to her question said that he was going to her destination.[2] The jury are warranted in finding that a certain person was driving an automobile at the time of an accident where there is evidence as to declarations made by him shortly after the accident that he was doing so, notwithstanding he and other occupants of the car testified at the trial that another person was driving.[3] The presumption that an automobile was under the control and operation of the owner at the time of an accident was held to be so conclusively overcome as to present no question for the jury, by the uncontradicted evidence that the car was being driven by the owner's son-in-law for his own business purposes, without the owner's knowledge.[4] The inference, arising from proof that defendant was the owner of the automobile which injured the plaintiff, that the driver was acting as the owner's agent, will not support a verdict for plaintiff where the fact of rental of the automobile to the driver is established by uncontradicted evidence of such substantial character as to leave no reasonable doubt.[5]

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[15] Voegeli v. Waterbury Yellow Cab Co. 111 Conn. 407, 150 A. 303, 69 A.L.R. 902.

[16] Paiewonsky v. Joffe, 101 N. J. L. 521, 129 A. 142, 40 A.L.R. 1335.

[17] Wolf v. Sulik, 93 Conn. 431, 106 A. 443, 4 A.L.R. 356.

[18] Crowell v. Duncan, 145 Va. 489, 134 S. E. 576, 50 A.L.R. 1425.

[19] Hickson v. Walker Co. 110 Conn. 604, 149 A. 400, 68 A.L.R. 1044.

[20] Ibid.

[1] Ibid.

Where there is evidence to justify a finding that the person who had charge of the automobile at the time of the accident was a dealer in automobiles, evidence that such person had put his own registered number plate on the car, coupled with testimony of the owner of the car that he had given it to the dealer for sale, or for the purpose of renting it out, justifies a finding that the dealer was in control of the car for such purposes.[6]

§ 661. Proof of Ownership.—The license number on a motor vehicle is prima facie proof of the ownership thereof in the person whose name appears on the corresponding certificate of registration on file in the proper office.[7] This presumption may, however, be rebutted by competent evidence.[8] The presumption of ownership which arises from proof that the license was in defendant's name is not rebutted by testimony of defendant and his son that the car was licensed in the name of defendant instead of that of his son, the true owner, by mistake.[9] The fact that a manufacturer's license tag was attached to a car raises no inference that the car belonged to, or was under the control of, the manufacturer, where it appears that it was customary to leave such tags on cars sold and taken away by purchasers until such times as the latter could procure licenses for themselves.[10] Nor is the fact that an automobile involved in an accident bore the dealer's plates proof that it was being operated in the dealer's business, where the statute permits use for other than business purposes of vehicles bearing such plates.[11]

§ 662. Prima Facie Case from Proof of Ownership.—The general rule prevailing in the majority of jurisdictions may be stated to be that proof that an automobile causing damage or injuries was owned by the defendant at the time of the accident establishes a prima facie case for the plaintiff; that from such proof an inference arises that at the time of the injury the automobile was in the owner's possession and was being operated by him, or by his servant or agent under circumstances which would render him liable for the conduct of such agent or servant under the doctrine of respondeat superior.[12] As has been aptly pointed out, experience demonstrates that the probabilities are that an automobile involved in an accident was driven by the owner, or by someone for whose negligence he would be responsible, and if, in fact, it was being driven by one for whose acts the owner is not responsible, or by a servant on an unauthorized mission, it is but fair that the defendant, the owner of the car, should be compelled to show such facts affirmatively; they being matters as to which he alone would ordinarily have knowledge.[13] The fact that the person operating the automobile was a member of the owner's family adds to the strength of the presumption that it was being operated for his benefit, especially if the car was kept for family use.[14] The inference arising from ownership of an automobile inflicting an injury, that the driver was acting as the owner's agent, no longer obtains where there is uncontradicted evidence that the driver had rented it from the owner,[15] or when it is overcome by other substantial evidence rebutting such responsibility.[15a]

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[2] Ibid.

[3] Trice v. Bridgewater, 125 Tex. 75, 81 S. W. (2d) 63, 100 A.L.R. 1014.

[4] Patterson v. Surpless, 107 N. J. L. 305, 151 A. 754, 74 A.L.R. 841.

[5] Judson v. Bee Hive Auto Serv. Co. 136 Or. 1, 297 P. 1050, 74 A.L.R. 944.

[6] Koonovsky v. Quellette, 226 Mass. 474, 116 N. E. 243, Ann. Cas. 1918B, 1146.

[7] Ferris v. Sterling, 214 N. Y. 249, 108 N. E. 406, Ann. Cas. 1916D, 1161.
Annotation: Ann. Cas. 1916D, 1163.

[8] Annotation: Ann. Cas. 1916D, 1164.
In an action for personal injuries caused by the negligent operation of a licensed taxicab, the statement of the ownership thereof in the registry of licenses is not conclusive, but may be rebutted by the person named as owner. Kemp v. Elisha, [1918] 1 K. B. 228, Ann. Cas. 1918E, 730—C. A.

[9] Ferris v. Sterling, 214 N. Y. 249, 108 N. E. 406, Ann. Cas. 1916D, 1161.

[10] Janik v. Ford Motor Co. 180 Mich. 557, 147 N. W. 510, 52 L.R.A.(N.S.) 294, Ann. Cas. 1916A, 669.

[11] Caswell v. Maplewood Garage, 84 N. H. 241, 149 A. 746, 73 A.L.R. 433.

Many courts take the position that proof of ownership alone, without further proof that the person operating the automobile was in the owner's employ or driving it with his consent, is insufficient to establish prima facie that the owner is liable for the damage caused.[16] Consequently, in conformity with this view, if the jury have no evidence before them from which they can find that the person driving the automobile at the time of the accident was in fact engaged in the defendant's business at that time, or was operating the vehicle with the owner's consent, a verdict in favor of the plaintiff will be set aside.[17] Proof that an automobile involved in an accident bore license plates issued to the defendant, or that it was owned by the defendant, does not require submission to the jury of the question whether it was being operated on defendant's behalf.[18]

§ 663. —When Coupled with Proof that Driver Was Agent of Owner.— Even though mere proof of ownership of the automobile causing an injury may not be sufficient to establish a prima facie case of responsibility for the injury [19] additional proof tending to establish the agency of the driver or that he was acting for the defendant, considered in connection with the proof of the defendant's ownership of the automobile, may establish a prima facie case.[20] Thus, a prima facie case will be established if, in connection with proof of the defendant's ownership of the automobile the negligent operation of which caused the injury to plaintiff, the plaintiff proves that at the time of the accident it was being operated by one regularly employed to drive it.[1] And in several cases it has been held that proof of ownership of the automobile and that it was being operated at the time of the injury by a general employee of the defendant create a prima facie case.[2] Other courts, however, have refused to extend the rule to cases where the proof was merely that a general employee of the defendant was driving the car.[3] These courts take the position that a prima facie case of negligence against the owner is not made out, unless it appears affirmatively that the employee, at the time of the injury, was acting within the scope of his employment; at least, where driving the defendant's automobile was not within the scope of the usual duties of the employee.[4]

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[12] Rose v. Balfe, 223 N. Y. 481, 119 N. E. 842, Ann. Cas. 1918D, 238; Potts v. Pardee, 220 N. Y. 431, 116 N. E. 78, 8 A.L.R. 785; Ferris v. Sterling, 214 N. Y. 249, 108 N. E. 406, Ann. Cas. 1916D, 1161; West v. Kern, 88 Or. 247, 171 P. 413, 1050, L.R.A.1918D, 920; Birch v. Abercrombie, 74 Wash. 486, 133 P. 1020, 50 L.R.A.(N.S.) 59.

Annotation: 42 A.L.R. 899, s. 74 A.L.R. 951; 46 L.R.A.(N.S.) 1091, s. L.R.A.1918D, 924.

[13] Annotation: 42 A.L.R. 903.

The truth and the weight of the explanation offered by the owner, tending to meet and control the prima facie case made out by the plaintiff under a statute making proof of ownership prima facie evidence of responsibility for the driver's negligence, are for the consideration of the jury. Annotation: 74 A.L.R. 956.

[14] Annotation: 42 A.L.R. 902.

[15] Judson v. Bee Hive Serv. Co. 136 Or. 1, 294 P. 588, 297 P. 1050, 74 A.L.R. 944.

[15a] Rose v. Balfe, 223 N. Y. 481, 119 N. E. 842, Ann. Cas. 1918D, 238.

[16] Tice v. Crowder, 119 Kan. 494, 240 P. 964, 42 A.L.R. 893; Gardner v. Farnum, 230 Mass. 193, 119 N. E. 666, L.R.A.1918E, 997; Hays v. Hogan, 273 Mo. 1, 200 S. W. 286, L.R.A.1918C, 715, Ann. Cas. 1918E, 1127; White Oak Coal Co. v. Rivoux, 88 Ohio St. 18, 102 N. E. 302, 46 L.R.A.(N.S.) 1091, Ann. Cas. 1914C, 1082; Lotz v. Hanlon, 217 Pa. 339, 66 A. 525, 10 L.R.A.(N.S.) 202, 118 Am. St. Rep. 922, 10 Ann. Cas. 731; McFarlane v. Winters, 47 Utah, 598, 155 P. 437, L.R.A. 1916D, 618.

Annotation: 42 A.L.R. 908; 46 L.R.A. (N.S.) 1091.

[17] Annotation: 42 A.L.R. 909.

[18] Caswell v. Maplewood Garage, 84 N. H. 241, 149 A. 746, 73 A.L.R. 433.

[19] See § 662, supra.

§ 664. **—As Dependent upon Whether Automobile Is Used for Commercial Purposes or for Pleasure.**—In determining what is sufficient to make out a prima facie case against the defendant in an automobile accident case, a distinction is sometimes drawn between cases where the injuries were caused by a pleasure automobile, and those where they were caused by a commercial truck.[5] In the latter case, there is obviously strong reason for assuming that the truck was being used in the owner's business, if at the time of the accident it was carrying or hauling goods ordinarily carried or hauled for the owner; while in the case of a pleasure car there is a likelihood that it was being used by members of the owner's family for their own pleasure, or even by a friend of the owner, or of his family. Upon this distinction the rules governing the proof necessary to establish a prima facie case where the accident was caused by the negligent operation of a commercial truck have been modified in some states.[6] In other words, although mere proof of defendant's ownership of a pleasure vehicle will not raise an inference or create a presumption that the person driving it is the owner's agent sufficient to establish a prima facie case of liability,[7] in the case of injuries by commercial vehicles, a contrary holding prevails, and proof of ownership is viewed as sufficient to create a presumption of liability.[8]

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[20] West v. Kern, 88 Or. 247, 171 P. 413, 1050, L.R.A.1918D, 920.

Annotation: 42 A.L.R. 913, s. 74 A.L.R. 960; 46 L.R.A.(N.S.) 1091, s. L.R.A.1918D, 924.

Ownership of an automobile gives rise to no presumption of liability on the part of the owner for injuries to one struck by the automobile while it was being driven by the owner's son. Hays v. Hogan, 273 Mo. 1, 200 S. W. 286, L.R.A.1918C, 715, Ann. Cas. 1918E, 1127.

Proof of ownership of the automobile by the defendant, coupled with the fact that it was being driven by a member of his family, with his permission, and, further, that it was purchased and maintained for the use of his family, make a prima facie case of liability. King v. Smythe, 140 Tenn. 227, 204 S. W. 296, L.R.A.1918F, 293.

[1] Guthrie v. Holmes, 272 Mo. 215, 198 S. W. 854, Ann. Cas. 1918D, 1123; White Oak Coal Co. v. Rivoux, 88 Ohio St. 18, 102 N. E. 302, 46 L.R.A.(N.S.) 1091, Ann. Cas. 1914C, 1082. Annotation: 42 A.L.R. 915, s. 74 A.L.R. 962.

[2] Stumpf v. Montgomery, 101 Okla. 257, 226 P. 65, 32 A.L.R. 1490.

Annotation: 42 A.L.R. 919, s. 74 A.L.R. 964.

[3] White Oak Coal Co. v. Rivoux, 88 Ohio St. 18, 102 N. E. 302, 46 L.R.A.(N.S.) 1091, Ann. Cas. 1914C, 1082.

[4] White Oak Coal Co. v. Rivoux, 88 Ohio St. 18, 102 N. E. 302, 46 L.R.A.(N.S.) 1091, Ann. Cas. 1914C, 1082.

Annotation: 42 A.L.R. 920.

[5] Annotation: 42 A.L.R. 921, s. 74 A.L.R. 966.

[6] Hays v. Hogan, 273 Mo. 1, 200 S. W. 286, L.R.A.1918C, 715, Ann. Cas. 1918E, 1127; Guthrie v. Holmes, 272 Mo. 215, 198 S. W. 854, Ann. Cas. 1918D, 1123.

[7] Annotation: 42 A.L.R. 921.

[8] Hays v. Hogan, 273 Mo. 1, 200 S. W.

G. TRIAL

1. IN GENERAL

§ 665. **Generally.**—The trial of civil actions for injuries arising out of the operation of motor vehicles is determined by the general rules applicable to the trial of other civil actions;[9] in such actions a right to trial by jury exists, and may be insisted on by either party.[10] In cases where a jury trial is had, it is the distinctive province of the court to decide questions of law as distinguished from questions of fact, and of the jury to try the facts of the case; each party has a right to have issues raised by pleadings, when supported by any competent evidence, submitted to the jury under proper instructions,[11] and if the verdict is one that reasonable men might find, the court should not disturb the decision of fact which the law has confided to the jury.[12] The purpose here is to discuss the particular application of these general principles in the trial of automobile cases.

§ 666. **Conduct of Trial.**—The general course of procedure in the actual trial of an automobile accident case, such as the right to open and close the order of proof in the introduction of evidence, objections to and motions to strike out evidence, the powers, duties, and conduct of the trial judge, and the conduct and argument of the counsel, is governed by the rules which apply to other civil actions.[13] Thus, if improper testimony is admitted, but no motion is then made to strike it out, the court may properly refuse to do so on the following day after the opposite party has moved for a nonsuit and opened his case to the jury.[14]

It may be stated as the prevailing rule, subject to but few qualifications or exceptions, that the fact that the defendant carries automobile liability insurance cannot, directly or indirectly, be injected into the case by evidence, argument, or remarks, so as to influence the jury, and that the violation of this rule ordinarily constitutes reversible error.[15] Few matters have been so zealously guarded against by the courts as a showing by the plaintiff, through inadvertence or otherwise, of the insurance protection running to the defendant in the action. The assumption, whether well taken or not, that jurors are instinctively prejudiced against insurance companies, particularly in automobile

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286, L.R.A.1918C, 715, Ann. Cas. 1918E, 1127; Guthrie v. Holmes, 272 Mo. 215, 198 S. W. 854, Ann. Cas. 1918D, 1123.

Annotation: 42 A.L.R. 921, s. 74 A.L.R. 966.

[9] See TRIAL [Also 26 R. C. L. p. 1008].

[10] See JURY [Also 16 R. C. L. p. 214, § 32].

[11] Packard v. O'Neil, 45 Idaho, 427, 262 P. 881, 56 A.L.R. 317.

[12] Bentson v. Brown, 186 Wis. 629, 203 N. W. 380, 38 A.L.R. 1417.

[13] See TRIAL [Also ARGUMENT OF COUNSEL, 2 R. C. L. p. 433; TRIAL, 26 R. C. L. p. 1008].

[14] Luckett v. Reighard, 248 Pa. 24, 93 A. 773, Ann. Cas. 1916A, 662.

[15] Watson v. Adams, 187 Ala. 490, 65 So. 528, Ann. Cas. 1916E, 565; Stehouwer v. Lewis, 249 Mich. 76, 227 N. W. 759, 74 A.L.R. 844; Taulborg v. Andresen, 119 Neb. 273, 228 N. W. 528, 67 A.L.R. 642; Birch v. Abercrombie, 74 Wash. 486, 132 P. 1020, 50 L.R.A.(N.S.) 59.

Annotation: 56 A.L.R. 1418, s. 74 A.L.R. 850.

The trial judge should require discontinuance by the attorney for plaintiff, in an action to recover damages for injury through an automobile collision, of a course in the examination of jurors tending to create prejudice by suggesting that an insurer is interested in the defense. Schwalen v. W. P. Fuller & Co. 107 Wash. 476, 182 P. 592, 187 P. 367, 10 A.L.R. 296.

Refusal of the trial court to declare a mistrial in an action for injuries sustained in an automobile accident, because of improper questions, while the jury was being drawn, as to whether any of the jurors were stockholders in a certain insurance company, is an abuse of discretion requiring reversal of a judgment for the plaintiff, where the defendant's testimony, admitted without objection, that he was not insured, was stricken out on motion of plaintiff's counsel, and the trial court refused defendant's request at the conclusion of the testimony to disregard any question of insurance, the record not disclosing that any instruction was otherwise given to neutralize the injurious effect of the questions. Patterson v. Surpless, 107 N. J. L. 305, 151 A. 754, 74 A.L.R. 841.

accident cases, is so well grounded in the juridical concept upon the matter, that there appears to be no hesitancy in setting aside a verdict otherwise amply justified by the facts, merely because of the admission of such evidence, however innocuous or ineffective it may appear in its relation to other matters of a far more determinative character. It has been repeatedly held that the attorney for the plaintiff in a personal injury suit should not be permitted to bring out on direct examination of his witnesses, or by introducing into the evidence documents tending to show the fact that the defendant carries liability insurance, thereby leaving the inference that he will not be called upon to pay any judgment that may be recovered.[16] Whether made at the opening of the case, or in the closing argument, or at any stage of the trial, references to or remarks upon matters tending to bring out the fact that the defendant carries automobile liability insurance, or that he will not have to pay any judgment rendered in the case, are viewed as improper.[17]

§ 667. Taking Case from Jury.—In ruling on a motion for a nonsuit or for a directed verdict, or upon a demurrer to the evidence, based upon insufficiency of proof, the court in an automobile case is governed by the rules applicable in other civil actions,[18] especially negligence actions.[19] The court must accept the truth of the evidence of the party against whom the motion or demurrer is made and construe it most favorably to him; it cannot base its judgment on the evidence of the moving party, or draw inferences favorable to him.[20] A motion for a nonsuit or a directed verdict on the ground that the evidence clearly establishes certain facts must be refused if there is ground for debate as to what facts are established.[1] Such a motion cannot be granted for the defendant in an automobile accident case, if there is any substantial evidence of negligence on the part of the defendant[2] which has a causal connection with the accident, unless it is proved that the plaintiff's own lack of due care contributed to his injury.[3] Such a motion must be denied when the evidence on behalf of the plaintiff, and the reasonable inferences to be drawn therefrom, disregarding evidence in conflict therewith, tend to establish the defendant's negligence.[4] In the absence, however, of anything to show whether the accident in which the plaintiff was injured was caused by the negligence of the defendant, there is nothing to submit to the jury.[5] The defendant is entitled to a directed verdict where there is an entire failure of proof as to any essential fact of the plaintiff's case, or where the nonexistence of such fact is established.[6] And if the evidence in an action for damages occasioned by a collision of automobiles establishes the plaintiff's contributory negligence, a demurrer to his evidence is properly sustained.[7]

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[16] Akin v. Lee, 206 N. Y. 20, 99 N. E. 85, Ann. Cas. 1914A, 947; Lytton v. Marion Mfg. Co. 157 N. C. 331, 72 S. E. 1055, Ann. Cas. 1913C, 358; Vasquez v. Pettit, 74 Or. 496, 145 P. 1066, Ann. Cas. 1917A, 439; Birch v. Abercrombie, 74 Wash. 486, 133 P. 1020, 50 L.R.A.(N.S.) 59.

Annotation: 56 A.L.R. 1418, s. 74 A.L.R. 850.

[17] Annotation: 74 A.L.R. 858.

[18] See TRIAL [Also 26 R. C. L. p. 1060, §§ 68–87].

[19] See NEGLIGENCE.

[20] Wood v. North Carolina Pub. Serv. Corp. 174 N. C. 697, 94 S. E. 459, 1 A.L.R. 942; Marland Ref. Co. v. Duffy, 94 Okla. 16, 220 P. 846, 35 A.L.R. 52.

[1] West v. Jaloff, 113 Or. 184, 232 P. 642, 36 A.L.R. 1391.

Where it appears that the deviation from the direct route of return to the garage at the time of an accident was not so great as to warrant the conclusion of law that defendant's employee was acting outside the scope of his employment, it is proper to refuse to direct a verdict for defendant. Luckett v. Reighard, 248 Pa. 24, 93 A. 773, Ann. Cas. 1916A, 662.

[2] Riccio v. Ginsberg, 49 R. I. 32, 139 A. 652, 62 A.L.R. 967.

[3] Milbury v. Turner Center System, 274 Mass. 358, 174 N. E. 471, 73 A.L.R. 1070.

[4] Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A.L.R. 1327; Vandell v. Sanders, 85 N. H. 143, 155 A. 193, 80 A.L.R. 550.

Where there is evidence from which a jury might properly find that the defendant, knowing of plaintiff's exposed position on the running board, operated his automobile without due regard for plaintiff's safety, a motion for a nonsuit or a directed verdict must be denied. Vandell v. Sanders, 85 N. H. 143, 155 A. 193, 80 A.L.R. 550.

[5] Klein v. Beeten, 169 Wis. 385, 172 N. W. 736, 5 A.L.R. 1237.

The making of a prima facie case, where based solely upon an inference as distinguished from a presumption of law, does not preclude the court from withdrawing the cause from the jury after all the evidence is submitted.[8]

And if the testimony is incredible, or contrary to scientific principles or laws of nature, the case may be taken from the jury.[9]

2. Questions of Law and Fact

a. In General

§ 668. Generally.—In damage actions arising from the use and operation of automobiles, as in other civil actions tried before a jury,[10] where the evidence respecting an issue of fact is contradictory, the court cannot rule as a matter of law that the fact has or has not been proved, but must leave the determination of this question to the jury.[11] Generally, it may be said that when not only the facts constituting the conduct of the parties, but also the standard of care which they should have exercised, are to be determined, the case is entirely one of fact.[12] Ordinarily, whether an inference or presumption has been overcome is a question for the jury, but if the evidence is of such character that but one reasonable deduction can be made therefrom, the court may so declare as a matter of law.[13] It also is usually a question for the jury whether persons riding in an automobile were engaged in a joint enterprise so that the negligence of the driver would be imputable to the occupants, although the particular circumstances of the case may be such as to establish a joint adventure as a matter of law.[14] Throughout this article it has been necessary, for a complete understanding of the discussion of various particular matters arising in connection with the operation of the automobile causing the injury complained of, to discuss whether the particular matter was one of fact for the jury or a question of law for the court.

§ 669. Proximate Cause.—As in other negligence actions,[15] the question of proximate cause in automobile accident cases is ordinarily for the jury, even where the evidence is undisputed, if different inferences may fairly be drawn therefrom.[16] Where it is not plain that reasonable men could not reasonably find a causal relation between defendant's act and the injury, or a part of the injury, the court must leave it to the jury to find as a fact whether defendant's conduct was a substantial factor in producing the injury, or part of the injury;[17] but the question is for the court where but one inference and conclusion can be drawn from the evidence.[18] In other words, where fair-minded men may differ as to the facts, or as to conclusions to be deduced therefrom, the question of proximate cause is for the jury; otherwise for the court;[19] whether only one inference may be drawn must necessarily ultimately rest with the court.[20] It is for the court to determine whether or not the facts in evidence support any reasonable inference of a causal relation between an act of negligence on defendant's part and the injury complained of, in whole or in part, and it must reach its conclusion by determining whether the evidence reasonably justifies the submission to the jury of the question whether defendant's conduct was a substantial factor in producing plaintiff's injuries.[1]

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[6] **Where the testimony both of the driver and the owner of the automobile which caused the accident,** that it was loaned for a purpose other than that for which it was being driven, is uncontradicted by any fact or circumstance which would tend to cast doubt upon it, the owner is entitled to the direction of a verdict. Heavilin v. Wendell, 214 Iowa, 844, 241 N. W. 654, 83 A.L.R. 872.

[7] Ferguson v. Lang, 126 Kan. 273, 268 P. 117, 63 A.L.R. 1423.

Where uncontradicted evidence shows that an automobile collision which occurred when defendant's car, in turning to the left to pass a vehicle ahead of it, struck the car in which plaintiff was riding, which was trying to pass defendant's car, was wholly due to the failure of the driver of the passing car to signal his intention to pass as required by the traffic laws, the defendant is entitled to a directed verdict. Meese v. Goodman, 167 Md. 658, 176 A. 621, 98 A.L.R. 480.

[8] Judson v. Bee Hive Auto Serv. Co. 136 Or. 1, 294 P. 588, 297 P. 1050, 74 A.L.R. 944.

[9] Seiwell v. Hines, 273 Pa. 259, 116 A. 919, 21 A.L.R. 139.

[10] See Trial.

[11] Bacon v. Boston Elev. R. Co. 256 Mass. 30, 152 N. E. 35, 47 A.L.R. 1100.

In an action for the death of a motorcyclist resulting from a collision with the defendant's automobile, refusal to take from the jury's consideration the question of the defendant's alleged failure to render aid and assistance to the motorcyclist after the accident is not error, where the plaintiffs' counsel had stipulated that the motorcyclist died as the result of the injuries received, since no intention was evidenced in the stipulation to eliminate the charge of negligence predicated on the failure of the defendant to render assistance. Packard v. O'Neil, 45 Idaho, 427, 262 P. 881, 56 A.L.R. 317.

[12] Rozycki v. Yantic Grain & Products Co. 99 Conn. 711, 122 A. 717, 37 A.L.R. 582.

[13] Judson v. Bee Hive Auto Serv. Co. 136 Or. 1, 294 P. 588, 297 P. 1050, 74 A.L.R. 944.

[14] Annotation: 48 A.L.R. 1083.

[15] See Negligence; Trial.

It is for the jury to say whether allowing a windshield to become so clouded as to impair the driver's vision or view,[2] or the absence or insufficiency of lights upon an automobile,[3] or the circumstance that a motorist had violated a traffic regulation, was a causative factor in the accident involved,[4] unless it appears that there is no dispute concerning the facts and circumstances surrounding the occurrence and the inferences that may reasonably be drawn therefrom.[5] Thus, whether a violation by an automobile of a statute forbidding the cutting of corners in turning into an intersecting street[6] constituted the proximate cause of an accident is generally held to present a question of fact for the jury, unless the facts and circumstances surrounding the accident are undisputed, and admit of but one inference upon this issue.[7]

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[16] Bachelder v. Morgan, 179 Ala. 339, 60 So. 815, Ann. Cas. 1915C, 888; Loveless v. Red Top Cab Co. 158 Wash. 474, 291 P. 344, 79 A.L.R. 347; O'Malley v. Eagan, 43 Wyo. 233, 2 P. (2d) 1063, 77 A.L.R. 582, rehearing denied in 43 Wyo. 350, 5 P. (2d) 276, 77 A.L.R. 597.

Annotation: 14 A.L.R. 795, 796.

Whether a fracture of the skull sustained by an occupant of an automobile, who, though uninjured by the collision, fainted from fright and fell on stepping out of the car, was a proximate result of the collision, is a question of fact. Comstock v. Wilson, 257 N. Y. 231, 177 N. E. 431, 76 A.L.R. 676.

[17] Mahoney v. Beatman, 110 Conn. 184, 147 A. 762, 66 A.L.R. 1121.

[18] O'Malley v. Eagan, 43 Wyo. 233, 2 P. (2d) 1063, 77 A.L.R. 582, rehearing denied in 43 Wyo. 350, 5 P. (2d) 276, 77 A.L.R. 597.

[19] Wyatt v. Chesapeake & P. Teleph. Co. 158 Va. 470, 163 S. E. 370, 82 A.L.R. 386.

[20] O'Malley v. Eagan, 43 Wyo. 233, 2 P. (2d) 1063, 77 A.L.R. 582, rehearing denied in 43 Wyo. 350, 5 P. (2d) 276, 77 A.L.R. 597.

[1] Mahoney v. Beatman, 110 Conn. 184, 147 A. 762, 66 A.L.R. 1121.

[2] Schwalen v. W. P. Fuller & Co. 107 Wash. 476, 182 P. 592, 187 P. 367, 10 A.L.R. 296.

[3] See § 253, supra.

[4] Railway Exp. Agency v. Little (C. C. A. 3d) 50 F. (2d) 59, 75 A.L.R. 963; Riccio v. Ginsberg, 49 R. I. 32, 139 A. 652, 62 A.L.R. 967. Putting a motor vehicle in motion against traffic direction or regulation is substantive evidence of negligence, and if there are any facts which excuse it, it is for the defendant to show them. Railway Express Agency v. Little, 50 F. (2d) 59, 75 A.L.R. 963.

The question whether plaintiff's negligence in violating a statute limiting the rate of speed of vehicles at a street intersection was the proximate cause of his being struck by another automobile proceeding on the intersecting street is for the jury where there is testimony on behalf of the plaintiff that he was more than halfway across the street at the time of the collision, so that the approaching car would not have struck him had it remained on its proper side of the street, and had he reached the intersection before or at the same time the other car did so, he would have had the right of way, though, according to testimony on defendant's behalf, plaintiff's car had not reached the center of the street when defendant swerved to the left in an attempt to avoid it. Larsen v. Webb, 332 Mo. 370, 58 S. W. (2d) 967, 90 A.L.R. 67.

[5] Annotation: 14 A.L.R. 795.

[6] See § 326, supra.

[7] Annotation: 6 A.L.R. 323.

The proximate cause of injury in an automobile accident case need not be shown by direct testimony, but may be determined from the circumstances in the case.[8]

§ 670. Intervening Cause.—Intervening acts of negligence, or other factors, do not necessarily affect the actionability of the primary inducing cause of an automobile accident; the test is found in the character of the intervening acts and in the natural and probable connection between the wrong done and the injurious consequences. The relationship between the acts complained of and the injuries sustained is generally one for the jury to decide in the light of all the surrounding facts and circumstances.[9]

§ 671. Credibility of Witnesses.—The general rules governing the determination of the credibility of witnesses upon the trial[10] apply to cases involving automobile accidents. The credibility of witnesses,[11] and the weight to be accorded their testimony,[12] are questions peculiarly within the province of the jury. It is the province of the jury to reconcile conflicting statements in plaintiff's evidence, whether of the same or of different witnesses, or to draw the line between them and say which shall prevail, unless the conflicting statements are so irreconcilable that a finding one way or the other would be a mere guess.[13] The jury is not bound to believe the testimony of an interested witness.[14] However, the uncontradicted testimony of a credible witness cannot be disregarded by the jury, especially if it is corroborated by other evidence.[15]

§ 672. Competency and Authority of Driver.—Where one, for purposes wholly apart from any business or enterprise of his, intrusted an automobile to a minor unaccustomed to its use, the question of competency is one for the jury under proper instructions.[16]

Whether or not a servant causing injury to a stranger was acting within the scope of his employment, so as to render the master liable[17] or whether he had so far departed from or exceeded the authority given him on the particular occasion, as to relieve defendant from liability for injury caused,[18] is usually a question for the jury although it may be a question for the court where there is no conflict in the evidence. When the owner is present in a car driven by another, the question whether the driver was under the owner's control, or whether they were engaged in a common enterprise, is for the jury.[19]

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[8] O'Malley v. Eagan, 43 Wyo. 233, 2 P. (2d) 1063, 77 A.L.R. 582, rehearing denied in 43 Wyo. 350, 5 P. (2d) 276, 77 A.L.R. 597.

Annotation: 77 A.L.R. 598.

[9] Maloney v. Kaplan, 233 N. Y. 426, 135 N. E. 838, 26 A.L.R. 909. The questions of negligence and proximate cause are for the jury where a motor vehicle left standing in the street is set in motion by strangers, to the injury of a third person.

[10] See TRIAL.

[11] Hempel v. Hall, 136 Md. 174, 110 A. 210, 9 A.L.R. 1245 (police officer testifying with respect to an automobile accident); Carlton v. Boudar, 118 Va. 521, 88 S. E. 174, 4 A.L.R. 1480; Mitchell v. Churches, 119 Wash. 547, 206 P. 6, 36 A.L.R. 1132.

Annotation: 9 A.L.R. 1248.

[12] Crowell v. Duncan, 145 Va. 489, 134 S. E. 576, 50 A.L.R. 1425.

[13] Railway Exp. Agency v. Little (C. C. A. 3d) 50 F. (2d) 59, 75 A.L.R. 963.

[14] Mitchell v. Churches, 119 Wash. 547, 206 P. 6, 36 A.L.R. 1132.

[15] Potts v. Pardee, 220 N. Y. 431, 116 N. E. 78, 8 A.L.R. 785.

[16] Elliott v. Harding, 107 Ohio St. 501, 140 N. E. 338, 36 A.L.R. 1128.

[17] Crowell v. Duncan, 145 Va. 489, 134 S. E. 576, 50 A.L.R. 1425.

Annotation: 45 A.L.R. 485.

Evidence, in an action against a partnership conducting an automobile garage business for injuries inflicted by an automobile, of a statement in a deposition by one partner that he thought it might be said that the driver of the car was on a partnership errand in procuring automobile parts, because they were not in stock in the garage, and that he was willing that the driver should be considered his agent in making the trip for the partnership, and of a statement by the other partner that he felt the partnership was responsible, is of doubtful sufficiency in substance to carry to the jury the question whether the driver of the car was the agent of the partnership. Caswell v. Maplewood Garage, 84 N. H. 241, 149 A. 746, 73 A.L.R. 433.

Whether or not an employee who, as part of his compensation, was entitled to the use of his employer's automobile was acting in the employer's business at the time he negligently brought the car into collision with a railroad train so as to prevent the owner from holding the railroad company liable for its negligence is a question for the jury where, although he took the car for a pleasure drive of his own, he stops on the way home to carry an express package for his employer without the latter's instructions to do so. Lloyd v.

Where the driver of a taxicab was in charge of it during business hours within the territory of his employment, with a taxi sign displayed, the mere fact that he had a friend in the taxi with him, and that he and the friend testify that they were pursuing their own pleasure, is not conclusive of the question, as a matter of law, in an action to hold the master liable for injury inflicted by the driving of the car.[20]

b. NEGLIGENCE OF DEFENDANT

(1) IN GENERAL

§ 673. Generally.—The question of the defendant's negligence, or the negligence of his agent or servant, in the operation of the motor vehicle alleged to have caused the injury or damage for which action is brought, is a question for the jury, where there is a reasonable doubt as to the facts, or as to the inference to be drawn from them; i. e., where reasonable men may differ as to the existence of such negligence.[1] When negligence may reasonably and legitimately be inferred from the evidence, it is for the jury to say whether from such evidence negligence ought to be inferred.[2] If there is evidence which would sustain a verdict against defendant, even though such evidence is simply of the violation of a legal requirement, the plaintiff is entitled to have the question of negligence submitted to the jury unless the negligent act had no causal connection with the accident, or his own lack of due care contributed to his injury.[3] To justify a court in characterizing conduct as negligent in law, it must involve some prominent and decisive act, in regard to the effect and character of which no room is left for ordinary minds to differ.[4] In determining whether conduct was negligent, it is for the jury to say whether an

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Northern P. R. Co. 107 Wash. 57, 181 P. 29, 6 A.L.R. 307.

[18] Johnson v. Evans, 141 Minn. 356, 170 N. W. 220, 2 A.L.R. 891; Kohlman v. Hyland, 54 N. D. 710, 210 N. W. 643, 50 A.L.R. 1437.

The question whether the deviation of a servant, who was driving an automobile belonging to the defendant, from the prescribed route, resulted in such an abandonment of the master's service as to exonerate the latter from liability on account of the servant's tortious acts, is generally one of fact to be determined by the jury, and not a matter of law to be decided by the court. Kohlman v. Hyland, 54 N. D. 710, 210 N. W. 643, 50 A.L.R. 1437.

[19] Annotation: 2 A.L.R. 891.

[20] Crowell v. Duncan, 145 Va. 489, 134 S. E. 576, 50 A.L.R. 1425.

[1] Crawford v. McElhinney, 171 Iowa, 606, 154 N. W. 310, Ann. Cas. 1917E, 221; American Exp. Co. v. Terry, 126 Md. 254, 94 A. 1026, Ann. Cas. 1917C, 650; Pratt v. Western Bridge & Constr. Co. 116 Neb. 553, 218 N. W. 397, 58 A.L.R. 527, later appeal in 118 Neb. 736, 226 N. W. 324; Tullgren v. Amoskeag Mfg. Co. 82 N. H. 268, 133 A. 4, 46 A.L.R. 380; Auer v. Sinclair Ref. Co. 103 N. J. L. 372, 137 A. 555, 54 A.L.R. 623; Marland Ref. Co. v. Duffy, 94 Okla. 16, 220 P. 846, 35 A.L.R. 52; McClure v. Wilson, 109 Wash. 166, 186 P. 302, 18 A.L.R. 1421; Hiscock v. Phinney, 81 Wash. 117, 142 P. 461, Ann. Cas. 1916E, 1044.

It is for the jury to say whether the driver of an automobile, seeing a person alight from a street car and turn towards the sidewalk without ascertaining the whereabouts of automobiles, is negligent in continuing his course without warning, or apparently slackening his speed, and striking and injuring such person within the intersection of streets, where it is the duty of a driver to look out for persons alighting from street cars. McClure v. Wilson, 109 Wash. 166, 186 P. 302, 18 A.L.R. 1421.

[2] Auer v. Sinclair Ref. Co. 103 N. J. L. 372, 137 A. 555, 54 A.L.R. 623.

[3] Milbury v. Turner Centre System, 274 Mass. 358, 174 N. E. 471, 73 A.L.R. 1070.

[4] Chesapeake & P. Teleph. Co. v. Merriken, 147 Md. 572, 128 A. 277, 41 A.L.R. 763.

average prudent person placed in the particular situation disclosed by the evidence, with the same knowledge and means of knowledge of the surrounding circumstances, would have acted in the same way.[5]

Where liability attaches only for gross negligence, it is for the jury, under proper instructions of the court, to pass upon the question whether such negligence exists.[6]

Under disputed facts, the court must submit the case to the jury upon the question of comparative negligence.[7]

(2) CONDUCT TOWARDS PARTICULAR PERSONS

§ 674. Pedestrians—Walking along Highway.—Whenever the evidence relative to the negligence or care of the driver of an automobile which struck a pedestrian is conflicting, or different inferences may reasonably be drawn from unconflicting testimony, the jury must be permitted to determine whether the defendant was negligent. The question of the negligence of the operator of an automobile in injuring a pedestrian walking along a street or highway, as affected by the operator's failure to give timely warning,[8] or by any other factors explanatory of the occurrence, such as absence of lights,[9] the crowding of the pedestrian,[10] or excessive speed,[11] is usually one for the jury to consider in connection with all the existing circumstances,[12] and in accordance with the general rules determinative of the relative rights and duties of motorists and pedestrians upon the highway,[13] unless, of course, the facts are undisputed and the inferences that may be drawn therefrom are not conflicting.[14]

The jury must determine the questions of relative negligence in case of collision between an automobile and a pedestrian who was walking along the extreme left of the road.[15]

§ 675. —Crossing Street.—The issue of a motorist's negligence in striking a pedestrian crossing the street at a regular crossing generally presents a factual question to be decided by the jury in the light of all the surrounding facts and circumstances, unless the facts are undisputed, and conflicting inferences cannot be drawn therefrom.[16] The age of the person injured, whether an infant or adult,[17] the conditions of traffic at the place of the accident,[18] the place where the pedestrian attempted to cross,[19] the speed of the vehicle,[20] and any other factors explanatory of the degree of care exercised by those involved in the occurrence, are subject to proof at the trial.[1] A pedestrian who crosses a street between crossings is required to use greater care for his own safety than when he crosses at the place provided for pedestrians;[2] Whether such additional measure of care was exercised is generally held to present a question of fact for the jury.[3] It has been ruled that in arriving at such determination the jury must be guided by the conventional test of what the ordinarily prudent person would have done under similar circumstances.[4]

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[5] Charbonneau v. MacRury, 84 N. H. 501, 153 A. 457, 73 A.L.R. 1266.

[6] Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A.L.R. 1327.

[7] Pratt v. Western Bridge & Constr. Co. 116 Neb. 553, 218 N. W. 397, 58 A.L.R. 527, later appeal in 118 Neb. 736, 226 N. W. 324.

[8] Annotation: 67 A.L.R. 102, s. 93 A.L.R. 556.

[9] Hatzakorzian v. Rucker-Fuller Desk Co. 197 Cal. 82, 239 P. 709, 41 A.L.R. 1027.

Annotation: 67 A.L.R. 103, s. 93 A.L.R. 557.

[10] Annotation: 67 A.L.R. 108, s. 93 A.L.R. 559.

[11] Woodhead v. Wilkinson, 181 Cal. 599, 185 P. 851, 10 A.L.R. 291.

Annotation: 67 A.L.R. 105, s. 93 A.L.R. 558.

[12] Woodhead v. Wilkinson, 181 Cal. 599, 185 P. 851, 10 A.L.R. 291; Marton v. Pickrell, 112 Wash. 117, 191 P. 1101, 17 A.L.R. 68.

Annotation: 67 A.L.R. 97, s. 93 A.L.R. 551.

[13] See supra, §§ 187 et seq.

[14] Hatzakorzian v. Rucker-Fuller Desk Co. 197 Cal. 82, 239 P. 709, 41 A.L.R. 1027.

[15] Marton v. Pickrell, 112 Wash. 117, 191 P. 1101, 17 A.L.R. 68.

[16] Annotation: 14 A.L.R. 1176, s. 67 A.L.R. 313.

[17] See supra, § 185.

[18] See supra, §§ 264 et seq.

[19] See supra, § 211.

[20] See supra, § 259.

[1] Negative testimony by persons awaiting an opportunity to cross a street, that standing automobiles gave no signal before starting, may outweigh positive testimony of the occupants of the cars that such signals were given. Richter v. Dahlman & I. Co. 179 Wis. 7, 190 N. W. 841, 30 A.L.R. 747.

§ 676. **—On Sidewalk.**—When an automobile leaves its accustomed place of travel in the street and runs upon the sidewalk and there strikes a pedestrian, the cases have quite uniformly held that the plaintiff establishes a prima facie case by the mere proof of the accident.[5] Where the motorist presents proof tending to show that the accident was due to causes not under his immediate control, such as the fact that he was driven on to the sidewalk by the negligent operation of another vehicle,[6] a question of fact for the jury is generally presented as to the proximate cause of the accident.[7]

§ 677. **—Boarding or Alighting from Street Car.**—Not unlike other situations involving injuries to pedestrians through the operation of motor vehicles, it is generally held that where an automobile strikes a pedestrian who is boarding or alighting from a street car,[8] whether the motorist was negligent is a question of fact for the jury to decide.[9] Where the facts in the case are not in dispute, and the inferences that may be drawn therefrom do not conflict, the issue of the motorist's negligence may properly be decided as a matter of law.[10]

§ 678. **Persons Repairing Vehicle in Road.**—It being well settled that the driver of a vehicle approaching a person engaged about an automobile in the highway owes him the duty to exercise reasonable care to avoid injuring him, it is generally held that the question whether such care has been used in any particular case depends upon the facts and circumstances which are made to appear, and is generally one of fact for the determination of the jury.[11] There are numerous factors that must be taken into consideration in arriving at such determination, such as conditions of visibility, the character of the road, the speed of the vehicle, the position of the person injured at the time of the accident, and any other factors explanatory of the occurrence.[12]

§ 679. **Person Darting in Front of Automobile.**—The negligence of an automobilist who strikes a person that suddenly darts in front of the vehicle is ordinarily a factual question for the jury to decide,[13] in accordance with the well-settled rules on the subject, particularly in the light of the established rule that a motorist has the right to assume that the pedestrian will remain in the place of safety until the car has passed, and will not suddenly dart into a place of danger.[14] To precisely what point in the series of events leading up to the accident the motorist was justified in relying upon such assumption is for the jury to decide upon the basis of the available facts.[15]

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[2] See supra, § 454.

[3] Sheldon v. James, 175 Cal. 474, 166 P. 8, 2 A.L.R. 1493.
Annotation: 14 A.L.R. 1178.

[4] Peterson v. Ballantine, 205 N. Y. 29, 98 N. E. 202, 39 L.R.A.(N.S.) 1147; Watts v. Plymouth, 255 Pa. 185, 99 A. 470, 3 A.L.R. 1110.
Annotation: 14 A.L.R. 1184.

[5] Linberg v. Stanto, 211 Cal. 771, 297 P. 9, 75 A.L.R. 555.
Annotation: 75 A.L.R. 559.

[6] Annotation: 75 A.L.R. 567.

[7] Annotation: 75 A.L.R. 567.

[8] See supra, § 211.

[9] Day v. Cunningham, 125 Me. 328, 133 A. 855, 47 A.L.R. 1229. An automobile driver passing a car which has stopped to take on or discharge passengers should not pass close to the car, and, if he does so, and strikes a person alighting or embarking, his negligence is for the jury.
Annotation: 47 A.L.R. 1237.

[10] Annotation: 47 A.L.R. 1233.

[11] Daughraty v. Tebbets, 122 Me. 397, 120 A. 354, 34 A.L.R. 1507; Grein v. Gordon, 280 Pa. 576, 124 A. 737, 34 A.L.R. 1513; Humes v. Schaller, 39 R. I. 519, 99 A. 55, L.R.A. 1917B, 316; Long v. Steffen, 194 Wis. 179, 215 N. W. 892, 61 A.L.R. 1155; Schacht v. Quick, 178 Wis. 330, 190 N. W. 87, 25 A.L.R. 130.
Annotation: 25 A.L.R. 134, s. 34 A.L.R. 1513, and 61 A.L.R. 1159.

[12] Annotation: 25 A.L.R. 134, s. 34 A.L.R. 1513, and 61 A.L.R. 1159.

[13] Klink v. Bany, 207 Iowa, 1241, 224 N. W. 540, 65 A.L.R. 187; Burvant v. Wolfe,

§ 680. **Traffic Officer or Person Directing Traffic.**—The question whether the driver of a motor vehicle was negligent in causing injury to one who was directing traffic is generally for the jury to decide,[16] unless the facts surrounding the occurrence are undisputed, and present no conflicting inferences.[17] The issue of the motorist's negligence is to be considered in the light of the well-settled rule that while the drivers of automobiles owe a traffic officer the same duty that they owe other pedestrians,[18] he is not required to use the same degree of care and caution in looking for approaching vehicles as an ordinary pedestrian.[19]

§ 681. **Bicyclist.**—In accordance with the well-settled rule that the rights and duties of motorists and bicyclists are reciprocal, and that each owes to the other the duty to exercise reasonable care and caution to avoid injury,[20] whether such care was exercised, and to what extent the negligence of the motorist, or bicyclist, proximately contributed to the accident, ordinarily presents a question of fact for the jury, unless the facts are not in dispute, and are such as to admit of but one inference upon these issues.[1]

§ 682. **Infants.**—It being well settled that an infant charged with actionable negligence is not held to the same standard of care and caution as an adult, but only to such behavior as may reasonably be expected of a child of like age, intelligence, and experience,[2] it is generally held in actions for injuries sustained by minors in automobile accidents that a question for the jury is presented as to whether the conduct of the infant conformed to the test of what might have been expected of another person of like intelligence, experience, and years, placed in a similar situation.[3]

§ 683. **Guests.**—In conformity with the rule prevailing in the majority of jurisdictions, that the driver of an automobile owes an invited guest the duty of exercising reasonable care in its operation, so as not unreasonably to expose him to danger and injury by increasing the hazard of travel,[4] it has been held to be a factual question properly to be decided by the jury as to whether the requisite degree of care was exercised in a specific situation,[5] unless the inferences that may be drawn from the undisputed facts are not in conflict.[6]

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126 La. 787, 52 So. 1025, 29 L.R.A.(N.S.) 677.

Annotation: 65 A.L.R. 192.

[14] See supra, § 195.

[15] Annotation: 65 A.L.R. 192.

[16] Beyrent v. Kaplan, 315 Pa. 353, 172 A. 651, 92 A.L.R. 1515.

Annotation: 92 A.L.R. 1518.

[17] Annotation: 92 A.L.R. 1518.

[18] Annotation: 92 A.L.R. 1518.

[19] Beyrent v. Kaplan, 315 Pa. 353, 172 A. 651, 92 A.L.R. 1515.

[20] See supra, § 184.

[1] Rogers v. Phillips, 206 Mass. 308, 92 N. E. 327, 28 L.R.A.(N.S.) 944.

Annotation: 28 L.R.A.(N.S.) 944.

[2] See NEGLIGENCE [Also 20 R. C. L. 125, § 105].

[3] Charbonneau v. MacRury, 84 N. H. 501, 153 A. 457, 73 A.L.R. 1266; Buch v. Amory Mfg. Co. 69 N. H. 257, 44 A. 809, 76 Am. St. Rep. 163; Gulf, C. & S. F. R. Co. v. McWhirter, 77 Tex. 356, 14 S. W. 26, 19 Am. St. Rep. 755; Briese v. Maechtle, 146 Wis. 89, 130 N. W. 893, 35 L.R.A.(N.S.) 574, Ann. Cas. 1912C, 176.

[4] For detailed treatment of subject of liability of motorist for injuries to guest, see supra, §§ 229 et seq.

[5] Avery v. Thompson, 117 Me. 120, 103 A. 4, L.R.A.1918D, 205, Ann. Cas. 1918E, 1122.

[6] Annotation: 65 A.L.R. 956.

Where the liability of an owner or operator of an automobile to a guest is limited to gross negligence or the like, it is the province of the jury in an action by a guest, to determine, upon the facts introduced in evidence, whether or not the driver was guilty of such negligence.[7]

§ 684. Persons Riding outside Car.—The question whether the operator of an automobile was negligent in respect of the duty owed to one riding on the running board of the automobile or some other place outside of the car is, ordinarily, a question of fact for the jury.[8]

(3) Particular Acts and Situations

§ 685. Violation of Law of Road.—In accordance with the well-settled rule that the conventional law of the road is not an inflexible, hard and fast rule, the violation of which will necessarily render the offender guilty of negligence, or contributory negligence, as a matter of law,[9] it is generally held that whether a motorist, in turning improperly or otherwise violating the rules of the road, acted as a reasonably prudent traveler would have done under similar circumstances, is a factual question for the jury to decide.[10] Any circumstances explanatory of the motorist's failure to comply with the rules of the road are admissible in evidence at the trial; as, for example, proof that he swerved from the lane of traffic to avoid an obstruction or a person in the road.[11] Whether such acts of the driver constituted the proximate cause of the accident is similarly a question of fact for the jury to decide.[12]

§ 686. Skidding.—Where the evidence is conflicting, and different inferences of fact can be drawn therefrom, whether a motorist was negligent in skidding generally presents a question for the jury to decide in the light of all the surrounding facts and circumstances.[13] In some instances, proof of the skidding of a car, even without negligence on the part of its driver, may be found by the jury to amount to an intervening cause, relieving negligence in other respects of its character as a proximate cause of the injury and an actionable wrong.[14]

§ 687. Backing.—The inquiry whether the defendant was negligent in the manner in which he backed his vehicle,[15] and the extent to which such negligence contributed to the accident resulting in the injuries complained of, are generally matters for the jury to decide, where the evidence on these points is conflicting, and different inferences may reasonably be drawn therefrom.[16]

In determining whether or not one backing an automobile in a public street, and colliding with a pedestrian on the street, was guilty of negligence resulting in the injury, the jury must consider all the facts of the case,—the direction in which the car was traveling, the rate of speed, whether any signal or warning was given, the condition of the street, the situation and surroundings of the parties, the manner in which the injured person was crossing the street, and what observation, if any, the one in charge of the car made while backing it.[17]

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[7] Annotation: 74 A.L.R. 1198, s. 86 A.L.R. 1145, and 96 A.L.R. 1479.

[8] Annotation: 80 A.L.R. 557.

[9] See supra, §§ 264 et seq.

[10] Lawson v. Dye, 106 W. Va. 494, 145 S. E. 817, 63 A.L.R. 271.
Annotation: 63 A.L.R. 277.

[11] Annotation: 63 A.L.R. 277.

[12] Annotation: 63 A.L.R. 279.

[13] Zarzana v. Neve Drug Co. 180 Cal. 32, 179 P. 203, 15 A.L.R. 401.
Annotation: 58 A.L.R. 276.

[14] Annotation: 58 A.L.R. 265.

[15] See supra, § 328.

[16] Annotation: 2 A.L.R. 1499; 67 A.L.R. 651.

§ 688. Driving while Asleep.—Whether or not one going to sleep while driving an automobile was negligent so as to render him liable for injury caused by the running of the car while he was in that condition is a question of fact upon consideration of all the circumstances, including the fact that sleep does not come upon one without warning of its approach.[18] It has been held, however, that the mere fact that one driving an automobile permitted himself to go to sleep justified an inference of negligence sufficient to make a prima facie case in favor of one injured by the car while the driver was in that condition, if no circumstances tending to excuse or justify his conduct are proven.[19]

§ 689. Speeding.—Upon issues of negligence and contributory negligence, where the evidence is in conflict as to the speed of each of the vehicles and as to the distance of each of the vehicles from the point at which the accident occurred at the time when the driver of each car first had a reasonable opportunity to observe the approach of the other, elements are presented which the triers of the facts must consider in their estimate of conduct.[20] It is generally for the jury to decide whether the speed of the vehicle proximately contributed to the accident,[1] and whether such speed was excessive, considering in connection therewith the hazards of the surrounding circumstances.

§ 690. Reliance upon Traffic Signal.—It being well settled that a motorist is not permitted to rely blindly upon traffic signals which give him the right of way,[2] it has been held that the question to what extent the motorist was justified in relying upon the signals is ordinarily for the jury to decide, except, of course, where the facts of the case are undisputed, and only one inference may properly be drawn therefrom.[3]

§ 691. Parking on Wrong Side of Street.—It being clear that the mere fact of stopping an automobile on the left, or wrong, side of the highway, does not under all conditions necessarily constitute negligence or contributory negligence,[4] it is generally held that the question as to whether such act constituted the proximate cause of the accident is for the jury to decide, and that ordinarily it is not the function of the court to rule that the parking of a motor vehicle on the wrong side of road did, or did not, proximately contribute to the accident,[5] unless the facts and the inferences that may be drawn therefrom are not in conflict.[6]

§ 692. Collision—At Intersection.—Although rights of way have been given by statutes and ordinances to certain travelers, as, for example, to those approaching an intersection from the right, these are to be construed as only relative rights, dependent upon the particular circumstances, such as speed and the distance of the vehicles from the intersection;[7] it is generally held, in cases of accidents at intersections, that it is for the jury to fix the precise relationship of a traffic regulation to the accident,[8] as well as to any acts of negligence or carelessness on the part of those involved therein, considering in connection therewith any circumstances explanatory of the relative degrees of care exercised by those involved in the occurrence.[9]

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[17] Sheldon v. James, 175 Cal. 474, 166 P. 8, 2 A.L.R. 1493 (the mere backing of an automobile is not negligence per se).

[18] Bushnell v. Bushnell, 103 Conn. 583, 131 A. 432, 44 A.L.R. 785; Meyers v. Tri-State Auto Co. 121 Minn. 68, 140 N. W. 184, 44 L.R.A.(N.S.) 113.

Annotation: 64 A.L.R. 136.

[19] Bushnell v. Bushnell, 103 Conn. 583, 131 A. 432, 44 A.L.R. 785.

[20] Heidle v. Baldwin, 118 Ohio St. 375, 161 N. E. 44, 58 A.L.R. 1186.

[1] Cowart v. Lewis, 151 Miss. 221, 117 So. 531, 61 A.L.R. 1229. The negligence of the driver of an automobile in driving at an excessive speed during rain, resulting in his losing control of the car, which overturned, injuring a passenger was held to be a question for the jury.

[2] See supra, § 308.

[3] Annotation: 75 A.L.R. 970.

[4] See supra, § 335.

[5] Annotation: 70 A.L.R. 1027.

[6] Waynick v. Walrond, 155 Va. 400, 154 S. E. 522, 70 A.L.R. 1014; Barnes v. Ashworth, 154 Va. 218, 153 S. E. 711, citing R. C. L.

§ 693. **—Vehicles Traveling in Same Direction.**—In the case of a collision between vehicles traveling in the same direction, the issue of the negligence of a driver involved in such accident is ordinarily a factual one, to be decided by the jury in the light of all the surrounding circumstances,[10] except where the undisputed facts lend themselves to but one conclusion upon this point.[11] Pertinent in this connection are numerous factors, such as the speed with which the vehicles were proceeding,[12] the signals given,[13] stopping without lights,[14] and any other facts explanatory of the occurrence.

§ 694. **Towing Car.**—The mere towing of an automobile through a street by means of a rope which is attached to another automobile ahead of the towed car does not constitute negligence per se, and where an accident occurs,[15] it is for the jury to determine whether the motorist towing the vehicle exercised a degree of care and caution commensurate with the hazards of the situation, unless the undisputed facts and circumstances are such as to admit of but one inference upon this point.[16]

(4) PARTICULAR CONDITIONS

§ 695. **Generally.**—The fact that the brakes of an automobile are defective undoubtedly is a material element in the determination of the question of negligence in a case involving a collision with or by such machine; at least, where the driver knew, or should by the exercise of proper care have known, of the defect. There appears to be little doubt that a driver falling within this category is placed under a duty to exercise a greater degree of care and caution in his use of the public streets than would be exacted under normal conditions;[17] and the broad inquiry whether the care exercised was proportionate to the hazards of the surrounding circumstances is generally a question of fact for the jury to determine.[18] Similarly, whether the lights were sufficient, in view of statutory requirements, is a question within the province of the jury to decide.[19]

The question whether the failure of an automobile driver to give a signal proximately contributed to the accident is usually one for the jury under all the circumstances of the case.[20] In general, the jury will be guided by the exigencies of each situation in determining the necessity for a signal by a motorist, and whether his neglect or omission in this respect was sufficient to constitute it the proximate cause of the accident.[1]

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[7] Annotation: 89 A.L.R. 838, 839.

[8] Heidle v. Baldwin, 118 Ohio St. 375, 161 N. E. 44, 58 A.L.R. 1186.
Annotation: 89 A.L.R. 838, 839.

[9] Heidle v. Baldwin, 118 Ohio St. 375, 161 N. E. 44, 58 A.L.R. 1186.

[10] Riccio v. Ginsberg, 49 R. I. 32, 139 A. 652, 62 A.L.R. 967.

[11] Annotation: 62 A.L.R. 970.

[12] See supra, § 259.

[13] Riccio v. Ginsberg, 49 R. I. 32, 139 A. 652, 62 A.L.R. 967.
Annotation: 62 A.L.R. 971.

[14] Annotation: 62 A.L.R. 972.

[15] Richter v. Dahlman, 179 Wis. 7, 190 N. W. 841, 30 A.L.R. 747.
Annotation: 30 A.L.R. 750.

[16] Annotation: 30 A.L.R. 751.

[17] See supra, § 252.

[18] Puhr v. Chicago & N. W. R. Co. 171 Wis. 154, 176 N. W. 767, 14 A.L.R. 1334.

[19] Annotation: 14 A.L.R. 795.

[20] Riccio v. Ginsberg, 49 R. I. 32, 139 A. 652, 62 A.L.R. 967.

§ 696. **Defects in Highway or Street.**—Where an automobile accident upon the public highway is alleged to have been due to a defect or obstruction in the road,[2] or to the absence of sufficient lights, barriers, or warning devices,[3] it is ordinarily a question of fact for the jury to decide as to whether such condition proximately contributed to the accident,[4] unless the surrounding circumstances are such as to leave room for but one inference respecting the issue of negligence.[5] Similarly, it is generally within the province of the jury to decide what will constitute a sufficient railing, barrier, or warning device.[6] But it has been held that such issues necessarily become questions of fact under statutory provisions giving to any person injured by means of a defective road a right of action to recover damages from the party bound to keep it in repair, and giving to any persons so injured a right of action to recover damages.[7]

§ 697. **Blinding Lights.**—In accordance with the general rule that where a person driving a car at night is blinded by a glare of light, he must use such care as to avoid injuring any person or other vehicle that may be using the street, while he is unable to see what is before him,[8] it is generally held that a question of fact is presented for the jury as to whether a motorist driving under such conditions exercised a degree of care and caution commensurate with the existing hazards,[9] unless the facts and circumstances surrounding the accident, and the inferences deducible therefrom, are such as to admit of but one conclusion upon this point.[10]

§ 698. **Slippery Road.**—In an action against a municipality for injuries sustained in an automobile accident, due to the slippery condition of a street or road,[11] a question of fact as to whether the condition was of such character as to impose any duty of correction upon the municipality is generally presented to the jury[12] which should consider in connection therewith all factors explanatory thereof, such as duration of the slippery condition, density of traffic in the vicinity, visibility, etc. Similarly, the question whether the slippery condition constituted the proximate cause of the accident is one for the jury to decide, unless the facts are not in dispute, and the inferences that may be drawn therefrom do not conflict.[13–16]

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[1] Annotation: 62 A.L.R. 970.

[2] See HIGHWAYS [Also 13 R. C. L. p. 432, §§ 354 et seq.].

[3] See HIGHWAYS [Also 13 R. C. L. p. 384, §§ 313 et seq.].

[4] Strickfaden v. Greencreek Highway Dist. 42 Idaho, 738, 248 P. 456, 49 A.L.R. 1057.

Annotation: 86 A.L.R. 1404.

See HIGHWAYS [Also 13 R. C. L. p. 354].

[5] Martin v. J. A. Mercier Co. 255 Mich. 587, 238 N. W. 181, 78 A.L.R. 520; McCracken v. Curwensville, 309 Pa. 98, 163 A. 217, 86 A.L.R. 1379.

What would be a reasonable warning of an excavation was held a question of fact for the jury, which should consider the place, nature of the road, kind of travel, probable speed of vehicles, and the general situation. Strickfaden v. Greencreek Highway Dist. 42 Idaho, 738, 248 P. 456, 49 A.L.R. 1057.

Annotation: 78 A.L.R. 525.

See HIGHWAYS [Also 13 R. C. L. p. 517].

[6] Martin v. J. A. Mercier Co. 255 Mich. 587, 238 N. W. 181, 78 A.L.R. 520. Whether and when a hole or an excavation would be noticed by a careful driver, especially on a misty and dark morning, is necessarily so uncertain and dependent on circumstances that ordinarily it is an issue of fact.

[7] Annotation: 86 A.L.R. 1404.

[8] See supra, § 270.

[9] Annotation: 10 A.L.R. 295.

[10] Jaquith v. Worden, 73 Wash. 349, 132 P. 33, 48 L.R.A.(N.S.) 827.

Annotation: 62 A.L.R. 1531.

[11] See HIGHWAYS [Also 13 R. C. L. p. 408, § 335].

[12] Gabrielsen v. Seattle, 150 Wash. 157, 272 P. 723, 63 A.L.R. 200, affirmed on rehearing in 152 Wash. 700, 278 P. 1071, 63 A.L.R. 207.

Annotation: 63 A.L.R. 200.

§ 699. **Atmospheric Conditions.**—The precise degree or quantum of care properly exercisable by a motorist, or pedestrian, under varying atmospheric conditions, such as fog, smoke, dust, etc.,[17] is ordinarily a question for the jury.[18] Whether the exercise of reasonable care required a complete stop, a slowing down, or any other precautions dictated by the standard of ordinary prudence, is generally within the province of the jury to decide, in the light of all the surrounding facts and circumstances.[19] The jury should be permitted to find, under proper instructions, whether the driver was negligent in allowing his windshield to become so clouded as to prevent him from having a clear and unobstructed view.[20]

§ 700. **Obstruction in Road.**—In an action to recover damages for injuries sustained as a result of an automobile being driven against an obstruction in the street, the jury must determine whether or not a reasonably prudent man, driving in a reasonably careful manner, would have seen the obstruction in time to have stopped before striking it,[1] and whether the failure to make such timely observation constituted the proximate cause of the accident.[2]

§ 701. **Emergency.**—One who acted in a sudden emergency cannot be expected to exercise the same discretion and judgment which would be exhibited by an ordinarily prudent person acting with deliberation,[3] whether one acted as a reasonably prudent man would have acted in a similar situation generally is held to present a factual question for the jury.[4] In other words, the question whether an automobile driver even when acting in an emergency, was or was not negligent must be determined by the standard of reasonableness under the particular circumstances, considering the emergency as one of the circumstances.[5]

§ 702. **Disability or Illness.**—The fact that one has a physical defect will not, in itself, render him liable, or prevent his recovering, for an injury resulting from the operation of an automobile, where the defect is not such as to render the operation of the car by him negligence;[6] it is for the jury to determine to what extent such disability or illness contributed to the accident,[7]

[13-16] Gabrielsen v. Seattle, 150 Wash. 157, 272 P. 723, 63 A.L.R. 200, affirmed on rehearing in 152 Wash. 700, 278 P. 1071, 63 A.L.R. 207.

[17] Annotation: 73 A.L.R. 1020.

[18] Peasley v. White, 129 Me. 450, 152 A. 530, 73 A.L.R. 1017; Murphy v. Hawthorne, 117 Or. 319, 244 P. 79, 44 A.L.R. 1397.
Annotation: 37 A.L.R. 587, s. 73 A.L.R. 1020.

[19] Murphy v. Hawthorne, 117 Or. 319, 244 P. 79, 44 A.L.R. 1397.

[20] Schwalen v. W. P. Fuller & Co. 107 Wash. 476, 182 P. 592, 187 P. 367, 10 A.L.R. 296.
Annotation: 10 A.L.R. 299.

[1] Morehouse v. Everett, 141 Wash. 399, 252 P. 157, 58 A.L.R. 1482.
See Highways [Also 13 R. C. L. p. 478].
See also annotation in 19 A.L.R. 870.

[2] **Where the statutes or decisions of the courts** require red lights as a warning of danger on any object in the highway, and such lights were not present, it is for the jury to determine whether one who was driving at night should have seen the obstruction notwithstanding the absence of red lights. Morehouse v. Everett, 141 Wash. 399, 252 P. 157, 58 A.L.R. 1482.

[3] See supra, §§ 171 et seq.

[4] Annotation: 79 A.L.R. 1280.

[5] Annotation: 79 A.L.R. 1283.

[6] See supra, §§ 178–181.

[7] **In an action by one who had been adjudged insane,** to recover damages for personal injuries alleged to have resulted from negligent collision with an automobile which he was driving, evidence is admissible as to his sanity at and after the time of the accident. Criez v. Sunset Motor Co. 123 Wash. 604, 213 P. 7, 32 A.L.R. 627.
Annotation: 64 A.L.R. 136.

unless the facts in connection therewith are undisputed, and only one inference may properly be drawn therefrom.[8]

c. Contributory Negligence of Plaintiff

§ 703. Generally.—In automobile accident cases, as in other negligence actions,[9] whether the question of contributory negligence of the person injured in the accident out of which the suit arose is one of law for the court, or of fact for the jury, must be determined on the facts of the particular case,[10] where the evidence on that question is conflicting, or different inferences may be drawn therefrom,—where an honest difference of opinion between men of average intelligence can arise as to the effect of the evidence, presented on this question,—a case is presented for the jury.[11] The issue of contributory negligence in an action to recover damages for negligent killing by operation of an automobile must be submitted to the jury where it is raised by the answer and supported by evidence.[12] The jury must determine whether or not one riding a bicycle close behind a truck which obscured his view of the road ahead, who was injured by a vehicle coming from the opposite direction when he turned out to pass the truck as it suddenly stopped in front of him, was guilty of negligence which will prevent his holding the owner of the truck liable for the injury.[13]

§ 704. Walking along Highway.—In the absence of an applicable statute or ordinance, a pedestrian has the right to walk longitudinally in a street or highway, and is not, as a matter of law, guilty of contributory negligence in doing so;[14] the question as to whether such a traveler is precluded by his own negligence from recovering for any injuries sustained in an accident involving an automobile being driven upon the highway is generally one of fact for the jury to decide in the light of all the surrounding circumstances,[15] unless, of course, the facts are not in dispute and leave room for but one conclusion respecting the pedestrian's lack of care.[16]

§ 705. Crossing Street.—There is no imperative rule of law requiring a pedestrian under all circumstances to look for approaching automobiles before crossing a street or highway;[17] it is generally held that the question whether a pedestrian has by his own lack of care and caution constituted himself contributorily negligent so as to preclude his recovery for injuries sustained while crossing a street is properly decided by the jury.[18]

Where statutes or ordinances give pedestrians the right of way at street crossings, creating a preferential and not an absolute right in their favor,[19] the question of contributory negligence on the part of the pedestrian is generally one of fact.[20] Thus, it is generally a question of fact to be submitted to the jury whether a pedestrian, crossing a street, was at fault in failing to look and listen.[1] Also, whether a pedestrian should have looked again, or continued to look, for automobiles while crossing a street or highway, depends on the circumstances and is a question for the jury.[2] Whether a pedestrian should have looked for automobiles turning into the street which he was crossing also presents a question of fact for the determination of the jury.[3] When, however, it appears from the plaintiff's undisputed evidence, in an action by a pedestrian seeking damages for injuries by an automobile, that he was wanting in ordinary care, the question is one of law for the court and not one of fact for the jury.[4]

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[8] Meyers v. Tri-State Auto. Co. 121 Minn. 68, 140 N. W. 184, 44 L.R.A.(N.S.) 113.

[9] See Negligence [Also 20 R. C. L. p. 1].

[10] Crowley v. Chicago, B. & Q. R. Co. 204 Iowa, 1385, 213 N. W. 403, 53 A.L.R. 964; Gibbs v. Almstrom, 145 Minn. 35, 176 N. W. 173, 11 A.L.R. 227; Idell v. Day, 273 Pa. 34, 116 A. 506, 20 A.L.R. 1429.

[11] Hatzakorzian v. Rucker-Fuller Desk Co. 197 Cal. 82, 239 P. 709, 41 A.L.R. 1027.

[12] Sims v. Eleazer, 116 S. C. 41, 106 S. E. 854, 24 A.L.R. 1293.

[13] Simpson v. Snellenburg, 96 N. J. L. 518, 115 A. 403, 24 A.L.R. 503.

[14] Hatzakorzian v. Rucker-Fuller Desk Co. 197 Cal. 82, 239 P. 709, 41 A.L.R. 1027.

Annotation: 67 A.L.R. 109, s. 93 A.L.R. 561.

[15] Annotation: 67 A.L.R. 113, s. 93 A.L.R. 561.

[16] Annotation: 67 A.L.R. 113.

[17] See supra, §§ 446 et seq.

[18] Ivy v. Marx, 205 Ala. 60, 87 So. 813, 14 A.L.R. 1173; Sheldon v. James, 175 Cal. 474, 166 P. 8, 2 A.L.R. 1493; Zoltovski v. Gzella, 159 Mich. 620, 124 N. W. 527, 26 L.R.A.(N.S.) 435, 134 Am. St. Rep. 752 (negligence of infant crossing street held for jury).

It is not negligence as a matter of law for a pedestrian to cross a street at the regular crossing without stopping, looking, and listening for automobiles. Bachelder v. Morgan, 179 Ala. 339, 60 So. 815, Ann. Cas. 1915C, 888.

Annotation: 67 A.L.R. 321.

[19] See supra, §§ 289 et seq.

§ 706. **—At Point Other than Intersection.**—The fact that a pedestrian undertook to cross a street at a place other than a regular crossing will not, of itself, constitute contributory negligence, so as to defeat an action for his injury,[5] but is a circumstance to be taken into consideration in determining whether he was contributorily negligent.[6] Whether the pedestrian, in making such crossing, exercised a degree of care commensurate with the hazards involved, is generally held a question of fact for the jury, unless the circumstances surrounding the accident, and the inferences that may be drawn therefrom, admit of but one conclusion upon this point.[7]

Whether an occupant of an automobile that was standing beside the road was negligently attempting to cross the road, which was being used by other cars, is, under all the circumstances of the case, a question for the jury, especially where he was compelled to act in an emergency.[8]

§ 707. **Boarding or Alighting from Street Car.**—One alighting from a street car in front of a moving automobile cannot be said to have been negligent as a matter of law, where he testifies that, immediately before attempting to alight, he looked for an automobile and failed to see one.[9]

Whether a person is chargeable with contributory negligence for failure to look in both directions, after alighting from a street car, before starting to cross the street, is a question for the jury to determine, in accordance with the well-settled rule that such a person is not bound as a matter of law to look in both directions, but only to exercise reasonable care under all the circumstances.[10] It also is generally a question of fact for the jury whether a person who walked towards the sidewalk diagonally from a street car, and was struck by an automobile, was guilty of contributory negligence,[11] unless the facts and circumstances surrounding the accident are undisputed, and admit of but one inference upon that question.[12] Similarly, it has been held to be a question for the jury whether a person who was standing in the street at the regular stopping place of an approaching street car, intending to board the car, was guilty of contributory negligence in failing to observe the approach of an automobile.[13] Precisely what will constitute reasonable care in any given situation falling within this category is ordinarily a factual question for the jury to decide.

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[20] Horwitz v. Eurove, 129 Ohio St. 8, 193 N. E. 644, 96 A.L.R. 782.
Annotation: 96 A.L.R. 788.

[1] Annotation: 79 A.L.R. 1081.

[2] Ritter v. Hicks, 102 W. Va. 541, 135 S. E. 601, 50 A.L.R. 1505; Deputy v. Kimmell, 73 W. Va. 595, 80 S. E. 919, 51 L.R.A.(N.S.) 989, Ann. Cas. 1916E, 656.
Annotation: 79 A.L.R. 1088.

[3] Hemple v. Hall, 136 Md. 174, 110 A. 210, 9 A.L.R. 1245.
Annotation: 79 A.L.R. 1091.

[4] Stewart v. Olson, 188 Wis. 487, 206 N. W. 909, 44 A.L.R. 1292.

[5] See supra, §§ 211 et seq.

[6] Annotation: 14 A.L.R. 1183.

[7] Annotation: 14 A.L.R. 1185, s. 67 A.L.R. 322.

[8] Daughraty v. Tebbets, 122 Me. 397, 120 A. 354, 34 A.L.R. 1507.

[9] Wood v. North Carolina Pub. Serv. Corp. 174 N. C. 697, 94 S. E. 459, 1 A.L.R. 942.

[10] Wolfe v. Ives, 83 Conn. 174, 76 A. 526, 19 Ann. Cas. 752.
Annotation: 47 A.L.R. 1244.

[11] McClure v. Wilson, 109 Wash. 166, 186 P. 302, 18 A.L.R. 1421.
Annotation: 47 A.L.R. 1249.

[12] Annotation: 47 A.L.R. 1249.

§ 708. Darting in Front of Vehicle.—The question as to whether a person was contributorily negligent in suddenly darting in front of an automobile is generally one of fact for the jury to decide, in the light of all the surrounding circumstances,[14] unless there is no conflict in the evidence, and only one inference may be drawn from the facts in the case.[15] In determining whether a child, who, while playing in the street, suddenly ran from a place of safety into the path of a motor vehicle, was contributorily negligent,[16] the jury must decide whether the child acted as another person of the same age, intelligence, and experience would have acted if placed in a similar situation.[17]

§ 709. Repairing Vehicle in Road.—A traveler engaged about an automobile in the highway is under a duty to use reasonable care for his own safety;[18] whether such care was exercised, and whether one was guilty of contributory negligence, depend upon the facts in each case, and is ordinarily a question of fact for the jury.[19]

It has been held, however, that a truck driver who, to repair a punctured tire, places his truck on the side of the road with ample passenger space in the highway, with lights lighted, and a person on guard to signal approaching cars while he works in front of the car within its protection, is free from contributory negligence as a matter of law.[20]

§ 710. While Walking on Sidewalk.—While it is well settled that ordinarily a pedestrian walking or standing on a sidewalk is under no obligation to take any precautions against automobiles,[1] where a motor vehicle did leave the road, injuring a person on the sidewalk, and conflicting inferences of fact arise respecting the measure of care exercised by the pedestrian at the time of the accident, a question of fact for the jury is generally presented as to whether the pedestrian is barred from recovery for the injuries sustained through any acts of contributory negligence on his part.[2] The jury must determine whether one hit by an autotruck while standing on a sidewalk waiting to cross the street was guilty of contributory negligence.[3]

§ 711. Child Crossing or Playing in Street.—It is for the jury to determine from the available facts and circumstances whether a child injured by an automobile while crossing the street exercised such care as persons of his age, experience, and intelligence ordinarily exercise under like circumstances.[4] They must also determine whether or not a twelve-year-old boy racing across a street which he knew to be much used by automobiles failed to look, or attempted to pass in front of an approaching car, which struck and killed him.[5] Whether or not one coasting on a public highway is exercising the care and diligence to avoid danger which would be expected of a reasonably careful and prudent man under like circumstances is a question for the jury where the evidence as to the danger is conflicting and the inferences to be drawn are not clear.[6]

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[13] Hennessey v. Taylor, 189 Mass. 583, 76 N. E. 224, 3 L.R.A.(N.S.) 345, 4 Ann. Cas. 396.

Annotation: 47 A.L.R. 1252.

[14] Klink v. Bany, 207 Iowa, 1241, 224 N. W. 540, 65 A.L.R. 187; Zoltovski v. Gzella, 159 Mich. 620, 124 N. W. 527, 26 L.R.A. (N.S.) 435, 134 Am. St. Rep. 752 (contributory negligence of child); Humes v. Schaller, 39 R. I. 519, 99 A. 55, L.R.A.1917B, 316.

Annotation: 65 A.L.R. 202, 210.

[15] Annotation: 65 A.L.R. 202.

[16] See supra, §§ 198–200.

[17] See NEGLIGENCE [Also 20 R. C. L. p. 125].

[18] See supra, § 442.

[19] Southall v. Smith, 151 La. 967, 92 So. 402, 27 A.L.R. 1194; Daughraty v. Tebbets, 122 Me. 397, 120 A. 354, 34 A.L.R. 1507; Humes v. Schaller, 39 R. I. 519, 99 A. 55, L.R.A.1917B, 316; Long v. Steffen, 194 Wis. 179, 215 N. W. 892, 61 A.L.R. 1155; Schacht v. Quick, 178 Wis. 330, 190 N. W. 87, 25 A.L.R. 130.

Annotation: 25 A.L.R. 136, s. 34 A.L.R. 1515, and 61 A.L.R. 1164.

[20] Long v. Steffen, 194 Wis. 179, 215 N. W. 892, 61 A.L.R. 1155.

[1] See supra, § 460.

[2] Annotation: 75 A.L.R. 575.

[3] Brown v. Des Moines Steam Bottling Works, 174 Iowa, 715, 156 N. W. 829, 1 A.L.R. 835.

§ 712. **Guest or Occupant of Automobile.**—The duty of an invited passenger in an automobile is so dependent upon special circumstances, and upon such varied and conflicting notions of the propriety of interference in the management of the automobile, that in cases of accident the courts are loath to hold such a passenger guilty of contributory negligence as a matter of law.[7] Ordinarily, the question of the contributory negligence of a guest in an automobile involved in a collision, is for the jury to decide in the light of all the surrounding facts and circumstances.[8]

§ 713. **Traffic Officer.**—The question of the contributory negligence of one struck by a motor vehicle while directing traffic is generally for the jury to decide,[9] except, of course, where there is no conflict in the facts of the case, or the inferences deducible therefrom.[10] Their determination must be governed by the broad and well-settled rule that a traffic officer is not held to the same degree or extent of care and caution in watching for approaching vehicles as the ordinary pedestrian.[11]

§ 714. **Workman in Road.**—A person employed at work in a street must necessarily devote his attention to his work, and is not guilty of contributory negligence for failure to keep a sharp lookout for approaching traffic.[12] The decisions are uniform in holding that a workman on a public road has the right to rely on the exercise of such degree of care by drivers of automobiles as will protect him from injury, and that he will not be charged with contributory negligence if he fails to observe the negligence of a driver in approaching him.[13] However, where the facts are in dispute concerning the degree of care exercised by the workman, and conflicting inferences may reasonably be drawn therefrom, the issue of contributory negligence properly becomes one for the jury to decide.[14]

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[4] Annotation: 14 A.L.R. 1191.

[5] Bentson v. Brown, 186 Wis. 629, 203 N. W. 380, 38 A.L.R. 1417.

[6] Idell v. Day, 273 Pa. 34, 116 A. 506, 20 A.L.R. 1429.

[7] Powell v. Berry, 145 Ga. 696, 89 S. E. 753, L.R.A.1917A, 306; Ford v. Maney, 251 Mich. 461, 232 N. W. 393, 70 A.L.R. 1315.

[8] Powell v. Berry, 145 Ga. 696, 89 S. E. 753, L.R.A.1917A, 306; Crowley v. Chicago, B. & Q. R. Co. 204 Iowa, 1385, 213 N. W. 403, 53 A.L.R. 964; Sharp v. Sproat, 111 Kan. 735, 208 P. 613, 26 A.L.R. 1421; Archer v. Chicago, M. St. P. & P. R. Co. 215 Wis. 509, 255 N. W. 67, 95 A.L.R. 851.

Annotation: 18 A.L.R. 311; 20 A.L.R. 1026, s. 26 A.L.R. 1428, 40 A.L.R. 1341, and 91 A.L.R. 556.

The question of the contributory negligence of a guest in an automobile approaching a railroad crossing is for the jury where he failed to look in the direction from which the train was coming at the first opportunity, the automatic signaling device was not working, and there was as much reason to expect a train from the opposite direction as from that from which the train came, while the former track would be crossed first in passing over the crossing. Crowley v. Chicago, B. & Q. R. Co. 204 Iowa, 1385, 213 N. W. 403, 53 A.L.R. 964.

The contributory negligence of a wife riding on the back seat of an automobile driven by her husband when it collided at night with a train at a railroad crossing is for the jury where she testified that she looked to the left, and then looked in the direction of the watchman's shanty and did not see a watchman, and inferred from his absence that no train was approaching. Archer v. Chicago, M. St. P. & P. R. Co. 215 Wis. 509, 255 N. W. 67, 95 A.L.R. 851.

Where an automobile was driven at a reckless speed only a short distance before the accident occurred, and there was little time for the guest to observe the danger and protest, or take other precautions for his own safety, it is a question of fact for the jury to determine whether he had time and opportunity to do so. Sharp v. Sproat, 111 Kan. 735, 208 P. 613, 26 A.L.R. 1421.

[9] Annotation: 92 A.L.R. 1520.

[10] Annotation: 92 A.L.R. 1520.

[11] Beyrent v. Kaplan, 315 Pa. 353, 172 A. 651, 92 A.L.R. 1515.

[12] Chaney v. Moore, 101 W. Va. 621, 134 S. E. 204, 47 A.L.R. 800.

Annotation: 47 A.L.R. 809.

§ 715. **Collision—At Intersection.**—In accidents at intersections,[15] the question of the contributory negligence of a motorist involved in the occurrence, is generally a factual one for the jury to decide,[16] unless there is no conflict in the inferences that may be drawn from the surrounding facts and circumstances. The provisions of local statute or ordinance respecting the regulation of traffic at intersections are pertinent in this connection, although a violation thereof does not necessarily operate to withdraw the issue of negligence or contributory negligence from the consideration of the jury.[17] But where it appears that the injury occurred at a time when the plaintiff, driving an automobile, was attempting to pass the defendant driving another automobile, and that the ordinance prohibits such passing, the question of contributory negligence of the defendant becomes a matter of law to be charged by the court.[18]

§ 716. **—Automobile and Street Car.**—The mere fact that a collision takes place between a street car and an automobile at a street intersection does not, in itself, establish the fact that it was caused by negligence so that an automobilist so injured cannot recover,[19] no conclusive inference as to the motorist's contributory negligence may be drawn as a matter of law from the accident itself.[20] Whether a motorist when about to cross a street railway track at a street intersection was negligent, under a given set of circumstances, in failing to stop, look, and listen for approaching cars, is a question for the jury.[1]

The question of the automobilist's negligence, speed, and lack of control in approaching the intersection, or his negligence in failing to discover approaching street cars, due to lack of sufficient light, obstructed vision, etc., is ordinarily one for the jury.[2] Nor does the fact that an automobilist misjudged the speed of an approaching street car, and attempted to pass in front of it, convict him of contributory negligence as a matter of law.[3] Of course, the undisputed facts may be such as to leave room for but one inference respecting the measure of care exercised by the person injured.[4] There are many decisions holding, under the circumstances enumerated therein, an automobilist to be guilty of contributory negligence as a matter of law in failing to look, listen, or otherwise make an effort to discover an approaching street car.[5]

He may be held guilty of contributory negligence as a matter of law where he looked before approaching the street car tracks and saw an approaching street car, or even where he saw no street car, and failed to look again before entering the danger zone, especially where, when he looked, his view was obstructed.[6] The manner in which the motorist approached the street car intersection, as where he approached at a high rate of speed, or otherwise failed to have his automobile so under control that it could be stopped in time to avoid a collision upon the appearance of danger, may be sufficient to charge him with contributory negligence as a matter of law.[7]

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[13] Chaney v. Moore, 101 W. Va. 621, 134 S. E. 204, 47 A.L.R. 800.

Annotation: 47 A.L.R. 807.

See HIGHWAYS, STREETS, AND SIDEWALKS [Also 13 R. C. L. p. 282].

[14] Annotation: 47 A.L.R. 809.

[15] See supra, § 431.

[16] Heidle v. Baldwin, 118 Ohio St. 375, 161 N. E. 44, 58 A.L.R. 1186.

Annotation: 89 A.L.R. 838, 839.

[17] Heidle v. Baldwin, 118 Ohio St. 375, 161 N. E. 44, 58 A.L.R. 1186.

Annotation: 89 A.L.R. 839.

[18] Gosma v. Adams, 102 Fla. 305, 135 So. 806, 78 A.L.R. 1193.

[19] See supra, § 431.

[20] Annotation: 28 A.L.R. 257.

[1] Union Traction Co. v. Moneyhun, 192 Ind. 288, 136 N. E. 18, 28 A.L.R. 211.

Annotation: 28 A.L.R. 257, s. 46 A.L.R. 1028.

[2] Annotation: 28 A.L.R. 257, s. 46 A.L.R. 1028.

[3] Annotation: 46 A.L.R. 1030.

[4] Annotation: 28 A.L.R. 257.

[5] Annotation: 28 A.L.R. 264, s. 46 A.L.R. 1032.

§ 717. **—Vehicles Traveling in Same Direction.**—The question of the contributory negligence of a motorist involved in a collision with a vehicle proceeding in the same direction is generally a factual one, to be decided by the jury in the light of all the surrounding facts and circumstances,[8] except where the facts of the case are undisputed, and admit of but one inference upon this point.[9]

§ 718. **Backing Automobile.**—Where the issue is presented of the plaintiff's contributory negligence in so backing his vehicle as proximately to contribute to the accident,[10] it is ordinarily a question for the jury to decide, on the basis of all the facts and circumstances, whether the acts of the plaintiff were of such character that they may reasonably be held to preclude recovery on his part for the injuries sustained.[11]

§ 719. **Improper Parking.**—In accordance with the well-settled rule that the mere parking of a motor vehicle on the wrong side of the road or highway does not constitute contributory negligence,[12] at least in the absence of statutory authority to the contrary,[13] it is generally held that whether such improper parking constituted the proximate cause of the accident, so as to bar recovery by the plaintiff for the resulting injuries, is a question of fact for the jury to decide.[14]

§ 720. **Disregard of or Reliance upon Traffic Signals.**—Where a person injured in an automobile accident was violating or disregarding traffic signals, it is generally a question for the jury to decide, where conflicting issues of fact are involved, to what extent such acts of the person injured contributed to the accident, and whether they constitute contributory negligence so as to preclude his recovery.[15] Similarly, in accordance with the well-settled rule that a pedestrian is not absolutely absolved from the duty of exercising some degree of care merely because the traffic signal is in his favor,[16] it has been held to fall within the province of the jury to decide whether the person injured exercised such care, in relying upon the traffic signals in his favor, as might be expected of a reasonably prudent traveler placed in the same situation.[17]

§ 721. **Acts in Emergency.**—The emergency rule is equally applicable whether the question is contributory negligence of the plaintiff or negligence on the part of the defendant,[18] and it is generally held, where the existence of a sudden peril or emergency is drawn in issue, that the question whether the plaintiff is barred by his own acts from recovering against the defendant is a factual one, properly decided by the jury,[19] unless, of course, there is no conflict in the facts of the case, or the inferences that may be drawn therefrom.[20]

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[6] Annotation: 46 A.L.R. 1032, 1033.

[7] Annotation: 46 A.L.R. 1033.

[8] Whether the plaintiff was passing or attempting to pass the defendant's car at a given time and place is for the jury to determine. Gosma v. Adams, 102 Fla. 305, 135 So. 806, 78 A.L.R. 1193.

[9] Annotation: 62 A.L.R. 970.

[10] See supra, § 434.

[11] Annotation: 67 A.L.R. 647.

[12] Annotation: 70 A.L.R. 1027.
See supra, § 435.

[13] See supra, § 335.

[14] Annotation: 70 A.L.R. 1027.

[15] Annotation: 75 A.L.R. 970, 975.

[16] Melville v. Rollwage, 171 Ky. 607, 188 S. W. 638, L.R.A.1917B, 133.
Annotation: 75 A.L.R. 970.
See supra, § 453.

[17] Annotation: 75 A.L.R. 970.

[18] Landry v. Hubert, 100 Vt. 268, 137 A. 97, later appeal in 101 Vt. 111, 141 A. 593, 63 A.L.R. 396.

§ 722. Physical Defect or Illness.—It being well settled that the mere disability or illness of a pedestrian is an insufficient basis upon which to predicate a finding of contributory negligence so as to preclude recovery for injuries sustained in an automobile accident,[1] it has been held a question for the jury to decide, upon the basis of all the available facts and circumstances, to what extent a pedestrian's disability or illness proximately contributed to the accident, and whether he acted as a reasonably prudent man would have acted under similar circumstances.[2]

§ 723. Violating Rules of Road.—It being well settled that a violation of the rules of the road, apart from the mere disregard of traffic signals, will not constitute contributory negligence,[3] it has been held that whether such violation constituted the proximate cause of the accident, so as to preclude the injured person from recovering, is a question for the jury to decide, unless the facts, and the inferences that may be drawn therefrom, are not in conflict.[4]

§ 724. Riding on Running Board.—In the absence of a statute to the contrary, a person riding on the running board of an automobile is not thereby contributorily negligent, so as to preclude recovery for injuries sustained;[5] whether a person so injured acted as a reasonably prudent person would have acted under similar circumstances ordinarily presents a factual question for the jury to decide, except, of course, where the facts, and the inferences that may be drawn therefrom, do not conflict.[6]

§ 725. Impaired Visibility.—Generally where the driver of an automobile has been injured, or his car damaged, in a motor accident where his view was obscured by dust, smoke, or atmospheric conditions, it is a question for the jury whether his conduct constituted contributory negligence,[7] unless the facts and circumstances surrounding the accident, and the inferences that may be drawn therefrom, are not in dispute.[8] Factors to be considered in connection with arriving at a determination of the motorist's contributory negligence are the speed of his automobile, extent of visibility, control of car, and any other matters explanatory of the proper degree of care and caution demanded under the circumstances.[9]

§ 726. Blinding Lights.—The issue as to whether a person operating a motor vehicle was contributorily negligent, where he continued to drive while blinded by the glare of the headlights of an approaching vehicle, and met with an accident, is ordinarily one within the province of the jury to decide[10] in the absence of specific statutory authority to the contrary, unless the facts and circumstances surrounding the accident are not in dispute, and the inferences that may be drawn therefrom do not conflict.[11]

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[19] Dickinson v. Erie R. Co. 81 N. J. L. 464, 81 A. 104, 37 L.R.A.(N.S.) 150.
Annotation: 6 A.L.R. 683.

[20] Annotation: 79 A.L.R. 1289.

[1] Annotation: 64 A.L.R. 136.
See Negligence [Also 20 R. C. L. p. 1].

[2] Annotation: 64 A.L.R. 137.

[3] See supra, §§ 420 et seq.

[4] Annotation: 63 A.L.R. 277.

[5] Vandell v. Sanders, 85 N. H. 143, 155 A. 193, 80 A.L.R. 550.
See supra, § 484.

[6] Annotation: 80 A.L.R. 557.

[7] Rozycki v. Yantic Grain & Products Co. 99 Conn. 711, 122 A. 717, 37 A.L.R. 582.
Annotation: 37 A.L.R. 594, s. 73 A.L.R. 1027.

[8] Annotation: 73 A.L.R. 1026.

[9] Rozycki v. Yantic Grain & Products Co. 99 Conn. 711, 122 A. 717, 37 A.L.R. 582; Peasley v. White, 129 Me. 450, 152 A. 530, 73 A.L.R. 1017.

The question of the negligence of an automobile driver in continuing in the nighttime, at a rate of speed which prevented his stopping within his range of vision after a passing vehicle had filled the air with dust, so that he collided with an unlighted parked truck, is for the jury. Murphy v. Hawthorne, 117 Or. 319, 244 P. 79, 44 A.L.R. 1397.

§ 727. **Defects in Road.**—The question whether a motorist who sustained injuries in an accident due to a defect or obstruction in the highway was contributorily negligent in not having discovered the dangerous condition in sufficient time to avoid it is ordinarily a factual one for the jury to decide,[12] unless the facts and circumstances surrounding the accident were such as to leave room for but one inference respecting the issue of negligence.[13-17]

3. INSTRUCTIONS.

§ 728. **Generally.**—The general rules govering instructions to the jury in civil actions are applicable in actions to recover damages for injuries sustained through the negligent operation of automobiles.[18] In such cases the instructions should define the relative degrees of care and caution properly exercisable by those involved in the accident,[19] and, in general, state the issues of fact clearly and concisely, as well as the law applicable to the case.[20] However, the mere statement of abstract principles of law, without any pertinency to the evidentiary facts in the case, is not in itself ground for reversal, unless of course, its tendency is to confuse or mislead the jury.[1] The corresponding duties of those who participated in the occurrence, under the surrounding facts and circumstances, should be stated by the court in its instructions to the jury.[2] Instructions are proper that lay down appropriate rules by which the jury should be guided in determining the necessity for a warning signal by a motorist on a specific occasion,[3] or define the standard of conduct that will meet the requirements of ordinary care,[4] or make clear the intent of a statute covering the particular situation.[5] An instruction that assumes a fact is not erroneous if it expressly requires the jury to find such fact.[6]

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[10] Annotation: 10 A.L.R. 295.

[11] Woodhead v. Wilkinson, 181 Cal. 599, 185 P. 851, 10 A.L.R. 291 (similarly as to water on the windshield); Ruth v. Vroom, 245 Mich. 88, 222 N. W. 155, 62 A.L.R. 1528; Schwalen v. W. P. Fuller & Co. 107 Wash. 476, 182 P. 592, 187 P. 367, 10 A.L.R. 296.

[12] Martin v. J. A. Mercier Co. 255 Mich. 587, 238 N. W. 181, 78 A.L.R. 520.

Annotation: 78 A.L.R. 529.

[13-17] Davis v. Mellen, 55 Utah, 9, 182 P. 920, 7 A.L.R. 1193.

Annotation: 78 A.L.R. 525.

See HIGHWAYS [Also 13 R. C. L. p. 462, §§ 378 et seq.].

[18] Heacock v. Baule, 216 Iowa, 311, 249 N. W. 437, 93 A.L.R. 151; Nunnelley v. Muth, 195 Ky. 352, 242 S. W. 622, 27 A.L.R. 910; Anderson v. Asphalt Distributing Co. — Mo. —, 55 S. W. (2d) 688, 86 A.L.R. 1033; Hornbuckle v. McCarty, 295 Mo. 162, 243 S. W. 327, 25 A.L.R. 1508; West v. Jaloff, 113 Or. 184, 232 P. 642, 36 A.L.R. 1391; Gabrielsen v. Seattle, 150 Wash. 157, 272 P. 723, 63 A.L.R. 200.

[19] Saliba v. Saliba, 178 Ark. 250, 11 S. W. (2d) 774, 61 A.L.R. 1348; Heacock v. Baule, 216 Iowa, 311, 249 N. W. 437, 93 A.L.R. 151; Hornbuckle v. McCarty, 295 Mo. 162, 243 S. W. 327, 25 A.L.R. 1508; Maloney v. Kaplan, 233 N. Y. 426, 135 N. E. 838, 26 A.L.R. 909 (holding that motorist is entitled to an instruction defining the degree of care which would relieve him from liability for the accident); Harmon v. Haas, 61 N. D. 772, 241 N. W. 70, 80 A.L.R. 1131.

[20] West v. Jaloff, 113 Or. 184, 232 P. 642, 36 A.L.R. 1391.

An automobile bus company sued jointly with an insurer for the benefit of persons injured by the operation of its vehicles is entitled to have the jury advised by proper instruction as to the limit of the insurer's liability. Field v. North Coast Transp. Co. 164 Wash. 123, 2 P. (2d) 672, 76 A.L.R. 1114.

[1] Gabrielsen v. Seattle, 150 Wash. 157, 272 P. 723, 63 A.L.R. 200.

[2] Nunnelley v. Muth, 195 Ky. 352, 242 S. W. 622, 27 A.L.R. 910. In an action to recover damages for driving a truck against a boy in a highway, it is reversible error to refuse an instruction as to the duty of the driver to give a signal when he saw the boy, where the evidence is conflicting as to the speed of the truck and the distance of the boy from it when he could have been first seen.

[3] Heacock v. Baule, 216 Iowa, 311, 249 N. W. 437, 93 A.L.R. 151; Hornbuckle v. McCarty, 295 Mo. 162, 243 S. W. 327, 25 A.L.R. 1508.

[4] West v. Jaloff, 113 Or. 184, 232 P. 642, 36 A.L.R. 1391.

§ 729. Form and Contents Generally.—The general rules respecting the form and manner of giving of instructions[7] apply in actions brought to recover damages for injuries sustained in an automobile accident.[8] Such instructions should be clear and understandable, whether they purport to define issues of fact or to state the law applicable to a particular situation;[9] in such action the plaintiff and defendant alike are entitled to have issues of fact presented by the pleadings submitted to the jury without the introduction of extraneous matter that may mislead them or divert their minds from a consideration of the evidence pertinent to the real issues;[10] the instructions should be founded upon and applicable to the particular issue joined and upon which proof has been adduced. Mere abstract legal rules applicable to any case, or mere statements of law in general terms, even though correct, should not be given unless they are made applicable to the issues in the case at bar.[11] While instructions should be so given that the jury will understand to what questions they refer, it is not necessary that an instruction should be separately stated in immediate connection with every question upon which it bears, if, from the nature of the instruction, the jury will understand the relation.[12]

The instructions should be complete and cover all the issues that are properly raised for determination.[13] However, where the trial court instructs upon the issues raised by the pleadings and justified by the evidence, it is not error for it to fail to instruct on all theories which may be drawn from the evidence presented, in the absence of requests for such instructions.[14] An instruction which tells the jury they should find for plaintiff if they believe certain enumerated facts is defective if there is wholly omitted from such enumeration a fact which the evidence strongly tends to prove, which, if true, would require a different verdict.[15]

§ 730. Requests to Charge.—In accordance with the well-established practice that permits counsel, by means of appropriate requests, to call the attention of the court to any omissions from its charge to the jury,[16] counsel for either party in an automobile accident case will generally be allowed to request such instructions of the court as will make the charge already given more complete, definite, or fuller in scope.[17] In fact, where the trial court gives instructions upon the issues raised by the pleadings and justified by the evidence, which are correct in law and sufficient to guide the jury, its charge is not open to objection because it fails to instruct on all the theories which may be drawn from the evidence introduced, unless a request for further instructions is made.[18] Error cannot be predicated upon such omissions to charge, where no request to charge was made.[19] It may happen that certain phases of the court's charge will be clouded as to their true meaning, particularly to a lay mind. A party believing instructions given to be misleading or obscure should request an explanatory charge.[20] In automobile cases, as in other cases, however, requested instructions, even though correctly stating the law, which ignore an essential phase of a case that is supported by evidence,[1] or are without basis in the evidence,[2] or are not applicable to the situation disclosed by the evidence,[3] or assume facts not supported by the evidence,[4] or are included in[5] or fully covered by those given,[6] will be refused. Nor as a general rule can a party complain because requested instructions were not given to the jury in the exact language of the request,[7] although in some jurisdictions requested instructions, if proper, must be given in the form requested.

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[5] Ibid.

[6] Hornbuckle v. McCarty, 295 Mo. 162, 243 S. W. 327, 25 A.L.R. 1508.

[7] See TRIAL [Also INSTRUCTIONS, 14 R. C. L. p. 764].

[8] Hanson v. Matas, 212 Wis. 275, 249 N. W. 505, 93 A.L.R. 546.

[9] Alabama G. S. R. Co. v. Burgess, 119 Ala. 555, 25 So. 251, 72 Am. St. Rep. 943; Jacobs v. Bangor, 16 Me. 187, 33 Am. Dec. 652.

See TRIAL [Also INSTRUCTIONS, 14 R. C. L. p. 798].

[10] Jessup v. Davis, 115 Neb. 1, 211 N. W. 190, 56 A.L.R. 1403.

[11] Undisputed testimony that an injury to one assisting in pushing an automobile out of a ditch might have occurred because of the failure of the driver to apply the brakes prevents regarding as abstract an instruction to the effect that the driver would be liable if he negligently released the brakes, or negligently failed to apply them, even though the complaint alleges that the negligence of the driver consisted in his suddenly and carelessly reversing the gear of the car and increasing the supply of gasoline, thereby causing the car to lurch and roll backward. Saliba v. Saliba, 178 Ark. 250, 11 S. W. (2d) 774, 61 A.L.R. 1348.

[12] Hanson v. Matas, 212 Wis. 275, 249 N. W. 505, 93 A.L.R. 546, holding that where, in giving general instructions as to what constitutes ordinary care, the court expressly stated that they were given for the purpose of defining the word "negligence" as used in all questions submitted as to the negligence of both parties involved in the accident, it was unnecessary to repeat them in connection with the submission of each question.

[13] Harmon v. Haas, 61 N. D. 772, 241 N. W. 70, 80 A.L.R. 1131.

[14] Ibid.

[15] Lawson v. Dye, 106 W. Va. 494, 145 S. E. 817, 63 A.L.R. 271.

[16] See TRIAL [Also INSTRUCTIONS, 14 R. C. L. p. 795].

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[17] Anderson v. Asphalt Distributing Co. — Mo. —, 55 S. W. (2d) 688, 86 A.L.R. 1033; Hornbuckle v. McCarty, 295 Mo. 162, 243 S. W. 327, 25 A.L.R. 1508; Merrihew v. Goodspeed, 102 Vt. 206, 147 A. 346, 66 A.L.R. 1109. If the court fails to charge on all essential matters, it is the duty of counsel to call its attention to the claimed shortage or error, so that it may be corrected.

It is reversible error to refuse an instruction as to the duty of the driver to give a signal when he saw the boy in the highway against whom he drove his automobile, where the evidence is conflicting as to the speed of the automobile, and the distance of the boy from it when he could have been first seen. Nunnelley v. Muth, 195 Ky. 352, 242 S. W. 622, 27 A.L.R. 910.

[18] Harmon v. Haas, 61 N. D. 772, 241 N. W. 70, 80 A.L.R. 1131.

In the absence of a specific request, reversible error cannot be predicated upon the failure of the court to instruct, in an action by a passenger in a motor car to hold the owner liable for injury caused by its reckless operation, which he encouraged, or in which he acquiesced, that he might recover if before the accident he requested careful operation. Kansas City S. R. Co. v. Ellzey, 275 U. S. 236, 72 L. ed. 259, 48 S. Ct. 80.

[19] Railway Exp. Agency v. Little (C. C. A. 3d) 50 F. (2d) 59, 75 A.L.R. 963; Giddings v. Honan, 114 Conn. 473, 159 A. 271, 79 A.L.R. 1215.

[20] Brown v. Woolverton, 219 Ala. 112, 121 So. 404, 64 A.L.R. 640.

[1] Thixton v. Palmer, 210 Ky. 838, 276 S. W. 971, 44 A.L.R. 1379 (refusal to instruct upon contributory negligence); Hornbuckle v. McCarty, 295 Mo. 162, 243 S. W. 327, 25 A.L.R. 1508.

Where defendant relies upon the negligence of plaintiff in driving on the wrong side of the road, thus forcing defendant to turn to the left in order to avoid a head-on collision, it is not error to refuse an instruction which would have told the jury that the operator of a vehicle, in meeting another vehicle coming from the opposite direction, should turn to the right of the center of the road, and, if they believed that defendant did not turn to the right of the center of the road on the occasion of the accident, and in consequence thereof, and as a proximate result thereof, the damages sued for were caused, they should find for plaintiff, if they further believe that plaintiff at the time was exercising ordinary care, because the requested instruction ignores such defense. Lawson v. Dye, 106 W. Va. 494, 145 S. E. 817, 63 A.L.R. 271.

[2] Opecello v. Meads, 152 Md. 29, 135 A. 488, 50 A.L.R. 1385; Potter v. Gilmore, 282 Mass. 49, 184 N. E. 373, 87 A.L.R. 1462.

A requested instruction with reference to the contributory negligence of a child struck by an automobile, based upon the assumption that, in running out into the road, he did so to get out of the way of a car backing out of the driveway, is properly refused where there is no direct evidence that he was in the path of the backing car. Merrihew v. Goodspeed, 102 Vt. 206, 147 A. 346, 66 A.L.R. 1109.

[3] Merrihew v. Goodspeed, 102 Vt. 206, 147 A. 346, 66 A.L.R. 1109.

[4] West v. Jaloff, 113 Or. 184, 232 P. 642, 36 A.L.R. 1391.

[5] Merrihew v. Goodspeed, 102 Vt. 206, 147 A. 346, 66 A.L.R. 1109; Washington v. Seattle, 170 Wash. 371, 16 P. (2d) 597, 86 A.L.R. 113.

[6] Marland Ref. Co. v. Duffy, 94 Okla. 16, 220 P. 846, 35 A.L.R. 52; Crowell v. Duncan, 145 Va. 489, 134 S. E. 576, 50 A.L.R. 1425.

Refusal of a requested instruction regarding the emergency doctrine applicable to the driver of an automobile is not error where the subject has been covered by an instruction given, which, unlike that requested, conditions the doctrine upon the driver's freedom from negligence in bringing about the perilous situation. McDowell v. Hurner, 142 Or. 617, 20 P. (2d) 395, 88 A.L.R. 578.

[7] Lange v. Hoyt, 114 Conn. 590, 159 A. 575, 82 A.L.R. 486.

A request for an instruction that the evidence clearly shows a fact is properly refused if the evidence in regard thereto is not clear.[8]

§ 731. Charges after Jury Have Retired.—As in other civil cases,[9] instructions given in automobile cases should be read in open court, and if, after the jury have retired for deliberation, the necessity arises for further instructions or communications of any kind concerning the case, these should be given in open court in the presence of the parties or their counsel,[10] unless the parties or their counsel have waived the right to be present, or to be notified of the return of the jury.[11]

§ 732. Duplication of Instructions.—An instruction should not be duplicative of what has already been charged.[12] Accordingly, a definition of contributory negligence need not be included in an instruction in which the court declares the law and tells the jury that the plaintiff is entitled to recover if they find a particular condition to exist, unless he himself was guilty of contributory negligence, where such negligence is defined in other instructions.[13] So, where, in giving general instructions as to what constitutes ordinary care, the court expressly stated that they were given for the purpose of defining the word "negligence" as used in all questions submitted as to the negligence of both parties, it is not necessary to repeat them in connection with the submission of each question.[14] The fact, however, that a proposition of law applicable to the facts which the evidence tends to prove may be given to the jury in one instruction does not preclude another instruction covering the same subject, but which is intended to and does define with greater particularity and clearness the rights of the party depending thereon.[15]

§ 733. Invading Province of Jury; Assuming Facts.—In giving instructions in automobile accident cases the trial court must observe the general rule that the court must not by its instructions invade the province of the jury.[16] Thus, the court cannot, upon conflicting evidence, instruct the jury that a fact, such as that a chauffeur in charge of a car in which a guest was injured was guilty of gross negligence, has been established.[17] An instruction should not assume as true the existence or nonexistence of any material fact in issue,[18] concerning which there is a conflict in the evidence.[19] Accordingly, the factual inquiry as to whether the brakes of a car were defective at the time of the accident cannot properly be answered either one way or the other by the court in its charge to the jury, where the evidence introduced upon this point is in conflict.[20] But an instruction in an action to recover damages for injuries to a pedestrian struck by an automobile, where the brakes of the vehicle are alleged to have been defective, that the plaintiff cannot recover if the jury shall be reasonably satisfied from the evidence that the sole proximate cause of the injury was the rapid rate at which the car was being driven, does not necessarily assume that the car was being driven at a rapid rate of speed.[1] Nor is an instruction erroneous in assuming a fact, if it expressly requires the jury to find such fact.[2] The mere statement by the trial judge, in expounding to the jury the terms of a relevant statute, that it would be a breach of the statute to attain a speed in excess of 15 miles per hour, is not reversible error because of absence of evidence that such speed existed, if the jury were told that fact.[3]

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[8] West v. Jaloff, 113 Or. 184, 232 P. 642, 36 A.L.R. 1391.

[9] See Trial [Also Instructions, 14 R. C. L. p. 723].

[10] Taulborg v. Andresen, 119 Neb. 273, 228 N. W. 528, 67 A.L.R. 642.

[11] Railway Exp. Agency v. Little (C. C. A. 3d) 50 F. (2d) 59, 75 A.L.R. 963.

[12] Saliba v. Saliba, 178 Ark. 250, 11 S. W. (2d) 774, 61 A.L.R. 1348.

Trial [Also Instructions, 14 R. C. L. pp. 751 et seq.]

[13] Saliba v. Saliba, 178 Ark. 250, 11 S. W. (2d) 774, 61 A.L.R. 1348.

[14] Hanson v. Matas, 212 Wis. 275, 249 N. W. 505, 93 A.L.R. 546.

[15] Chaney v. Moore, 101 W. Va. 621, 134 S. E. 204, 47 A.L.R. 800.

[16] Godfrey v. Brown, 220 Cal. 57, 29 P. (2d) 165, 93 A.L.R. 1092; McCown v. Muldrow, 91 S. C. 523, 74 S. E. 386, Ann. Cas. 1914A, 139.

[17] Flynn v. Lewis, 231 Mass. 550, 121 N. E. 493, 2 A.L.R. 896.

[18] Pratt v. Western Bridge & Constr. Co. 116 Neb. 553, 218 N. W. 397, 58 A.L.R. 527, later appeal in 118 Neb. 736, 226 N. W. 324, holding that an instruction which advises the jury that if they should find the plaintiff guilty of negligence, and that "such negligence . . . was slight in comparison with the gross negligence of the defendant, then you will find for the plaintiff," is erroneous in that "the gross negligence of the defendant" is thereby assumed.

See generally Trial [Also Instructions, 14 R. C. L. p. 738].

[19] Jessup v. Davis, 115 Neb. 1, 211 N. W. 190, 56 A.L.R. 1403, writ of error dismissed in 276 U. S. 593, 72 L. ed. 722, 48 S. Ct. 300.

§ 734. Instruction as to Particular Matters.—The particular matters to be covered in the instructions in automobile accident cases depend upon the issues joined by the pleading and supported by the evidence.[4] They must be pertinent to the facts of the case as proved at the trial.[5] Their correctness as to substance is determined by the rules of substantive law stated above. An allegation that defendant was under the influence of intoxicating liquors includes the condition of his having been in a state of intoxication, and authorized the court to give an instruction in the language of a statute that if defendant was in a state of intoxication, he is conclusively deemed to have been unable to control the automobile.[6]

Instructions given in an automobile accident case, as a guide to the jury in determining the character and extent of a general disability following the injuries, upon which evidence was introduced at the trial, are not different from those given in any other suit to recover damages for injuries negligently inflicted.[7] In an action against the owner of an automobile to recover for injuries sustained in an accident which occurred while the car was being driven by a member of the owner's family to take another member to consult a doctor, an instruction that when the owner of an automobile directs or permits another to operate such car under such circumstances that the one so operating it may be deemed to be performing a service for the owner, whether such service is one of profit for the owner or to promote for the owner the pleasure or wish of his guest, then the person operating the automobile will be the agent or servant of the owner, and the owner will be liable for the negligence of such person, is not inapplicable to the facts of the case.[8] In an action to recover for an injury inflicted by an automobile owned by the defendant husband and driven at the time by the defendant wife, the court may properly instruct that the husband is liable for the consequences of his wife's act if at the time of the accident complained of they were "engaged in a common enterprise."[9]

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[20] Saunders System Birmingham Co. v. Adams, 217 Ala. 621, 117 So. 72, 61 A.L.R. 1333.

[1] Saunders System Birmingham Co. v. Adams, 217 Ala. 621, 117 So. 72, 61 A.L.R. 1333.

[2] Hornbuckle v. McCarty, 295 Mo. 162, 243 S. W. 327, 25 A.L.R. 1508.

[3] Annotation: 49 A.L.R. 666.

[4] See Trial [Also Instructions, 14 R. C. L. p. 782, §§ 49 et seq.].

[5] The giving of an instruction in an action for injuries sustained by a pedestrian when struck by an automobile while crossing a road, that failure to comply with a statute requiring an automobile to sound a signal on approaching the tops of hills, where the operator's view is obscured, constitutes negligence, is not warranted where the accident occurred at a point 256 feet beyond the top of the hill. Heacock v. Baule, 216 Iowa, 311, 249 N. W. 437, 93 A.L.R. 151.

[6] Packard v. O'Neil, 45 Idaho, 427, 262 P. 881, 56 A.L.R. 317.

[7] Mazziotte v. Bridgeport & W. Pass. Service, 116 Conn. 32, 163 A. 409, 87 A.L.R. 908.

[8] Harmon v. Haas, 61 N. D. 772, 241 N. W. 70, 80 A.L.R. 1131.

[9] Crawford v. McElhinney, 171 Iowa, 606, 154 N. W. 310, Ann. Cas. 1917E, 221.

Under a rule not unlike that applicable to other civil proceedings brought to recover damages,[10] the court may properly instruct the jury as to the presumptive effect of the suppression of material evidence in an automobile accident case.[11] On the other hand, it may properly omit to comment upon the driver's testimony that he did not know what happened, or what caused the accident, where he testified to a conversation which took place during the drive, and that he recalled passing an intersecting road, and there is no suggestion that there were any unusual incidents preceding the accident which it might be claimed that the driver should have noted and recalled, especially where his injuries were such as to render him unconscious for hours.[12] In instructing the jury regarding the testimony of a witness who testified falsely, the court should so draw its instruction as to permit the jury to disregard the testimony of such witness only when it appears that he intentionally testified falsely, and that the false testimony was in regard to some "material" fact, although it is not essential to use the term "material" provided the same meaning is conveyed by other language.[13]

§ 735. —Negligence.—It is ordinarily within the province of the jury to determine from the facts presented at the trial whether negligence was established,[14] and such determination should be made on the basis of proper instructions from the court as to the law applicable to the specific situation.[15] However, an instruction which omits to require a finding that the defendant knew, or by the exercise of ordinary care could have known, that the person injured was in danger and was oblivious thereto, is harmless if the evidence shows that the defendant could have discovered the peril had he but looked and observed the injured person with any degree of care.[16] The court may explain to the jury what constitutes ordinary care as a matter of law; an instruction that, to recover for the alleged negligent injury, plaintiff must show that he was exercising reasonable care and diligence for his own safety, cannot be regarded as making the question of negligence one of law.[17] The fact that liability for the automobile accident is sought to be predicated upon a statute does not affect this broad rule. Thus, where, pursuant to a particular statute, liability attaches only for gross negligence, it is for the jury, under proper instructions by the court, to determine whether such negligence exists.[18] An instruction by the court that if the jury shall find that certain facts are established by the evidence presented at the trial, the defendant shall be conclusively presumed to have been guilty of negligence, is not improper where such facts, if established, compel the conclusion that he was negligent as a matter of law.[19] Error in reading to the jury a requested instruction which predicates defendant's liability entirely on the question of his negligence, without regard to the contributory negligence of plaintiff, is harmless where the court instructs fully upon the bearing of contributory negligence.[20]

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[10] See TRIAL [Also INSTRUCTIONS, 14 R. C. L. p. 723].

[11] Saliba v. Saliba, 178 Ark. 250, 11 S. W. (2d) 774, 61 A.L.R. 1348, holding that an instruction that the law presumes that evidence under the control of a party, which is withheld, would be against him if introduced, is proper as against the driver of an automobile within whose knowledge peculiarly rests the answer to a question of fact, and who failed to give his version of the occurrence.

[12] Giddings v. Honan, 114 Conn. 473, 159 A. 271, 79 A.L.R. 1215.

[13] Larsen v. Webb, 332 Mo. 370, 58 S. W. (2d) 967, 90 A.L.R. 67.

[14] See NEGLIGENCE [Also 20 R. C. L. p. 1].

[15] Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A.L.R. 1327; Hornbuckle v. McCarty, 295 Mo. 162, 243 S. W. 327, 25 A.L.R. 1508.

In an action arising from a collision with defendant's automobile, which was either in the center or on his lefthand side of the street, the giving of an instruction that the rights of the defendant and the person injured, who was riding a bicycle in the opposite direction, were the same, is prejudicial, where an ordinance required travelers to keep as near the righthand curb as possible, and the jury, after receiving the instructions, returned, requesting further instructions as to whether the defendant had the right to the center of the street. Hiscock v. Phinney, 81 Wash. 117, 142 P. 461, Ann. Cas. 1916E, 1044.

[16] Hornbuckle v. McCarty, 295 Mo. 162, 243 S. W. 327, 25 A.L.R. 1508.

[17] Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035, 1 L.R.A.(N.S.) 215, 108 Am. St. Rep. 196, 3 Ann. Cas. 487.

[18] Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A.L.R. 1327.

See JURY [Also 16 R. C. L. p. 189].

The giving of an instruction that if the injury complained of was the result of mere accident or misadventure, without the fault of anyone, the plaintiff cannot recover, is proper only where there is something in the record tending to show that the casualty resulted from some unknown cause, and is improper where it resulted from known actions of known persons and things, and the contention is that the cause of injury was the negligent act of one not a party to the suit.[1]

§ 736. —Weight of the Evidence.—The well-settled and firmly intrenched doctrine that the issues of fact in civil cases must be determined in accordance with the preponderance or weight of evidence[2] is applicable to the trial of automobile accident cases, and governs any instructions given therein that pertain to the existence, sufficiency, or weight of the evidence introduced.[3] Judicial attempts to define the term "preponderance of evidence" have frequently served to cloud the issue and confuse the precise intent and meaning inherent in the use of this phrase.[4] Thus, the instruction in an automobile accident case that by a preponderance of credible evidence is meant the "greater weight of the testimony," and that which best satisfies the mind as to its truth, has been held to place an unwarranted burden on the plaintiff.[5] In most jurisdictions, instructions variously worded, defining the term "preponderance or weight of evidence" as meaning evidence which, in the judgment of the jury, is entitled to the greater weight, have been held to be correct and sufficient.[6]

§ 737. —Rights and Duties.—An instruction as to the relative rights and duties of a pedestrian and a motorist under particular circumstances is proper when justified by the evidence introduced at the trial.[7] Accordingly, in an action for injury to a pedestrian by an automobile, where the parties disagree as to whether the accident occurred at a street crossing or a street intersection, the jury should be separately instructed as to the rights and duties of the parties with respect to crossings and at intersections, although by ordinance the pedestrian has the right of way in both cases.[8] In an action arising out of a collision of automobiles approaching one another on intersecting streets, the trial court should charge that if both approached the intersection at approximately the same time the one on the right, if proceeding at a lawful rate of speed, had the right of way.[9] Such an instruction is not incomplete in failing to define defendant's rights if it should be found that he entered the intersection first, where the evidence, without substantial conflict, was that both cars approached the intersection at approximately the same time.[10] In connection with a charge that one who steps into a street must remember that vehicles, etc., have a right of way, and act accordingly, the court may charge that a man must use his senses in any transaction, and that in considering plaintiff's conduct the jury should ask themselves whether a man of ordinary prudence, under all the circumstances, would have acted as plaintiff did, and that if so plaintiff would not be negligent.[11] In an action by a guest for injuries sustained in an accident to the car in which he was riding, the court should instruct the jury as to the duties which the law imposes upon, and the care to be exercised by, the guest for his own safety.[12] In an action by one who attempted to turn an automobile driven by him into an intersecting street in front of a machine coming from the opposite direction, to recover damages for injuries resulting from the ensuing collision, the jury should be instructed that it was plaintiff's duty to guide his automobile in a careful and prudent manner, and if he saw, or in the exercise of ordinary care should have seen, the approach of defendant's car, it was his duty not to drive across the path of such car so near as to make a collision probable or unavoidable.[13]

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[19] Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A.L.R. 1327.

[20] Roth v. Chatlos, 97 Conn. 282, 116 A. 332, 22 A.L.R. 1554.

[1] Hogan v. Kansas City Pub. Serv. Co. 322 Mo. 1103, 19 S. W. (2d) 707, 65 A.L.R. 129.

[2] Annotation: 93 A.L.R. 155.

[3] Heacock v. Baule, 216 Iowa, 311, 249 N. W. 437, 93 A.L.R. 151; West v. Jaloff, 113 Or. 184, 232 P. 642, 36 A.L.R. 1391.

[4] Annotation: 93 A.L.R. 155, and cases there collected.

[5] Heacock v. Baule, 216 Iowa, 311, 249 N. W. 437, 93 A.L.R. 151.

[6] Annotation: 93 A.L.R. 157.

See Trial [Also Instructions, 14 R. C. L. p. 723].

[7] Brown v. Woolverton, 219 Ala. 112, 121 So. 404, 64 A.L.R. 640; Godfrey v. Brown, 220 Cal. 57, 29 P. (2d) 165, 93 A.L.R. 1092; St. Louis-San Francisco R. Co. v. Prince, 145 Okla. 194, 291 P. 973, 71 A.L.R. 357.

An instruction that the operator of an automobile must anticipate the presence of other vehicular traffic and keep his vehicle under such control as will enable him to avoid collision with another automobile which is operated with reasonable care, and, if the situation so requires, must exercise reasonable care to slow down, and, if reasonably necessary, to stop, is not erroneous as taking from the jury the question of what constitutes ordinary care under the circumstances. Godfrey v. Brown, 220 Cal. 57, 29 P. (2d) 165, 93 A.L.R. 1092.

[8] Schwalen v. W. P. Fuller & Co. 107 Wash. 476, 182 P. 592, 187 P. 367, 10 A.L.R. 296.

The court should not instruct the jury in general terms that the law gives the right of way to the driver of the vehicle upon the main thoroughfare, without stating the conditions of and limitations upon that right.[14]

An abstract instruction, in an action for personal injuries growing out of an automobile collision, that all persons have an equal right to use the highways in an equal manner, is error when it wholly ignores the fact that under the evidence, and under a statute giving the right of way to vehicles approaching an intersection from the right when there is danger of collision, the jury may find that defendant's car had the right of way.[15]

§ 738. —**Proximate Cause.**—The court should define with sufficient clarity and definiteness the rule of proximate cause,[16] and then leave it to the jury, under proper instructions as to the issues of fact and the law applicable to the case, to determine the proximate cause of the accident in the light of the rule stated.[17] In an action for injuries resulting from an automobile collision, in which the jury were charged that the defendant's negligence, to be actionable, must have been the proximate cause of the plaintiff's injuries, the usual definition of proximate cause being given, and that if the negligence of the driver of the other car was the sole proximate cause of the accident, the defendant could not be held liable, it was held unnecessary to point out to the jury the application of the rule of proximate cause to the facts claimed to have been proven.[18] An instruction that the word "cause," as used in some of the questions submitted to the jury, "presents the simple question whether the relation of cause and effect exists between negligence on the part of the defendants and the damages which the plaintiff sustained," is insufficient in failing to impress upon the jury that the cause must have been the efficient and not a remote cause.[19]

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[9] Godfrey v. Brown, 220 Cal. 57, 29 P. (2d) 165, 93 A.L.R. 1092.

[10] Ibid.

[11] McCown v. Muldrow, 91 S. C. 523, 74 S. E. 386, Ann. Cas. 1914A, 139.

[12] Sharp v. Sproat, 111 Kan. 735, 208 P. 613, 26 A.L.R. 1421.

[13] Webber v. Park Auto Transp. Co. 138 Wash. 325, 244 P. 718, 47 A.L.R. 590.

[14] Heidle v. Baldwin, 118 Ohio St. 375, 161 N. E. 44, 58 A.L.R. 1186.

[15] Judd v. Rudolph, 207 Iowa, 113, 222 N. W. 416, 62 A.L.R. 1174.

[16] See NEGLIGENCE [Also 20 R. C. L. p. 1].

[17] Mazziotte v. Bridgeport & W. Pass. Service, 116 Conn. 32, 163 A. 409, 87 A.L.R. 908.

[18] Ibid.

§ 739. —**Standard of Care.**—It is the function of the court to instruct the jury as to the general standard of care required of motorists and pedestrians, and then leave it to the jury to determine whether such care was exercised upon a specific occasion.[20] The instruction should not operate to take from the jury the issue of whether the degree of care exercised at the time of the accident was adequate in the light of the surrounding circumstances.[1] Instructions to a jury in a negligence case that plaintiff is not entitled to recover if they find that defendant used due care, or that the plaintiff failed to use due care, are not objectionable as leaving to the jury the question of the meaning of "due care," where the court had defined negligence in its general charge.[2] An instruction that the operator of an automobile must anticipate the presence of other vehicular traffic and keep his vehicle under such control as will enable him to avoid collision with another automobile which is operated with reasonable care, and, if the situation so requires, must exercise reasonable care to slow down, and, if reasonably necessary, stop, is similarly not erroneous as taking from the jury the question of what constitutes ordinary care under the circumstances.[3]

§ 740. —**Contributory Negligence.**—Generally, it is within the province of the jury to decide from the facts in the case whether the plaintiff is guilty of such negligence contributing to the injury as will preclude his recovery,[4] and this determination is to be based upon proper instructions from the court respecting the law applicable to the case.[5] The court may, in a proper case, instruct the jury that if the accident happened in a specified manner, under stated conditions, the plaintiff is guilty of contributory negligence barring a recovery.[6] The court may without committing prejudicial error give an instruction that there is a presumption that a person injured in a collision was exercising due care for the protection of his person at the time of the accident, but that the presumption is not conclusive where there were eyewitnesses who testified directly as to his acts.[7] Generally speaking, an instruction is erroneous which places defendant's liability entirely on his own act, without regard to the question of plaintiff's contributory negligence,[8] unless the action is based upon alleged wanton, wilful, and reckless conduct.[9] However, in an action to hold an automobile driver liable for injuring a pedestrian, an instruction cannot be given exempting defendant from liability if she temporarily took her eyes off the street to give attention to her children, without any reference to the circumstances under which the act was done.[10] An instruction, in the language of the statute, that "no person shall stand or loiter on any roadway other than in a safety zone if such act interferes with the lawful movement of traffic," is properly given in a case where a deaf person was struck by a motor vehicle while he was standing in the middle of a narrow road with his back to a blind turn a short distance away.[11] Nor, where such person, when his clothing was brushed by the front of the automobile approaching him from behind, turned toward it instead of jumping away from it, and in consequence was struck by the projecting box of the truck, is he entitled to an instruction on the emergency rule, since he acted before he was aware of his danger.[12]

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[19] Walker v. Kroger Grocery & Baking Co. 214 Wis. 519, 252 N. W. 721, 92 A.L.R. 680.

[20] Godfrey v. Brown, 220 Cal. 57, 29 P. (2d) 165, 93 A.L.R. 1092.

[1] Brown v. Woolverton, 219 Ala. 112, 121 So. 404, 64 A.L.R. 640.

[2] Ibid.

[3] Godfrey v. Brown, 220 Cal. 57, 29 P. (2d) 165, 93 A.L.R. 1092.

[4] See supra, §§ 703 et seq.

[5] Keir v. Trager, 134 Kan. 505, 7 P. (2d) 49, 81 A.L.R. 181; Stehouwer v. Lewis, 249 Mich. 76, 227 N. W. 759, 74 A.L.R. 844.

The refusal of the court, in an action for injuries sustained by a blind person who, when walking alone across a street intersection was hit by an automobile, to instruct the jury that the blind have as much right to use the streets as those who have possession of their faculties, and that it is not negligence as a matter of law for a blind person to walk unattended, without a cane, upon a public street, is reversible error where improper instructions relative to contributory negligence were equivalent to a directed verdict for the defendant. Weinstein v. Wheeler, 127 Or. 411, 271 P. 733, 62 A.L.R. 574.

[6] Stehouwer v. Lewis, 249 Mich. 76, 227 N. W. 759, 74 A.L.R. 844.

Where the defendant claimed that the boy injured ran into the side of the car, the claim being supported by the absence of marks on the front of the car and the presence of marks on its side, there is no error in charging the jury that, if the accident was due to the sudden and unanticipated act of the boy, and the defendant did not know, or have reason to anticipate, that he was going to run into the side of the automobile, the plaintiff cannot recover. Ibid.

An instruction in an action for injury to a pedestrian struck by an automobile that if the plaintiff was guilty of some negligence in walking across the street at a point other than the intersection, which either in whole or in part proximately contributed to her alleged injuries, a verdict should not be found in her favor, is not an incorrect statement of the law. Brown v. Woolverton, 219 Ala. 112, 121 So. 404, 64 A.L.R. 640.

A definition of contributory negligence need not be included in an instruction in which the court declares the law and tells the jury that the plaintiff is entitled to recover, if they find that a particular condition existed, unless he himself was guilty of contributory negligence, where such negligence is defined in other instructions.[13] Nor is an instruction that plaintiff is not entitled to recover if he failed to use due care objectionable as leaving to the jury the question of the meaning of "due care," where the court had defined negligence in its general charge.[14]

§ 741. —Emergency.—The court, in instructing on the issue of negligence, may properly define the standard of conduct applicable in an emergency, but no reversible error is committed if the court fails specifically to apply the instruction to a party to the accident, where the evidence introduced fails to show that such person acted upon his own judgment in an emergency of imminent peril not created by his own negligence.[15] Any error in giving an instruction on the emergency rule on behalf of a motorist or of a pedestrian injured by the operation of the vehicle is nonprejudicial in an action for injuries thereby occasioned, where the jury finds such person to have been negligent.[16] Refusal of a requested instruction regarding the emergency doctrine applicable to the driver of an automobile is not error where the subject is covered by an instruction given, which, unlike that requested, conditions the doctrine upon the driver's freedom from negligence in bringing about the perilous situation.[17]

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[7] Packard v. O'Neil, 45 Idaho, 427, 262 P. 881, 56 A.L.R. 317.

[8] Roth v. Chatlos, 97 Conn. 282, 116 A. 332, 22 A.L.R. 1554.

An instruction that if the jury should believe that defendant's car was being driven at the time of the collision by another with his knowledge and consent, or at his request, about his business, he is liable to the plaintiff for any negligent act or omission of the driver which proximately caused or contributed to the injury and death of plaintiff's daughter, is misleading and erroneous as permitting a recovery even though the jury may have believed from the evidence that the person killed was guilty of contributory negligence. Fuller v. Darnell, 100 Fla. 773, 129 So. 915, 74 A.L.R. 1.

[9] Where an action for injury sustained by one operating an unregistered motor vehicle on a highway, in a collision with another vehicle, went to the jury only on a count of the declaration alleging wilful, wanton, and reckless conduct, there was no error in charging that the contributory negligence of plaintiff would not bar recovery. Potter v. Gilmore, 282 Mass. 49, 184 N. E. 373, 87 A.L.R. 1462.

[10] Bourland v. Baker, 141 Ark. 280, 216 S. W. 707, 20 A.L.R. 525.

[11] Hanson v. Matas, 212 Wis. 275, 249 N. W. 505, 93 A.L.R. 546.

[12] Ibid.

[13] Saliba v. Saliba, 178 Ark. 250, 11 S. W. (2d) 774, 61 A.L.R. 1348.

[14] Brown v. Woolverton, 219 Ala. 112, 121 So. 404, 64 A.L.R. 640.

[15] Hanson v. Matas, 212 Wis. 275, 249 N. W. 505, 93 A.L.R. 546.

§ **742. —Speed.**—Where there is a lack of evidence tending to establish the excessive speed of an automobile involved in an accident, it is error for the court to instruct as to the unreasonable speed of the vehicle.[18] But where the evidence introduced at the trial is of such a character as to justify an instruction respecting the reasonableness of the speed of a motor vehicle, it is proper for the court to instruct the jury upon that point.[19] An instruction that it was not negligence to drive at statutory speed, in the absence of warning of "danger ahead," is proper, where there is no allegation or proof of negligence, except with respect to speed.[20]

4. VERDICT, FINDINGS, AND JUDGMENT

§ **743. Generally.**—In actions for injuries to person or property arising from the operation of an automobile, the general rules which govern the form and sufficiency of the findings or verdict of the jury in the ordinary civil action[1] apply.[2] The jury may be polled for the purpose of ascertaining for a certainty that each juror agrees upon the verdict.[3] As in any other case, a verdict for the plaintiff implies that the jury accepted that part of the evidence favorable to the plaintiff, and that, where different inferences were possible, it drew those favorable to the plaintiff's case.[4] A quotient verdict, in an automobile accident action, obtained through an agreement whereby each juror put down the amount he thought proper, the twelve amounts were added and divided by twelve, and the quotient, by agreement, was the verdict, is invalid; but not so if, in the course of reaching an agreement, the amounts representing the views of the individual jurors were divided by twelve, and upon consideration the quotient was agreed upon as the verdict.[5]

A verdict in an action for personal injuries sustained by a pedestrian when struck by a motor truck, finding that the driver of the truck, who testified that he saw plaintiff as soon as he rounded a turn in the road, was not negligent as to lookout, and that the plaintiff, who was shown to have been exceedingly deaf and to have been standing in the middle of a narrow road with his back toward a blind turn 40 feet away, was negligent as to lookout, need not be set aside as inconsistent.[6] When the jury is required to make special findings of fact supplementing a general verdict,[7] such special findings must be consistent with the general verdict; otherwise the verdict cannot stand.[8] The form of a question to the jury in an action by a wife against her husband for injuries occasioned by his negligence in operating an automobile which collided with a train at a railroad crossing, as to whether the defendant, just prior to the collision, had failed to exercise ordinary care not to increase the danger assumed by the plaintiff upon entering the automobile, with respect to the speed at which he operated the automobile, is not such as to render the verdict for plaintiff defective on the ground that the form of the question made it impossible to determine whether the jury concluded that defendant was not driving at an excessive speed, or that he was so driving, and that plaintiff assumed the risk.[9] In automobile accident cases which are tried by a court without a jury, the court in making its findings of fact and conclusions of law is governed by the rules applicable to other civil actions.[10] In such cases a finding on the issue of contributory negligence is not necessary where the court finds that defendant's negligent acts were the sole and proximate cause of the injury sued for.[11] And notwithstanding a statutory provision that findings of fact and conclusions of law must be separately stated, a finding may be regarded as one of fact although mistakenly placed among the conclusions of law.[12]

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[16] Ibid.

[17] McDowell v. Hurner, 142 Or. 617, 20 P. (2d) 395, 88 A.L.R. 578.

[18] Saunders System Birmingham Co. v. Adams, 217 Ala. 621, 117 So. 72, 61 A.L.R. 1333.

[19] **An instruction on excessive speed of an automobile** is proper in an action to recover damages for injury to a pedestrian struck by it, where it traveled 16 feet, plus the width of the street, while the pedestrian was walking from the street car track to the curb. Riddel v. Lyon, 124 Wash. 146, 213 P. 487, 37 A.L.R. 486.

[20] Strickfaden v. Greencreek Highway Dist. 42 Idaho, 738, 248 P. 456, 49 A.L.R. 1057.

[1] See TRIAL [Also VERDICT, 27 R. C. L. p. 831].

[2] Babbitt, Motor Vehicle Law, 4th ed. p. 1579, § 2194.

[3] Hoffman v. St. Paul, 187 Minn. 320, 245 N. W. 373, 86 A.L.R. 198.

[4] Railway Exp. Agency v. Little (C. C. A. 3d) 50 F. (2d) 59, 75 A.L.R. 963.

[5] Hoffman v. St. Paul, 187 Minn. 320, 245 N. W. 373, 86 A.L.R. 198.

[6] Hanson v. Matas, 212 Wis. 275, 249 N. W. 505, 93 A.L.R. 546.

The general rules respecting judgments in civil proceedings[13] apply to judgments recovered in actions based upon injuries sustained in automobile accidents.[14] A judgment in one action will bar recovery in another action involving the same tort and the same accident, although the damages demanded in each action are for a different injury.[15]

5. New Trial; Review

§ **744. Generally.**—The procedure and the grounds for a new trial in automobile cases are the same as, and are governed entirely by the general rules applicable, in other civil actions; reference should be made to the general article.[16]

The broad rules governing appeals in civil actions generally[17] apply to appeals in actions instituted to recover damages for injuries sustained in automobile accidents.[18] In the absence of practice or local statute to the contrary, the procedural aspects of such appeals are no different from those of an appeal in any other civil proceeding. And, as in other actions,[19] a judgment in a proceeding involving the operation of a motor vehicle will not be reversed for error that is harmless or nonprejudicial to the other side,[20] whether such error relates to arguments of counsel,[1] admission of evidence,[2] or matters connected with the pleadings.[3]

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[7] See Trial [Also Verdict, 27 R. C. L. p. 866, § 39].

[8] Marsh v. Boyden, 33 R. I. 519, 82 A. 393, 40 L.R.A.(N.S.) 582; Minor v. Stevens, 65 Wash. 423, 118 P. 313, 42 L.R.A.(N.S.) 1178.

[9] Archer v. Chicago, M. St. P. & P. R. Co. 215 Wis. 509, 255 N. W. 67, 95 A.L.R. 851.

[10] See Trial.

[11] Woodhead v. Wilkinson, 181 Cal. 599, 185 P. 851, 10 A.L.R. 291.

[12] Linberg v. Stanto, 211 Cal. 771, 297 P. 9, 75 A.L.R. 555.

[13] See Judgments [Also 15 R. C. L. p. 554].

[14] Verhoeks v. Gillivan, 244 Mich. 367, 221 N. W. 287, 65 A.L.R. 1083; Underwood v. Dooley, 197 N. C. 100, 147 S. E. 686, 64 A.L.R. 656.

[15] Underwood v. Dooley, 197 N. C. 100, 147 S. E. 686, 64 A.L.R. 656.

[16] See New Trial [Also 20 R. C. L. p 214].

[17] See Appeal and Error, Vols. 2 and 3.

[18] Voegeli v. Waterbury Yellow Cab Co. 111 Conn. 407, 150 A. 303, 69 A.L.R. 902; Ragan v. MacGill, 134 Or. 408, 292 P. 1094, 72 A.L.R. 860; Ryder v. Hayward (Sturtevant v. Hayward) 98 Vt. 106, 126 A. 491, 36 A.L.R. 453.

[19] See Appeal and Error, Vol. 3, p. 555, §§ 1002 et seq.

[20] Ryder v. Hayward (Sturtevant v. Hayward) 98 Vt. 106, 126 A. 491, 36 A.L.R. 453.

X. DAMAGE TO VEHICLES

§ 745. **Generally.**—The measure of damages for destruction of or injury to an automobile has been variously stated by the courts, the variations of statement representing in the main not difference of judicial opinion, but merely different methods of arriving at full compensation to the owner. The familiar doctrine that an invasion of property rights calls for an award of substantial, as distinguished from nominal, damages, is applicable to claims for damages to both pleasure and commercial vehicles. The jury should award fair and reasonable compensation according to the circumstances of each case. If the actual injury is trifling, the damages will be small, but in any event, they are in the nature of substantial and not nominal damages.[4] In accordance with this general proposition, the measure of damages is the amount which will compensate for all of the detriment proximately caused.[5] Generally, when an automobile that has been damaged by the negligence of another can be repaired, the proper measure of damages is the cost of the repairs[6] and the value of the loss of the use of it while it is being repaired.[7] If it cannot be repaired, then the measure of damages is the difference between the market value of the automobile before it was damaged and the value of the wreckage.[8]

§ 746. **Difference in Market Value before and after Injury.**—When an automobile is totally destroyed the measure of damages is its reasonable market value before its destruction.[9] Where an automobile has been damaged by the wrongful act of another, and cannot by repair be placed in as good a condition as it was in before the injury,[10] the measure of damages is the difference between the market value of the automobile immediately before the accident and its market value immediately afterwards.[11] This is the rule applicable where the automobile is used for pleasure purposes,[12] as well as where the vehicle damaged is used for business purposes.[13] The basis for computation in this respect is the market value of the vehicle, irrespective of the fact that the owner procured it at a lower price.[14]

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[1] Ragan v. MacGill, 134 Or. 408, 292 P. 1094, 72 A.L.R. 860.

An error in permitting an unwarranted statement by counsel to stand does not require reversal if prejudice is not made to appear. Ryder v. Hayward (Sturtevant v. Hayward) 98 Vt. 106, 126 A. 491, 36 A.L.R. 453.

[2] Ryder v. Hayward (Sturtevant v. Hayward) 98 Vt. 106, 126 A. 491, 36 A.L.R. 453.

Example of judgment reversed for prejudicial error in admission of evidence. Voegeli v. Waterbury Yellow Cab Co. 111 Conn. 407, 150 A. 303, 69 A.L.R. 902.

[3] Gardiner v. Solomon, 200 Ala. 115, 75 So. 621, L.R.A.1917F, 380.

[4] Annotation: 4 A.L.R. 1350.

Generally as to measure of damages for injury to or loss or destruction of personal property, see DAMAGES [Also 8 R. C. L. p. 486, §§ 47 et seq.].

[5] Cook v. Packard Motor Car Co. 88 Conn. 590, 92 A. 413, L.R.A.1915C, 319; Weick v. Dougherty, 139 Ky. 528, 90 S. W. 966, 3 L.R.A.(N.S.) 348; Perkins v. Brown, 132 Tenn. 294, 177 S. W. 1158, L.R.A.1915F, 723, Ann. Cas. 1917A, 124.

Annotation: 78 A.L.R. 910.

[6] See infra, § 749.

[7] See infra, § 750.

[8] See infra, § 746.

[9] Annotation: 78 A.L.R. 918.

[10] See infra, § 749.

[11] Cook v. Packard Motor Car Co. 88 Conn. 590, 92 A. 413, L.R.A.1915C, 319; Louisville & I. R. Co. v. Schuester, 183 Ky. 504, 209 S. W. 542, 4 A.L.R. 1344; Chambers v. Cunningham, 153 Okla. 129, 5 P. (2d) 378, 78 A.L.R. 905.

Annotation: 4 A.L.R. 1352, s. 32 A.L.R. 706, and 78 A.L.R. 910.

See DAMAGES [Also 8 R. C. L. p. 486].

[12] Marland Ref. Co. v. Duffy, 94 Okla. 16, 220 P. 846, 35 A.L.R. 52.

Annotation: 32 A.L.R. 711, s. 78 A.L.R. 917.

Where a new automobile purchased by a dealer for resale has been disfigured by scratching and writing a name on the body of the car which penetrates the paint and varnish, the proper measure of damages is the difference in the value of the car immediately before and immediately after the injury. Broadie v. Randall, 114 Kan. 92, 216 P. 1103, 32 A.L.R. 708.

[13] Cook v. Packard Motor Car Co. 88 Conn. 590, 92 A. 413, L.R.A.1915C, 319; Louisville & I. R. Co. v. Schuester, 183

§ **747. —Time and Place of Valuation.**—Ordinarily, the value of the property damaged is to be determined as of the time and place of its damage or injury.[14a] Proof of its value within a reasonable time, under the circumstances of the particular case before and after the injury, is competent, provided the valuation was not too far removed from the accident, either in time or place.[15] The rules herein stated are not affected by the existence or nonexistence of a market value at such time or place. If there is a market value, the same should be applied. If not, then the actual or intrinsic value should govern.[16]

§ **748. —Evidence as to Value.**—In showing the actual cash value of the car at the time of loss, insured is entitled to show all the circumstances bearing upon that question. In the case of a used car, evidence as to the original cost thereof is admissible on the issue as to its value at the time of loss, under the general rule that the present value of a used article can be determined with a reasonable degree of certainty by taking such original cost and making due allowance for depreciation on account of age, use, conditions, and other elements.[17] The owner himself is competent to testify as to the value of the car at the time of loss,[18] even though he may not possess sufficient knowledge or skill to testify as an expert on the subject.[19] Determination of the qualification of a witness to testify as to the value of the car at the time of loss is a matter peculiarly within the discretion of the trial court.[20]

In determining the value of an automobile after injury, for the purpose of fixing the damages to be allowed therefor, evidence is admissible as to the reasonable value of repairs necessary to restore it to usable condition.[1]

§ **749. Cost of Repairs as Measure of Damages.**—While the general rule is that the measure of damages in respect of an injured automobile is the difference in its value immediately before and immediately after the injury, this measure may be established by showing the reasonable cost of necessary repairs to restore it to its previous condition. Where that character of proof is resorted to, the injured party must show that the cost of the repairs is reasonable, and the bill for the repairs must not exceed the difference in the market value of the car before and after the injury.[2] The cost of repairs is the proper measure of damages for injury to an automobile, if the machine is not substantially destroyed or rendered valueless, and can be repaired at reasonable expense,[3] although, in addition thereto, the owner may recover compensation

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Ky. 504, 209 S. W. 542, 4 A.L.R. 1344; Chambers v. Cunningham, 153 Okla. 129, 5 P. (2d) 378, 78 A.L.R. 905.

Annotation: 4 A.L.R. 1350, s. 32 A.L.R. 706, and 78 A.L.R. 910.

[14] Annotation: 78 A.L.R. 919.

[14a] Damages recoverable for conversion of automobile are limited to value at the time of conversion with interest on that sum to the date of trial. Mims v. Bennett, 160 S. C. 39, 158 S. E. 124, 78 A.L.R. 361.

[15] Annotation: 78 A.L.R. 918.

[16] Annotation: 78 A.L.R. 918.

[17] Annotation: 64 A.L.R. 176.

For more detailed treatment of the subject of insurance as it pertains to automobiles, see §§ 504 et seq. supra.

[18] Annotation: 64 A.L.R. 174.

[19] Annotation: 64 A.L.R. 175.

[20] Annotation: 64 A.L.R. 176.

[1] Murphy v. Hawthorne, 117 Or. 319, 244 P. 79, 44 A.L.R. 1397.

As to cost of repairs as measure of recovery, see infra, § 749.

[2] Annotation: 78 A.L.R. 919.

[3] Carruthers v. Campbell, 195 Iowa, 390, 192 N. W. 138, 28 A.L.R. 949; Thrapp v. Meyers, 114 Neb. 689, 209 N. W. 238, 47 A.L.R. 585; Marland Ref. Co. v. Duffy, 94 Okla. 16, 220 P. 846, 35 A.L.R. 52; Stubbs v. Molberget, 108 Wash. 89, 182 P. 936, 6 A.L.R. 318.

See also Murphy v. Hawthorne, 117 Or. 319, 244 P. 79, 44 A.L.R. 1397.

Annotation: 78 A.L.R. 911.

It is not reversible error to permit the damages allowed for injuries to an auto-for the loss of use of the car while the repairs are in progress.[4] The rule applies whether such vehicle is one used solely for pleasure,[5] or a commercial vehicle.[6]

But it often happens that no repairs can restore the original value of the automobile. To meet this situation it has been held that the measure of damages is the cost of repair plus the difference, if any, between the value of the car after repair and its value before the injury.[7] Likewise, it may happen that repairs will increase the value of the car beyond its market value before it was injured. Accordingly, it has been said that the amount to be allowed is not the actual cost of repairs, since they may increase the value, but what it would reasonably cost to place the car in its original condition.[8] In an action for damage to an automobile, it is not a condition precedent to recovery for items of damage for repairs that plaintiff should have actually expended the sums or incurred liability therefor.[9]

§ 750. Compensation for Loss of Use during Repairs.—Whether an automobile is used for pleasure only, or for commercial purposes, in case of injury thereto the owner may recover, in addition to the cost of repair, the value of its use during the time in which he was necessarily deprived thereof,[10] at least when such damages are pleaded.[11] Damages for this purpose may be measured by the cost of hiring another automobile while the repairs are being made;[12] that is, by the rental, or, as it is sometimes termed, the "usable," value of the car,[13] and this is true notwithstanding the fact that no other automobile was

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mobile to be based upon the cost of repairs rather than upon the difference in value of the machine immediately before and immediately after the injury, in the absence of evidence tending to show that the cost of repairs exceeded such difference in value. Murphy v. Hawthorne, 117 Or. 319, 244 P. 79, 44 A.L.R. 1397.

[4] See infra, § 750.

[5] Carruthers v. Campbell, 195 Iowa, 390, 192 N. W. 138, 28 A.L.R. 949; Marland Ref. Co. v. Duffy, 94 Okla. 16, 220 P. 846, 35 A.L.R. 52; Bader v. Marlin, 160 Wash. 460, 295 P. 160, 78 A.L.R. 914; Stubbs v. Molberget, 108 Wash. 89, 182 P. 936, 6 A.L.R. 318.

Annotation: 32 A.L.R. 712, s. 78 A.L.R. 917.

[6] Cook v. Packard Motor Car Co. 88 Conn. 590, 92 A. 413, L.R.A.1915C, 319; Thrapp v. Meyers, 114 Neb. 689, 209 N. W. 238, 47 A.L.R. 585; Chambers v. Cunningham, 153 Okla. 129, 5 P. (2d) 378, 78 A.L.R. 905.

Annotation: 4 A.L.R. 1352, s. 32 A.L.R. 706, and 78 A.L.R. 910.

[7] Cook v. Packard Motor Car Co. 88 Conn. 590, 92 A. 413, L.R.A.1915C, 319.

Annotation: 32 A.L.R. 712.

[8] Annotation: 32 A.L.R. 712.

[9] Chambers v. Cunningham, 153 Okla. 129, 5 P. (2d) 378, 78 A.L.R. 905.

[10] Cook v. Packard Motor Car Co. 88 Conn. 590, 92 A. 413, L.R.A.1915C, 319; Louisville & I. R. Co. v. Schuester, 183 Ky. 504, 209 S. W. 542, 4 A.L.R. 1344; Antokol v. Barber, 248 Mass. 393, 143 N. E. 350, 32 A.L.R. 703; Chambers v. Cunningham, 153 Okla. 129, 5 P. (2d) 378, 78 A.L.R. 905; Maryland Ref. Co. v. Duffy, 94 Okla. 16, 220 P. 846, 35 A.L.R. 52; Perkins v. Brown, 132 Tenn. 294, 177 S. W. 1158, L.R.A.1915F, 723, Ann. Cas. 1917A, 124; Stubbs v. Molberget, 108 Wash. 89, 182 P. 936, 6 A.L.R. 318.

Annotation: 4 A.L.R. 1355, s. 32 A.L.R. 706, and 78 A.L.R. 910; Ann. Cas. 1917A, 127.

[11] **An allegation of great damage** by negligent collision with an automobile justifies a recovery for loss of its use while the injuries are being repaired. Antokol v. Barber, 248 Mass. 392, 143 N. E. 350, 32 A.L.R. 703.

A judgment will not, however, be reversed for allowing the cost of hiring a substitute automobile while one injured by another's negligence is being repaired, although special damages are not pleaded, where the result would have been the same had the correct rule been followed, so that no harm was done. Antokol v. Barber, 248 Mass. 393, 143 N. E. 350, 32 A.L.R. 703.

[12] Annotation: 32 A.L.R. 713, s. 78 A.L.R. 917.

[13] Cook v. Packard Motor Car Co. 88 Conn. 590, 92 A. 413, L.R.A.1915C, 319; Louisville & I. R. Co. v. Schuester, 183 Ky. 504, 209 S. W. 542, 4 A.L.R. 1344; Perkins v. Brown, 132 Tenn. 294, 177 S. W. 1158, L.R.A.1915F, 723, Ann. Cas. 1917A, 124.

Annotation: 4 A.L.R. 1359, s. 32 A.L.R. 706, and 78 A.L.R. 910.

Whether the two terms, "rental value" and "usable value," may be treated as equivalent when applied to property so detained, is a matter on which the authorities seem to differ. The Connecticut court in Cook v. Packard Motor Car Co. 88 Conn. 590, 92 A. 413, L.R.A.1915C, 319, holds to the view that they are not equivalent. On the other hand, the intermediate appellate courts of New York and Illinois hold that the rental value of a car during the period of loss of its use is a proper actually procured during such interval.[14] It is not strictly accurate, however, to say that the owner is entitled to recover as damages the amount actually paid for the hire of another car; the amount which he pays is merely evidence of rental value.[15] Nor can the owner of a motor car kept for pleasure, and used only a small portion of each day, recover as damages for the loss of the use of the machine the full daily rental value of machines in that vicinity.[16] While it seems that in the case of articles of constant and daily use usable value, being well known and readily ascertained, constitutes a proper element of damage, the loss sustained by reason of the deprivation must not be left to conjecture.[17] The value of the use may be recovered, though the reason that another car was not procured was that the plaintiff could not afford to pay for it, and not because similar cars were not to be had.[18] It has also been held that the value of the use may be recovered, though this, with the amount allowed for depreciation of value, exceeds the market value of the car.[19] On the other hand, it has been held that where the depreciation of value is taken as the measure of damages, no allowance should be made for loss of use.[20] In estimating the value of the use of a car during repairs, only a reasonable time for repair is to be allowed.[1] To establish the rental value of an automobile during a certain period of time, the opinions of expert witnesses familiar with the subject may be admitted.[2]

§ 751. Compensation for Loss of Profits through Being Deprived of Use.—While the loss of prospective profits may, in certain circumstances, be considered as an element of damages for injury to a commercial vehicle, the weight of authority is to the contrary.[3] In no event, however, may one recover for loss of profits that are purely speculative or problematical.[4]

§ 752. Interest on Value of Car.—It seems to be the generally accepted rule that it is within the discretion of the jury to allow interest on the value of a commercial vehicle in an action for negligent injury thereto, if an accurate estimate of the value can be made.[5]

§ 753. Expenses of Removal and Storage.—The expense incident to removing a damaged vehicle and the storage charges incurred while awaiting repairs

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measure of plaintiff's damages. Perkins v. Brown, 132 Tenn. 294, 177 S. W. 1158, L.R.A. 1915F, 723, Ann. Cas. 1917A, 124.

Rental value includes a substantial allowance for depreciation and repairs, for the overhead expenses, and for the lost profits from renting the car. Cook v. Packard Motor Car Co. 88 Conn. 590, 92 A. 413, L.R.A.1915C, 319.

[14] Jackson Architectural Iron Works v. Hurlbut, 158 N. Y. 34, 52 N. E. 665, 70 Am. St. Rep. 432; Allen v. Fox, 51 N. Y. 562, 10 Am. Rep. 641; Perkins v. Brown, 132 Tenn. 294, 177 S. W. 1158, L.R.A.1915F, 723, Ann. Cas. 1917A, 124.

Annotation: 4 A.L.R. 1359, s. 32 A.L.R. 706, and 78 A.L.R. 910.

In New York no recovery can be had for loss of use unless a substitute car is actually hired. Annotation: 32 A.L.R. 714, s. 78 A.L.R. 917.

[15] Antokol v. Barber, 248 Mass. 393, 143 N. E. 350, 32 A.L.R. 703.

[16] Perkins v. Brown, 132 Tenn. 294, 177 S. W. 1158, L.R.A.1915F, 723, Ann. Cas. 1917A, 124.

[17] Annotation: 78 A.L.R. 1359.

[18] Annotation: 32 A.L.R. 714, s. 78 A.L.R. 917.

[19] Annotation: 32 A.L.R. 714, s. 78 A.L.R. 917.

[20] Annotation: 32 A.L.R. 714.

[1] Annotation: 32 A.L.R. 714. Accordingly, recovery cannot be had for loss of use for thirty days, the time the car was in the shop, when the work done did not take more than three days.

[2] Moses v. Lockwood, 54 App. D. C. 115, 295 F. 936, 33 A.L.R. 1467.

[3] Weick v. Dougherty, 139 Ky. 528, 90 S. W. 966, 3 L.R.A.(N.S.) 348.

Annotation: 4 A.L.R. 1361.

[4] Annotation: 78 A.L.R. 913.

[5] Louisville & I. R. Co. v. Schuester, 183 Ky. 504, 209 S. W. 542, 4 A.L.R. 1344; Cook v. Packard Motor Car Co. 88 Conn. 590, 92 A. 413, L.R.A.1915C, 319.

When the injury is less than a total loss, the measure of damage is the difference in the value of the vehicle before and after loss, with interest from the date of loss. Cook v. Packard Motor Car Co. 88 Conn. 590, L.R.A.1915C, 319, 92 A. 413.

may be considered by the jury as elements of damages.[6] It should appear that such charges are reasonable, in view of the services rendered.[7]

§ 754. Pleading and Proof as to Value in Action on Insurance Policy.—The general rules governing pleadings in other civil proceedings[8] are applicable in the instance of actions upon automobile fire, theft, or collision insurance policies to recover for loss of or damage to the car insured.[9] Where, as is usually the case under such a policy of insurance, the amount recoverable is limited to the actual value of the car at the time of the loss, it is ordinarily incumbent upon the insured, in an action upon the policy to recover as for a total loss, to show the value of the car at the time of the loss.[10] There can be no recovery where there is neither allegation nor proof as to the value of the car at that time,[11] although if the insured proves the value of the car at the time of the loss, any defect in his petition by reason of its failure specifically to allege the value of the car at that time is cured after verdict.[12] The absence of an allegation as to the value of the car, even though required by the terms of the policy, is not a fatal defect, no demurrer to the plaintiff's pleadings having been made.[13] But in the absence of evidence from which the jury could arrive at the value of the automobile at the time of its injury sometime after the issuance of the policy, a verdict found for the plaintiff, in an amount representing the face value of the policy is unauthorized.[14] The foregoing rules apply, notwithstanding the circumstance that the policy may be one subject to a valued policy law, whereby it is provided, in effect, that no property shall be insured for more than three fourths of its value at the time the policy is issued, and that, when so insured, "its value shall not be questioned in any proceeding," since a statute of that kind establishes the value of the property insured only as of the date the policy is issued, and not as of the date of the loss.[15]

Under policy of insuring a mortgagee, a conditional vendor of an automobile, against loss by reason of conversion, etc., if the policy is construed as not limiting the measure of recovery to the value of the car at the time of its conversion, etc., no evidence need be offered as to the value of the car at that time.[16] If, on the other hand, the policy is to be construed as limiting the measure of recovery to the value of the car at the time of its conversion, etc., the insured, in order to recover an amount equal to the indebtedness owed him by the mortgagor or conditional vendee, must show that the car was worth that amount at the time of its conversion; in other words, he must show that the car at that time was worth at least whatever amount was claimed upon the policy.[1]

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[6] Annotation: 32 A.L.R. 707. The cost of towing away and storing an injured car may be recovered. Annotation: 4 A.L.R. 1364.

[7] Annotation: 4 A.L.R. 1364.

[8] See PLEADING [Also 21 R. C. L. p. 431].

[9] Annotation: 64 A.L.R. 172.

[10] Bonesteel Motor Co. v. National Union F. Ins. Co. 128 Or. 554, 275 P. 608, 64 A.L.R. 166.

Annotation: 64 A.L.R. 172.

[11] Bonesteel Motor Co. v. National Union F. Ins. Co. 128 Or. 554, 275 P. 608, 64 A.L.R. 166.

Annotation: 64 A.L.R. 172, 173.

The failure to allege and prove the value, at the time of loss by fire, of a motor truck insured for a stated sum, but with the proviso that the insurer would be required to pay the insured only the market value at the time of loss, is fatal to recovery on the policy. Bonesteel Motor Co. v. National Union F. Ins. Co. 128 Or. 554, 275 P. 608, 64 A.L.R. 166.

[12] Annotation: 64 A.L.R. 172.

It is the duty of the insurer to give notice of its intention, in such a case, to rely upon the issue as to the value of the car at the time of loss. Annotation: 64 A.L.R. 172.

[13] Annotation: 64 A.L.R. 172.

[14] Annotation: 64 A.L.R. 173.

[15] Annotation: 64 A.L.R. 174.

[16] Annotation: 64 A.L.R. 175.

[1] Automobile Finance & Secur. Co. v.

Where, in an action for the cost of repairs merely, an insurer by special plea raises the contention that the repair bill exceeds the value of the car at the time it was damaged, its liability being limited to the acual cash value of the car at that time, it is no part of the insured's case to negative that proposition, but the burden is upon the insurer to establish it as a part of its defense.[2]

In showing the actual cash value of the car at the time of loss, the insured is entitled to show all the circumstances having a bearing upon that question.[3] Opinions as to value may be given by properly qualified witnesses; the owner himself is competent to testify as to the value of the car.[4]

Proof of the value of the car at the time the policy was issued, without other testimony showing how the car was afterwards used, its condition at the time of the loss as compared with its condition at the time it was insured, or other facts from which the value of the car at the time of the loss can be ascertained, is insufficient for the purpose of establishing its value at the time of the loss.[5] Similarly, evidence as to the purchase price of the car is not, of itself, sufficient for the purpose of establishing its value at the time of the loss a short time later, and so, will not support a judgment for even a lesser amount.[6]

Upon conflicting evidence as to the value of the car at the time of loss, the weight of the evidence and the credibility of the witnesses are questions for the jury.[7]

XI. CRIMES INCIDENT TO OWNERSHIP OR OPERATION

A. In General

§ 755. Generally.—The advent and ever-increasing use of automobiles has led to the enactment of numerous regulatory provisions, violations of which are made criminal offenses. Speeding,[8] reckless driving,[9] failure to stop when signaled or in case of accident,[10] are offenses against the public safety. The operation of a motor vehicle without sufficient brakes or signal devices, the failure to dim headlights upon the approach of another automobile, neglect to carry lights after dark, are statutory crimes. Stealing an automobile, and buying or concealing a stolen automobile knowing it to have been stolen, are criminal offenses.[11] Driving while intoxicated is likewise a crime.[12] Killing a person while operating a motor vehicle in violation of law,[13] or negligently,[14] constitutes homicide, usually manslaughter.[15] Injuring a person under like conditions constitutes an aggravated assault,[16] an assault with a deadly weapon,[17] or an assault and battery.[18] The penalty provided for violations

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Globe Indemnity Co. (1926) 161 La. 303, 55 A.L.R. 823, 108 So. 545.

[2] Annotation: 64 A.L.R. 174.

[3] Annotation: 64 A.L.R. 176.

[4] Annotation: 64 A.L.R. 174, 175.

[5] Automobile Finance & Securities Co. v. Globe Indem. Co. 161 La. 303, 108 So. 545, 55 A.L.R. 823; Bonesteel Motor Co. v. National Union F. Ins. Co. 128 Or. 554, 275 P. 608, 64 A.L.R. 166.

[6] Annotation: 64 A.L.R. 177.

[7] Annotation: 64 A.L.R. 180.

An insurance adjuster may be found to have elected to repair a stolen car recovered in a damaged condition, from evidence that he took possession of it, gave the work to a repair man, and took it from him and employed another to complete it, while the owner never contracted for its repair himself, or authorized, recognized, or ratified such contract. Councill v. Sun Ins. Co. 146 Md. 137, 126 A. 229, 51 A.L.R. 29.

[8] See infra, § 806.

[9] See infra, § 802.

[10] See infra, § 780.

[11] See infra, §§ 798, 801.

[12] See infra, § 766.

[13] See infra, § 788.

[14] See infra, § 789.

[15] See infra, § 787.

[16] See infra, 764.

[17] See infra, § 763.

[18] See infra, § 763.

is often a fine,[19] though not infrequently imprisonment. Often the violation of such a statute is made a misdemeanor, though occasionally it is made a felony, as is driving while intoxicated,[20] or leaving the scene of an accident without stopping and giving information required by law.[1]

Payment of a so-called "wheel tax" may be enforced by fine.[2] In some jurisdictions the violation of a municipal ordinance relating to automobiles gives rise merely to an action which, although commenced by affidavit and warrant, is not a criminal but a civil proceeding.[3]

§ 756. Right of Legislature to Prohibit Use of Automobile on Public Thoroughfare.—The legislature may, with a view to the safety of the public, provide for the complete exclusion of automobiles from a highway on which, in its judgment, they should not be allowed.[4] The right to operate a motor vehicle is not an unrestricted right, but a privilege which can be exercised only in accordance with the legislative restrictions fixed thereon.[5]

§ 757. Applicability of Principles of Criminal Law.—The principles of criminal law [6] apply to violations of criminal statutes regulating the operation of motor vehicles. As in other criminal prosecutions, persons charged with violations of the motor vehicle law have the right to trial by jury,[7] and guilt must be proved beyond a reasonable doubt.[8] At common law a criminal intent is an essential element of a crime, but is not always a necessary element of statutory crimes.[9] Under many statutes making noncompliance with motor vehicle regulations a penal offense neither intent to violate a regulation nor knowledge that it is being violated constitutes an element of the offense.[10] The only question involved is whether the defendant did the forbidden act.[11]

§ 758. Right to Jury Trial.—The general rules governing the right to trial by jury in criminal cases are discussed under another title; [12] here, however, it may be observed that when applying those rules to the crime under discussion the gravity of the offense under the statute involved, including the nature of the penalty that may be imposed, is determinative of the right to a trial by jury.[13] This is true as to prosecutions for driving while intoxicated,[14] as well as to prosecutions for other crimes.[15]

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[19] State v. Mayo, 106 Me. 62, 75 A. 295, 26 L.R.A.(N.S.) 502, 20 Ann. Cas. 512; Com. v. Kingsbury, 199 Mass. 542, 85 N. E. 848, L.R.A.1915E, 264, 127 Am. St. Rep. 513.

Re Rogers, 7 East L. Rep. (P. E. Island) 212, 15 Ann. Cas. 1167.

Annotation: 26 L.R.A.(N.S.) 502.

[20] See infra, § 767.

[1] See infra, § 780.

[2] Chicago v. Morell, 247 Ill. 383, 93 N. E. 295, 139 Am. St. Rep. 340.

[3] Chicago v. Morell, 247 Ill. 383, 93 N. E. 295, 139 Am. St. Rep. 340. And see Actions, Vol. 1, p. 433, § 42.

[4] State v. Mayo, 106 Me. 62, 75 A. 295, 26 L.R.A.(N.S.) 502, 20 Ann. Cas. 512; Com. v. Kingsbury, 199 Mass. 542, 85 S. E. 848, L.R.A.1915E, 264, 127 Am. St. Rep. 513.

See People v. Rosenheimer, 209 N. Y. 115, 102 N. E. 530, 46 L.R.A.(N.S.) 977.

Annotation: L.R.A.1915E, 264.

Forbidding the use of automobiles on highways constructed over deep ravines and along the edges of cliffs, to protect the lives of their occupants and of those attempting to use horses along such roads, is a reasonable regulation. State v. Mayo, 106 Me. 62, 75 A. 295, 26 L.R.A.(N.S.) 502, 20 Ann. Cas. 512.

[5] Ex parte Kneedler, 243 Mo. 632, 147 S. W. 983, 40 L.R.A.(N.S.) 622, Ann. Cas. 1913C, 923.

[6] See Criminal Law [Also 8 R. C. L. p. 38].

[7] See infra, § 758.

[8] See Evidence [Also Criminal Law, 8 R. C. L. pp. 218 et seq.].

[9] See Criminal Law [Also 8 R. C. L. pp. 60, 62].

[10] Annotation: 11 A.L.R. 1434.

A statute making possession of a motor vehicle with the manufacturer's serial number removed, defaced, or changed a penal offense is a valid exercise of the police power, as against the contention that one might be guilty under the act if he merely had in his possession a car from which the numbers had been removed without his knowledge. See infra, § 800.

A city ordinance regulating operation of motor vehicles on the streets of the city, and requiring a red rear light to be displayed between certain hours, may impose a penalty for its violation without making a specific intent or guilty mind an essential element of the misdemeanor. See infra, § 778.

[11] Annotation: 11 A.L.R. 1434.

[12] See Jury [Also 16 R. C. L. pp. 192 et seq., §§ 13 et seq.].

§ 759. Persons Liable.—The owner or person in control of an automobile may be criminally liable for an offense committed in operating it, not only when he is operating it personally, but also when he procures or permits the car to be driven by another person who is in the car with him. This is true where a homicide is committed in operating the automobile.[16] If the owner of an automobile permits or authorizes a person whom he knows to be intoxicated to drive it, he may be convicted of manslaughter or a degree of murder for a death caused by the reckless driving of such person.[17] An intoxicated person in charge of an automobile, who directs another intoxicated person to drive the car, will be liable for the criminal negligence of the latter in the operation of the car, which results in the killing of a person in the highway.[18]

All who join in an enterprise to take a pleasure ride in an automobile on a highway are liable in case the one having control of the machine is guilty of reckless driving.[19]

The owner of an automobile may be criminally liable for violation by a servant of the terms of the license or a regulation.[20]

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[13] District of Columbia v. Colts, 282 U. S. 63, 75 L. ed. 177, 51 S. Ct. 52.

[14] Annotation: 42 A.L.R. 1513, s. 49 A.L.R. 1401, and 68 A.L.R. 1375.

In New Jersey it has been held that a statute prohibiting the driving of an automobile upon a public highway while under the influence of intoxicating liquor does not violate the state Constitution by depriving defendant of a right of trial by jury. Annotation: 75 L. ed. 208.

[15] In District of Columbia v. Colts, 282 U. S. 63, 75 L. ed. 177, 51 S. Ct. 52, it was held that one charged with having driven an automobile, not merely at a forbidden rate of speed, or recklessly, but so as to endanger property and individuals, has a constitutional right to a jury trial.

[16] Story v. United States, 57 App. D. C. 3, 16 F. (2d) 342, 53 A.L.R. 246, writ of certiorari denied in 274 U. S. 739, 71 L. ed. 1318, 47 S. Ct. 576; State v. Campbell, 82 Conn. 671, 74 A. 927, 135 Am. St. Rep. 293, 18 Ann. Cas. 236; Com. v. Horsfall, 213 Mass. 232, 100 N. E. 362, Ann. Cas. 1914A, 682; Ex parte Liotard, 47 Nev. 169, 217 P. 960, 30 A.L.R. 63; State v. Hopkins, 147 Wash. 198, 265 P. 481, 59 A.L.R. 688, writ of certiorari denied in 278 U. S. 617, 73 L. ed. 540, 49 S. Ct. 21.

Annotation: 99 A.L.R. 771; Ann. Cas. 1914A, 684.

One who puts a dangerous instrumentality like an automobile in the immediate control of a careless and reckless driver, sits by his side, and permits him, without protest, so recklessly and negligently to operate the car as to cause the death of another, is responsible as principal for the act. Story v. United States, 57 App. D. C. 3, 16 F. (2d) 342, 53 A.L.R. 246, writ of certiorari denied in 274 U. S. 739, 71 L. ed. 1318, 47 S. Ct. 576.

[17] Story v. United States, 57 App. D. C. 3, 16 F. (2d) 342, 53 A.L.R. 246, writ of certiorari denied in 274 U. S. 739, 71 L. ed. 1318, 47 S. Ct. 576; Ex parte Liotard, 47 Nev. 169, 217 P. 960, 30 A.L.R. 63; State v. Trott, 190 N. C. 674, 130 S. E. 627, 42 A.L.R. 1114 (guilty of second degree murder); State v. Hopkins, 147 Wash. 198, 265 P. 481, 59 A.L.R. 688, writ of certiorari denied in 278 U. S. 617, 73 L. ed. 540, 49 S. Ct. 21 (guilty of manslaughter).

Annotation: 99 A.L.R. 772.

The owner of an automobile cannot jeopardize the lives of others by placing it in the hands of one under the influence of liquor, with permission to use it, or by allowing such person to use it with his knowledge and approval, without becoming liable criminally, where a statute prescribes punishment for one causing bodily injury by the operation of such instrumentality while intoxicated. Ex parte Liotard, 47 Nev. 169, 217 P. 960, 30 A.L.R. 63.

[18] State v. Trott, 190 N. C. 674, 130 S. E. 627, 42 A.L.R. 1114, wherein a conviction of murder in the second degree was sustained, it appearing that the accused, while intoxicated, directed another intoxicated person to drive his car, and that the car, containing the accused and several others, was driven on a main street at a speed of over 60 miles per hour, colliding with another car and killing a passenger in the accused's car. The court said that killing under such circumstances was murder, being an unlawful killing with malice aforethought, implied from the nature of the acts leading up to the homicide, and also that the intoxication of the accused did not prevent the imputation to him of a criminal intent.

[19] State v. Davis, 88 S. C. 229, 70 S. E. 811, 34 L.R.A.(N.S.) 295.

[20] Griffiths v. Studebakers [1924] 1 K. B. (Eng.) 102, 12 B. R. C. 1062—Div. Ct.

Annotation: 12 B. R. C. 1066.

The owner of a motor car is liable to the penalty imposed by the Roads Act for a violation of a road vehicle regulation au-

§ 760. Applicability of Motor Vehicle Regulations to Public Officials or Employees.—In many jurisdictions statutes and ordinances expressly give fire and police apparatus the right of way over other vehicles,[1] and in some instances regulations governing the speed of motor vehicles expressly except from their operation police and fire department vehicles, or provide that such apparatus shall not be limited as to speed while being used in the performance of the duties of such departments.[2] Apart from these express provisions, however, many courts take the view that public officers or employees cannot be subjected to criminal prosecution for violation of speed regulations while in the discharge of duties to the efficient performance of which speed is essential.[3] This rule has been applied to municipal fire departments,[4] to peace officers in the pursuit of fleeing criminals,[5] to the War Department,[6] and to police officers while engaged in the performance of their duty,[7] though as to the last proposition there is some authority to the contrary.[8]

Public officers, etc., are subject to other regulations.

For instance, a statute exempting municipal property from taxation does not relieve the municipality from the necessity of obtaining a license to operate motor vehicles on the public highways, although the fees are designed in part to raise revenue for governmental purposes, where the licensing statute expressly provides for the exemption of certain other vehicles from its operation.[9]

§ 761. Applicability of Motor Vehicle Regulations to Motorcycles.—By express provision, or by construction, motor vehicle acts in many jurisdictions

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thorizing limited trade licenses, subject to the observance of certain conditions, one of which was "that not more than two persons in addition to the driver shall be carried," where a limited trade license had been issued on the owner's car, which was driven on the highway by one of its servants with more than two persons in addition to the driver, although this was without the knowledge of the owner and contrary to his express orders, mens rea not being an essential ingredient of the offense. Griffiths v. Studebakers [1924] 1 K. B. (Eng.) 102, 12 B. R. C. 1062—Div. Ct.

[1] See supra, § 40.

[2] Annotation: 19 A.L.R. 460, s. 23 A.L.R. 418.

[3] Kansas City v. McDonald, 60 Kan. 481, 57 P. 123, 45 L.R.A. 429; State v. Sheppard, 64 Minn. 287, 67 N. W. 62, 36 L.R.A. 305; State v. Burton, 41 R. I. 303, 103 A. 962, L.R.A.1918F, 559; State v. Gorham, 110 Wash. 330, 188 P. 457, 9 A.L.R. 365.

Annotation: 9 A.L.R. 367; 19 A.L.R. 460, s. 23 A.L.R. 418; Ann. Cas. 1917D, 565.

Statutes or ordinances regulating the speed of motor vehicles on the street are inapplicable to police or fire apparatus while on active duty, notwithstanding the fact that the act establishing the speed limit employs the words "all vehicles," "any vehicle," or "any person." Annotation: 19 A.L.R. 460, s. 23 A.L.R. 418.

It would seem that the reason underlying the general rule would make it applicable to the drivers of ambulances of municipal or state hospitals in emergency calls, but in the limited authority bearing on the question it was held that the driver of a horse-drawn ambulance, apparently owned by a private hospital, was subject to a speed-regulating ordinance, and that such ordinance was not affected by another ordinance giving ambulances the right of way over other vehicles. Annotation: 9 A.L.R. 368.

[4] State v. Sheppard, 64 Minn. 287, 67 N. W. 62, 36 L.R.A. 305.

Annotation: 9 A.L.R. 367.

[5] State v. Gorham, 110 Wash. 330, 188 P. 457, 9 A.L.R. 365.

Annotation: 9 A.L.R. 368.

[6] State v. Burton, 41 R. I. 303, 103 A. 962, L.R.A.1918F, 559.

Annotation: 9 A.L.R. 368.

In State v. Burton, 41 R. I. 303, 103 A. 962, L.R.A.1918F, 559, it was held that a member of the United States Naval Reserve force on duty as a despatch rider was not subject to state speed laws when traveling on a public highway, in time of war, under orders of his superior officers to proceed with all possible despatch in the performance of a duty assigned him, the reason given being that the rules established by the general assembly regulating the use of the highways and the streets are subordinate to the exigencies of military operations by the Federal government in time of war.

[7] State v. Gorham, 110 Wash. 330, 188 P. 457, 9 A.L.R. 365.

[8] Annotation: 19 A.L.R. 461, s. 23 A.L.R. 418.

[9] Annotation: 23 A.L.R. 418.

embrace motorcycles, making the drivers thereof subject to the penalties prescribed for failure to comply with such motor vehicle regulations.[10]

§ 762. Constitutionality of Statutes.—The constitutionality of motor vehicle acts is generally upheld.[11] Such statutes must be definite in specifying the conduct which is condemned or prohibited, to the end that the ordinary member of society may know how to comply with their requirements.[12]

A law regulating the use of automobiles alone, of all the vehicles which use the highways, is not invalid special legislation.[13]

Requiring an automobile to carry a number does not violate the constitutional provision against unreasonable searches, or compel the owner to testify against himself, or deprive him of property without due process of law.[14] The general rule against delegation of legislative power does not preclude conferring upon a local subdivision or administrative officer the power to prescribe or vary regulations concerning motor vehicles used on the highways.[15]

B. Particular Crimes

1. Assault and Battery

§ 763. Generally.—In accordance with principles of the common law, as well as by express statutory provisions, a criminal assault and battery may be committed by striking a person with an automobile.[16] It is sometimes broadly stated that a person is guilty of assault and battery who, while intentionally violating a statute regulating the operation of motor vehicles, as, for example, a statute prohibiting the driving of an automobile beyond a certain speed limit, unintentionally runs into, strikes, and injures a person rightfully passing upon or across such street,[17] but there is considerable authority for the proposition that the violation of a statute while operating a motor vehicle is merely a circumstance to be considered in passing on the guilt of the driver.[18] While the injury of a person by the negligent operation of an automobile is not necessarily a criminal assault, yet where the injury was the result of reckless, wanton, and wilful conduct, showing an utter disregard of the safety of others, the law imputes to the wrongdoer a wilful and malicious intention, even though he may not in fact have entertained such intention.[19] However, a person who strikes another in a highway with a defective automobile which he is driving in excess of the statutory speed limit, without lights, in dark and storm, cannot, on the theory that one intends the natural consequences of his act, be convicted of assault with intent to inflict great bodily injury if he did not know of the presence of the injured person, or have any intent to injure him.[20] The jarring of the occupant of a vehicle by the wrongful propelling of a motor vehicle against it may constitute an assault and battery, although such occupant is not thrown from the car or struck in any part of his body.[1]

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[10] Annotation: 48 A.L.R. 1090, s. 70 A.L.R. 1253.

A motorcycle comes within the meaning of a statute providing for the registration and identification of motor vehicles, where the words "motor vehicle" are defined to mean all vehicles propelled by power other than muscular power, except traction engines and such motor vehicles as run only upon rails or tracks. People v. Smith, 156 Mich. 173, 120 N. W. 581, 21 L.R.A. (N.S.) 41, 16 Ann. Cas. 607.

In Re Kessler, 26 Idaho, 764, 146 P. 113, L.R.A.1915D, 322, Ann. Cas. 1917A, 228, it was apparently assumed that a motorcycle was a motor vehicle.

[11] As to the constitutionality of statutes making the driving of an automobile while intoxicated a criminal offense, see § 767.

As to the constitutionality of statutes penalizing a failure to stop, give information, etc., in case of an injury to person or property, see infra, § 785.

As to the constitutionality of statutes declaring the possession of an automobile from which the identifying numbers have been removed to be a criminal offense, see infra, § 800.

[12] People v. Grogan, 260 N. Y. 138, 183 N. E. 273, 86 A.L.R. 1266.

[13] State v. Swagerty, 203 Mo. 517, 102 S. W. 483, 10 L.R.A.(N.S.) 601, 120 Am. St. Rep. 671.

[14] People v. Schneider, 139 Mich. 673, 103 N. W. 172, 69 L.R.A. 345, holding that power to require the registering and numbering of automobiles is conferred upon the city council by charter authority to control, prescribe, and regulate the manner in which the streets shall be used and enjoyed.

[15] Re Hinkelman, 183 Cal. 392, 191 P. 682, 11 A.L.R. 1222; Com. v. Kingsbury, 199 Mass. 542, 85 N. E. 848, L.R.A.1915E, 264, 127 Am. St. Rep. 513.

Annotation: 87 A.L.R. 547.

The right to use the public highways in the business of carrying passengers or freight is subject to the powers of the state, through legislative enactment, to impose reasonable and impartial regulations upon such use; and this power may be delegated by the legislature to the governing bodies of municipal corporations. Annotation: 87 A.L.R. 551.

A statute expressly providing for the quality of headlights which shall be used on motor vehicles, and for the establishment of testing agencies to determine whether or not the lights in use comply with the law, is not invalid as a delegation of legislative power. Re Hinkelman, 183 Cal. 392, 191 P. 682, 11 A.L.R. 1222.

[16] Brimhall v. State, 31 Ariz. 522, 255 P. 165, 53 A.L.R. 231; Williamson v. State, 92 Fla. 980, 111 So. 124, 53 A.L.R. 250.

Annotation: 99 A.L.R. 835; L.R.A.1917D, 950.

[17] Annotation: 99 A.L.R. 835.

§ 764. Aggravated Assault.—An aggravated assault is one where the means or instruments used are highly dangerous, or where the assailant has some ulterior and malicious motive.[2] Mere negligence on the part of the operator of an automobile, resulting in a personal injury, is not therefore enough to establish an aggravated assault.[3] But one who operates an automobile recklessly, wantonly, or wilfully, and shows an utter disregard of the safety of others, may be convicted of aggravated assault, although there was no intent on his part to inflict injury. Such a conviction may rest upon the fact that the defendant, while driving an automobile at a reckless speed in the night, without headlights, on the wrong side of the road, in violation of positive law, ran against and injured another person.[4] An automobile may be so used as to constitute a deadly weapon and the driver may be guilty of an aggravated assault,[5] or an assault with a deadly weapon.[6]

§ 765. —Voluntary Drunkenness as a Defense.—As a general rule voluntary drunkenness is not an excuse for, or a defense to a charge of, the commission of a crime.[7] Consequently, it is not a defense to a prosecution for an aggravated assault committed by driving an automobile in such a manner as to injure another person.[8]

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[18] State v. Sudderth, 184 N. C. 753, 114 S. E. 828, 27 A.L.R. 1180.
Annotation: 99 A.L.R. 835.

[19] Brimhall v. State, 31 Ariz. 522, 255 P. 165, 53 A.L.R. 231.
Annotation: L.R.A.1917D, 950.

[20] State v. Richardson, 179 Iowa, 770, 162 N. W. 28, L.R.A.1917D, 944.
Annotation: L.R.A.1917D, 950.

[1] State v. Sudderth, 184 N. C. 753, 114 S. E. 828, 27 A.L.R. 1180.

[2] See Assault and Battery, Vol. 4, p. 142, § 26.

[3] Brimhall v. State, 31 Ariz. 522, 255 P. 165, 53 A.L.R. 231.

[4] Ibid.
Annotation: 99 A.L.R. 768.

[5] Williamson v. State, 92 Fla. 980, 111 So. 124, 53 A.L.R. 250.
Annotation: 99 A.L.R. 835.

Where, in a prosecution for the offense of "aggravated assault by means of an automobile," the indictment so describes the instrumentality used and the manner of its use as to show that the same constituted a deadly weapon, but omits expressly to allege that it was a deadly weapon, the trial court will not be held to have committed a reversible error in denying a motion in arrest of judgment based upon such omission. Williamson v. State, 92 Fla. 980, 111 So. 124, 53 A.L.R. 250.

[6] People v. Benson, 321 Ill. 605, 152 N. E. 514, 46 A.L.R. 1056.

One attempting to pass an overtaken automobile in a highway under conditions rendering his conduct so reckless and wanton as to show an utter disregard of the safety of the persons in the overtaken car may, if he strikes such car and causes injury to its occupants, be found guilty of an assault with a deadly weapon. Ibid.

[7] See Criminal Law [Also 8 R. C. L. p. 129, § 106].

2. Driving while Intoxicated

a. Under Common Law

§ 766. Generally.—At common law driving an automobile while intoxicated is an indictable offense only when such driving amounts to a common nuisance; that is to say, only when the public has been inconvenienced or endangered thereby.[9]

b. Under Statutes

§ 767. Generally.—Statutes in most jurisdictions make the driving of a motor vehicle by an intoxicated person a criminal offense,[10] and statutes of this kind have generally been recognized as a valid exercise of the police power.[11] Such statutes are variously phrased. One form extensively adopted is to the effect that whoever shall drive a motor vehicle while under the influence of intoxicating liquor shall be guilty, etc., while another form frequently used provides that whoever operates a motor vehicle while in an intoxicated condition shall be guilty, etc.[12] Some forbid the driving of an automobile by a person "while intoxicated or in any degree under the influence of intoxicating liquor."[13] Others add the element of causing injury to person or property in operating a motor vehicle while in an intoxicated condition.[14]

In most states the offense is defined as a misdemeanor,[15] but in a few it is declared to be a felony.[16]

§ 768. Construction of Statutes.—Notwithstanding the fact that criminal statutes are as a rule strictly construed,[17] the courts have in some instances said that statutes prohibiting the driving of an automobile while intoxicated should be liberally construed to effect their purpose,[18] and even where the

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[8] Brimhall v. State, 31 Ariz. 522, 255 P. 165, 53 A.L.R. 231.

[9] Annotation: 42 A.L.R. 1499, s. 49 A.L.R. 1392, and 68 A.L.R. 1356; 12 B. R. C. 142.

[10] Annotation: 42 A.L.R. 1499, s. 49 A.L.R. 1392, and 68 A.L.R. 1357.

A statute providing that "any person driving a motor car . . . who is apparently under the influence of intoxicating liquor may be apprehended without warrant by any member of the police force and charged with an offense against this act" merely authorizes the arrest of a person driving a car who is apparently under the influence of liquor, and does not by itself create any offense. Doyle v. Harvey, [1923] Vict. L. R. 271, 12 B. R. C. 137.

[11] Annotation: 42 A.L.R. 1499, s. 49 A.L.R. 1392, and 68 A.L.R. 1357.

Where the main purpose of a statute is to raise a general highway fund, the inclusion of provisions making it unlawful to operate a motor vehicle while under the influence of intoxicating liquor renders the act, pro tanto, unconstitutional as embracing matters not germane. Annotation: 49 A.L.R. 1393, s. 68 A.L.R. 1357.

But the inclusion in "an act in relation to motor vehicles" of a provision making it unlawful to drive or operate a motor vehicle while drunk or intoxicated is not a violation of a constitutional provision prohibiting the passage of an act containing provisions not fairly included within its title. Annotation: 49 A.L.R. 1393, s. 68 A.L.R. 1357.

[12] Annotation: 42 A.L.R. 1500, s. 49 A.L.R. 1393, and 68 A.L.R. 1357.

[13] Annotation: 42 A.L.R. 1500, s. 49 A.L.R. 1393, and 68 A.L.R. 1357.

[14] Annotation: 42 A.L.R. 1500, s. 49 A.L.R. 1393, and 68 A.L.R. 1357.

[15] Annotation: 42 A.L.R. 1500, s. 49 A.L.R. 1393, and 68 A.L.R. 1357.

[16] Annotation: 42 A.L.R. 1500, s. 49 A.L.R. 1393, and 68 A.L.R. 1357.

[17] See Statutes [Also 25 R. C. L. p. 1081, § 301].

[18] State v. Tacey, 102 Vt. 439, 150 A. 68, 68 A.L.R. 1353.

Annotation: 42 A.L.R. 1499, s. 49 A.L.R. 1392, and 68 A.L.R. 1357.

In State v. Tacey, 102 Vt. 439, 150 A. 68, 68 A.L.R. 1353, the court holds that such statutes should be so construed as to accomplish their intended purpose.

An Iowa court has observed that the law providing for the punishment of one operating an automobile on a public highway while intoxicated is a salutary one, and needs vigorous application, owing to the large number of automobiles and the large volume of traffic on the public high-courts have not expressly said so, they seem generally to have proceeded upon the assumption that such statutes should be liberally construed to carry out the purpose for which they were enacted.[19]

§ 769. Conflicts between Statutes and Ordinances.—The view has been taken that the act of driving an automobile upon the streets of a city while intoxicated is punishable under the state statutes making it a felony for an intoxicated person to drive an automobile upon a public highway, though there is a municipal ordinance, enacted within the powers of the municipal corporation, making such an act committed within the confines of the city a misdemeanor, as a municipal ordinance must yield to a state law enacted for the general welfare of all the people of the state.[20] If the state in prohibiting the driving of a motor vehicle upon the public highways by one under the influence of intoxicating liquor, provides that the act shall apply generally throughout the state, and that no political subdivision shall make or enforce any regulations imposing fines other than those prescribed by the statute, a municipal corporation has no authority to enact an ordinance forbidding the driving of motor vehicles upon the city streets by intoxicated persons, and fixing a higher punishment than that provided by the state law.[1]

c. ELEMENTS OF STATUTORY OFFENSE

§ 770. Generally.—The language of the various statutes differs greatly; as a general proposition it may be said that the elements of the offense consist, first, of the driving of an automobile; second, driving it on a public highway; and third, intoxication of the driver.[2] In some states, additional elements are provided; for instance, in some the driving must be such as to endanger the lives or the safety of the public; in others, the accused must have driven in such manner as to have caused injury to person or property.[3]

§ 771. "Driving" or "Operating" Motor Vehicle.—"Driving" an automobile within the meaning of statutes prohibiting driving while intoxicated or while under the influence of intoxicating liquor undoubtedly means that the car must be moving along a street or highway, or such place as falls within the contemplation of the statute, by virtue of the acts of the intoxicated person. Merely starting the motor of a car, or attempting to start it, does not constitute "driving" within the terms of such acts.[4] However, the fact that the car moved only a few feet does not justify a holding as a matter of law that the accused was not driving.[5]

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ways, and that the court was so disposed to uphold it, to the end that the general traveling public might be protected against reckless and careless driving by persons in an intoxicated condition; Annotation: 68 A.L.R. 1357.

[19] Annotation: 42 A.L.R. 1499, s. 49 A.L.R. 1392, and 68 A.L.R. 1357.

[20] Annotation: 42 A.L.R. 1499.

[1] Annotation: 42 A.L.R. 1499, s. 49 A.L.R. 1393, and 68 A.L.R. 1357.

A city orddinance prohibiting any person in an intoxicated condition from driving a motor vehicle is invalid under an express declaration in a statute that no ordinance "in respect to or limiting the use or speed of motor vehicles" shall have any force or validity. Annotation: 49 A.L.R. 1393.

[2] Annotation: 42 A.L.R. 1500, s. 49 A.L.R. 1393, and 68 A.L.R. 1357.

[3] Annotation: 42 A.L.R. 1500, s. 49 A.L.R. 1393, and 68 A.L.R. 1357.

[4] Annotation: 42 A.L.R. 1501, s. 49 A.L.R. 1393, and 68 A.L.R. 1358; 12 B. R. C. 142.

A person is not guilty of the offense of driving a car while intoxicated where he entered the car, which was standing in the street, and started the engine, but was prevented from setting the car in motion by the intervention of a constable, who arrested him on the charge of being under the influence of intoxicating liquor while driving a motor car. Doyle v. Harvey [1923] Vict. L. R. 271, 12 B. R. C. 137.

[5] Annotation: 49 A.L.R. 1393, s. 68 A.L.R. 1358.

A person may be guilty of an attempt to drive a car while intoxicated where he, while intoxicated, inserted the ignition key and put his foot upon the starter with intent to drive upon a public highway, although he was prevented from carrying the attempt into full execution.[6]

To constitute "operating" an automobile while intoxicated, within the meaning of motor vehicle acts, it is not necessary that the vehicle be in motion.[7] Starting the motor and allowing it to idle in neutral,[8] or steering a car as it is being towed to a place of repair, has been held to constitute "operating" within the meaning of such acts.[9]

§ 772. Driving "Motor Vehicle."—To constitute the offense of driving a motor vehicle while intoxicated the instrumentality used must be such as to constitute a motor vehicle within the meaning of the statute. In some jurisdictions a motorcycle is regarded as a motor vehicle within the meaning of regulations.[10] An automobile unable to proceed under its own power, which is being towed, is a "motor vehicle" within the meaning of a statute making it an offense to operate a motor vehicle while intoxicated, and providing that the term "motor vehicle" shall include all vehicles propelled by power other than muscular power.[11]

§ 773. Driving on Public Thoroughfare.—To constitute the offense of driving or operating an automobile while intoxicated it is generally necessary that the car be driven or operated upon a public street or highway,[12] though there is authority to the effect that under the provisions of some statutes, that is not necessary. Thus, under a statute prohibiting the operation of a motor vehicle while in an intoxicated condition, it is not required, and is not an element of the offense, that the driving be done on a public highway.[13]

§ 774. Intoxication—Generally.—While the statutes or ordinances forbidding the driving of a motor vehicle while intoxicated generally do not define the terms, a few statutes prohibit one from driving who is only slightly or to any degree under the influence of intoxicating liquor.[14] The phrases "under the influence of an intoxicant," and "in an intoxicated condition," mean substantially the same thing.[15]

§ 775. —Tests of Intoxication.—The courts have adopted various tests in construing the terms "intoxicated" or "under the influence of intoxicating liquor."[16] In general, however, they have construed such terms to mean that the driver must be so under the influence of liquor that his capacity to operate his automobile is impaired,[17] or that he had drunk intoxicating liquor to the extent that he had lost the normal control of his body and mental faculties.[18]

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[6] Annotation: 42 A.L.R. 1501, s. 49 A.L.R. 1393, and 68 L.R.A. 1358.

[7] Annotation: 42 A.L.R. 1501, s. 49 A.L.R. 1393, and 68 A.L.R. 1358.

[8] State v. Webb, 202 Iowa, 633, 210 N. W. 751, 49 A.L.R. 1389.

Annotation: 49 A.L.R. 1393, s. 68 A.L.R. 1358.

[9] State v. Tacey, 102 Vt. 439, 150 A. 68, 68 A.L.R. 1353, where it appears that the statute involved provided that the words "operate," "operating" or "operated" should include an attempt to operate and should be construed to cover all matters and things connected with the presence and use of motor vehicles on the highway whether they were in motion or not.

[10] See supra, § 761.

[11] State v. Tacey, 102 Vt. 439, 150 A. 68, 68 A.L.R. 1353.

[12] Annotation: 42 A.L.R. 1502, s. 49 A.L.R. 1394, and 68 A.L.R. 1359; 12 B. R. C. 144.

[13] Annotation: 49 A.L.R. 1394, s. 68 A.L.R. 1359.

[14] Annotation: 42 A.L.R. 1503, s. 49 A.L.R. 1394, and 68 A.L.R. 1359.

[15] Annotation: 42 A.L.R. 1503, s. 49 A.L.R. 1394, and 68 A.L.R. 1359.

[16] Annotation: 42 A.L.R. 1503, s. 49 A.L.R. 1394, and 68 A.L.R. 1359.

[17] Annotation: 42 A.L.R. 1503, s. 49 A.L.R. 1394, and 68 A.L.R. 1359.

§ 776. **Punishment.**—The statutes which in varying language define the crime ordinarily known as driving while intoxicated provide various penalties for violations thereof. In some cases it has been held proper to consider the extent of the damage resulting from the conduct of the accused as a factor in determining a suitable punishment for the particular offense.[19] In other cases the courts have taken the view that the offense of driving an automobile when intoxicated is of such nature as to justify a punishment as for an aggravated offense, although in the particular instance no injury was caused by the act.[20] Where a statute provides a minimum punishment, but does not fix a maximum, the punishment which may be given in a particular case rests in the sound discretion of the court. An indeterminate penitentiary sentence not to exceed one year is proper where the statute prescribes the alternative of such sentence or a fine and imprisonment in the county jail.[1]

3. DRIVING WITHOUT OPERATOR'S PERMIT OR LICENSE

§ 777. **Generally.**—Driving an automobile without an operator's license is made a crime by statute in many states.[2] And if a person drives a car in a jurisdiction where his permit has been revoked he is subject to a penalty. This is true even though he has become a resident of another state and has there procured a motor vehicle registration and automobile license tags, which he is using when he is apprehended.[3]

4. FAILURE TO COMPLY WITH REGULATIONS RELATING TO LIGHTS

§ 778. **Generally.**—Various penalties are prescribed for failure to comply with certain regulations as to lights while driving or operating an automobile.[4] Such regulations relate primarily to the number of lights required on automobiles, front and rear, the nature of the lights, and the time when they must be used.[5] Penalties are provided for failure to use lights which will not glare and for failure to have lights inspected.[6]

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[18] Annotation: 42 A.L.R. 1504, s. 49 A.L.R. 1394, and 68 A.L.R. 1361.

[19] Annotation: 42 A.L.R. 1512, s. 49 A.L.R. 1399, and 68 A.L.R. 1371.

[20] State v. Giles, 200 Iowa, 1232, 206 N. W. 133, 42 A.L.R. 1496.

[1] State v. Giles, 200 Iowa, 1232, 206 N. W. 133, 42 A.L.R. 1496.

[2] See McMahon v. Pearlman, 242 Mass. 367, 136 N. E. 154, 23 A.L.R. 1467.

[3] District of Columbia v. Fred, 281 U. S. 49, 74 L. ed. 694, 50 S. Ct. 163.

[4] Annotation: 11 A.L.R. 1226, s. 78 A.L.R. 815.

An automobile standing on a city street after dark with engine at rest is within a statute prohibiting the operation of automobiles on the streets after dark without lights. Com. v. Henry, 229 Mass. 19, 118 N. E. 224, L.R.A.1918B, 827.

In Jaquith v. Worden, 73 Wash. 349, 132 P. 33, 48 L.R.A.(N.S.) 827, the court decided that an automobile, when stopped or left standing in the highway, did not cease to be "driven" within the meaning of a statute providing that "every automobile or motor vehicle, when driven on any public road," between certain hours, should have "at least one lighted lamp, showing white to the front and red to the rear."

However, the view has been taken that an automobile left standing on the street with its engine stopped is not within the contemplation of an ordinance providing that motor vehicles "operated or driven" upon the street should, during certain hours, display two lighted lamps on the front and one on the rear, and that the rays of the rear light should shine upon the number plate in such manner as to render the numerals thereon visible for a stated distance "in the direction from which the motor vehicle is proceeding," and that the front lights should be visible for a stated distance "in the direction in which the motor vehicle is proceeding." Annotation: 11 A.L.R. 1228.

[5] Annotation: 11 A.L.R. 1226, s. 78 A.L.R. 815.

[6] Annotation: 11 A.L.R. 1226, s. 78 A.L.R. 815.

A headlight on an automobile, even

It is not a valid objection to an ordinance or statute that it penalizes driving without certain lights, for instance, rear lights, without making knowledge or intent an element of the offense.[7] The legislature or a municipal corporation may make the person in charge of an automobile absolutely liable for failure to maintain a rear light, even though it may have gone out without his knowledge,[8] though there is some authority to the contrary.[9] To be valid, such statutes are in most instances required to be definite and reasonable.[10]

Statutes requiring lights on an automobile traveling a public highway after dark have no application to a vehicle on a private way.[11]

5. Failure to Register

§ 779. Generally.—Statutes variously worded provide penalties for failure of a dealer, or of the owner, chauffeur, or manufacturer of a motor vehicle operated upon the public roads or highways, to file or cause to be filed annually an application for registration, and noncompliance is generally punishable as a misdemeanor.[12] The view has been taken, however, that the operation of an automobile without the requisite number plates is not a crime when due solely to official delay in furnishing the plates.[13] Various related or incidental acts are also penalized. Knowingly making a false statement in an application for the registration of a motor vehicle is a criminal offense.

An ordinance requiring the registration of automobiles, when properly adopted, may be enforced by a fine.[14]

6. Failure to Stop, Give Information, etc., after Accident

a. In General

§ 780. Generally.—A requirement universally incorporated in motor vehicle acts is that the driver of an automobile shall stop his car, in case of an injury to a person or property due to his culpability, or to accident, and furnish certain information, such as his name and address, the number of his driver's license, the registration number of the motor vehicle; and in some instances to render assistance.[15] Failure to comply is generally a felony.[16]

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though it does not produce a dangerous glare, may be unlawfully used where it has not been tested and sanctioned as required by statute. Re Hinkelman, 183 Cal. 392, 191 P. 682, 11 A.L.R. 1222.

[7] Hays v. Schueler, 107 Kan. 635, 193 P. 311, 11 A.L.R. 1433.
Annotation: 11 A.L.R. 1436.

[8] Hays v. Schueler, 107 Kan. 635, 193 P. 311, 11 A.L.R. 1433.
Annotation: 11 A.L.R. 1227, s. 78 A.L.R. 815.

A city ordinance regulating the operation of motor vehicles on the streets of a city, which requires a red rear light to be displayed between certain hours, may impose a penalty for its violation without making a specific intent or a guilty mind an essential element of the misdemeanor. Hays v. Schueler, 107 Kan. 635, 193 P. 311, 11 A.L.R. 1433.

[9] Annotation: 11 A.L.R. 1227, s. 78 A.L.R. 815.

[10] Annotation: 11 A.L.R. 1227, s. 78 A.L.R. 815.

[11] Annotation: 11 A.L.R. 1229, s. 78 A.L.R. 815.

[12] People v. Smith, 156 Mich. 173, 120 N. W. 581, 21 L.R.A.(N.S.) 41, 16 Ann. Cas. 607.
As to the applicability of motor vehicle acts to motorcycles, see § 761.

[13] State v. Gish, 168 Iowa, 70, 150 N. W. 37, Ann. Cas. 1917B, 135.
Annotation: Ann. Cas. 1917B, 145.

[14] People v. Schneider, 139 Mich. 673, 103 N. W. 172, 69 L.R.A. 345, 5 Ann. Cas. 798.
Annotation: 1 L.R.A.(N.S.) 221.

[15] Annotation: 16 A.L.R. 1426, s. 66 A.L.R. 1229 and 101 A.L.R. 911.

The object of the provision, "knowing that injury has been caused to a person or property due to the culpability of the said operator, or to accident," in a statute which provides that such a one shall be guilty of a felony if he leaves the place of such injury or accident without first stopping and giving his name, residence, etc., is to make the statute more clearly applicable to all cases of accident, however caused, than would be apparent if these words were omitted. People v. Rosenheimer, 209 N. Y. 115, 102 N. E. 530, 46 L.R.A.(N.S.) 977, Ann. Cas. 1915A, 161.

For discussion of the various phases of the statutes, see infra, §§ 781 et seq.

[16] Ule v. State, — Ind. —, 194 N. E. 140,

Such requirements are designed to prohibit drivers of motor cars from seeking to evade civil or criminal liability by escape before their identity can be established, and from leaving persons injured in collisions in distress or danger for want of proper medical or surgical treatment.[17]

The word "causing," in a statute defining the offense, "whoever knowingly goes away without stopping and making himself known after causing injury to any person or property," is used in the ordinary sense of the word, and does not mean "who was legally responsible for the death."[18]

A statute providing that any person operating a motor vehicle, who, knowing that injury has been caused to a person or to property, "due to the culpability of the said operator or to accident," leaves the place of the injury or accident without stopping, giving his name, residence, etc., shall be guilty of a felony, does not provide for the punishment of two offenses, or of one offense which may be committed in two different ways.[19]

b. Construction of Terms

§ 781. Knowledge of Accident or Injury.—Knowledge on the part of an automobile operator that an accident or injury has been caused by him is ordinarily made a prerequisite to the duty to stop and give information, or to do other affirmative acts.[20] Knowledge of the injury, however, does not mean an absolute, positive knowledge. It means that the driver must be aware that harm has been done; it must be present in his mind that there has been an injury; and then, with that in his mind, he must deliberately go away without making himself known.[1] If an injury is inflicted under such circumstances as would ordinarily superinduce the belief in a reasonable person that injury would flow, or had flowed, from the accident or collision, then it is the duty of the operator to stop his vehicle.[2]

§ 782. Requirement that Operator Stop.—The statutes requiring the driver of an automobile to stop after an accident either expressly require him to stop immediately, or have been construed to mean that he must do so.[3] Simply stopping the car, looking back, learning nothing of what has been done, and then driving on, leaving the victim without help, do not constitute a compliance with a statute requiring a driver in such circumstances to stop and offer assistance. Such statutes require the driver to stop as soon as reasonably possible, return to the scene of the collision, and do, or offer to do, all the acts required by a motor vehicle act.[4]

§ 783. Requirement that Operator Make Himself Known.—A requirement

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101 A.L.R. 903; Ex parte Kneedler, 243 Mo. 632, 147 S. W. 983, 40 L.R.A.(N.S.) 622, Ann. Cas. 1913C, 923; People v. Rosenheimer, 209 N. Y. 115, 102 N. E. 530, 46 L.R.A. (N.S.) 977, Ann. Cas. 1915A, 161.

Annotation: 16 A.L.R. 1426, s. 66 A.L.R. 1229, and 101 A.L.R. 911.

[17] Annotation: 16 A.L.R. 1428, s. 66 A.L.R. 1229, and 101 A.L.R. 911; Ann. Cas. 1917E, 588.

[18] Annotation: 16 A.L.R. 1425.

[19] People v. Rosenheimer, 209 N. Y. 115, 102 N. E. 530, 46 L.R.A.(N.S.) 977, Ann. Cas. 1915A, 161.

[20] Com. v. Horsfall, 213 Mass. 232, 100 N. E. 362, Ann. Cas. 1914A, 682; People v. Curtis, 217 N. Y. 304, 112 N. E. 54, Ann. Cas. 1917E, 586.

Annotation: 11 A.L.R. 1437; Ann. Cas. 1917E, 590.

[1] Annotation: 16 A.L.R. 1425, s. 66 A.L.R. 1228, and 101 A.L.R. 913.

Under a statute providing for the punishment of any person who, in operating an automobile, "knowingly went away without making himself known after injuring any person or property," the word "knowingly" imports a perception of the facts requisite to constitute a crime. Com. v. Horsfall, 213 Mass. 232, 100 N. E. 362, Ann. Cas. 1914A, 682.

[2] Annotation: 16 A.L.R. 1425, s. 66 A.L.R. 1228, and 101 A.L.R. 913.

[3] Annotation: 16 A.L.R. 1426, s. 66 A.L.R. 1229, and 101 A.L.R. 915.

[4] Annotation: 66 A.L.R. 1233.

is generally incorporated in motor vehicle acts that the driver of an automobile which causes injury to a person or property stop and make himself known;[5] that is, he must give his name and the place where he may be found. It is not sufficient compliance for the operator to furnish someone with the number of the car, since the operator may not be the owner and the information may not be sufficient for the purpose of ascertaining his identity as the person wanted.[6] Some statutes require the operator to give his name, address, and the number of his operator's license.[7] Delegating to another the duty of disclosing the driver's identity may be a sufficient compliance with the statute, though such other fails to deliver the information.[8]

§ 784. Requirement that Operator Render Assistance.—In many jurisdictions the statutes require that the operator of a motor vehicle shall, in case of accident, stop immediately and, among other things, render such assistance as may be reasonable or necessary, and such statutes have been given a common-sense interpretation in view of the fact that it would be futile for the legislature to undertake to be specific in stating what aid should be rendered,[9] though in some instances such statutes have been held invalid for vagueness, indefiniteness, and uncertainty.[10] A statute providing that in case of accident the driver shall stop and render assistance, including the taking of any injured persons to a physician or surgeon for medical treatment, if such treatment is required, or if such assistance is requested, by any occupant of the vehicle struck, does not make a driver guilty of a criminal offense in refusing to transport a person to a surgeon who is not in fact injured.[11]

c. CONSTITUTIONALITY OF STATUTES

§ 785. Generally.—Statutes requiring the operator of a motor vehicle on the highway, or one assuming control over the operator, to do certain affirmative acts after the happening of an accident, i. e., to stop, to furnish information and means of identification, to render assistance, and, in some cases, to report to the proper authorities, are a valid exercise of the police power.[12] They do not constitute an infringement of the constitutional guaranty of due process,[13] nor do they violate the constitutional guaranty against compulsory self-incrimination.[14] Such statutes do not require the operator of a motor vehicle to state the circumstances of the occurrence tending to show his responsibility, but merely to stop and identify himself.[15] Undoubtedly, however, they do require him to make known a fact which will be a link in a chain of evidence to convict him of crime, if in fact he has been guilty of one, but since the legislature may prohibit altogether the use of automobiles on the highway, it has authority to declare the use of a motor vehicle in such a way as to injure any person or property, a crime.[16] Such statutes, because of the uncertainty of the language used, are not unconstitutional as delegating to courts and juries legislative power to define the offense charged.[17]

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[5] Annotation: 16 A.L.R. 1428, s. 66 A.L.R. 1230, and 101 A.L.R. 916.

Such a statute imposes active and positive duties upon the operator of the automobile. It is not satisfied by his stopping at some remote, obscure, or inaccessible place, nor by his mere passive willingness to answer inquiries; it requires him to tender on the spot, and immediately, explicit and definite information regarding himself, of a nature which will make it easy to identify him readily. This information must be furnished to those whose person or property has been injured, if reasonably possible, and, if not, to someone representing their interest, or to some public officer or other person at or near the place at the time of injury. Com. v. Horsfall, 213 Mass. 232, 100 N. E. 362, Ann. Cas. 1914A, 682.

In People v. Rosenheimer, 209 N. Y. 115, 102 N. E. 530, 46 L.R.A.(N.S.) 977, Ann. Cas. 1915A, 161, the court stated: "The statute does not require the operator of the motor vehicle to state the circumstances of the occurrence tending to show his responsibility, but merely to stop and identify himself."

[6] Annotation: 16 A.L.R. 1428, s. 66 A.L.R. 1230, and 101 A.L.R. 916.

[7] Annotation: 66 A.L.R. 1230.

[8] Com. v. Horsfall, 213 Mass. 232, 100 N. E. 362, Ann. Cas. 1914A, 682.

[9] Annotation: 66 A.L.R. 1231; 101 A.L.R. 916.

The word "required," in a statute providing that an automobilist who strikes a person shall carry him to a physician or surgeon for treatment, if such treatment is "required," means "necessary." Scott v. State, 90 Tex. Crim. Rep. 100, 233 S. W. 1097, 16 A.L.R. 1420.

A statute requiring an automobilist who strikes a person to stop and render to him all necessary assistance requires the motorist to render all the aid which would reasonably appear to him, as an ordinary person, at the time to be necessary. Scott v. State, 90 Tex. Crim. Rep. 100, 233 S. W. 1097, 16 A.L.R. 1420.

[10] Annotation: 66 A.L.R. 1231; 101 A.L.R. 916.

[11] Annotation: 16 A.L.R. 1428, s. 66 A.L.R. 1229.

[12] State v. Razey, 129 Kan. 328, 282 P. 755, 66 A.L.R. 1225; Ex parte Kneedler, 243 Mo. 632, 147 S. W. 983, 40 L.R.A.(N.S.) 622, Ann. Cas. 1913C, 923.

Annotation: 66 A.L.R. 1234; 101 A.L.R. 918.

In Ex parte Kneedler, 243 Mo. 632, 147

d. Defenses

§ 786. Generally.—The absence of an essential element of an offense is, of course, always a good defense. Hence, lack of knowledge of the striking

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S. W. 983, 40 L.R.A.(N.S.) 622, Ann. Cas. 1913C, 923, the court said: "The statute is a simple police regulation. It does not make the accident a crime. If a crime is involved, it arises from some other statute. It does not attempt in terms to authorize the admission of the information as evidence in a criminal proceeding. The mere fact that the driver discloses his identity is no evidence of guilt, but rather of innocence."

[13] Annotation: 66 A.L.R. 1234; 101 A.L.R. 918.

[14] State v. Razey, 129 Kan. 328, 282 P. 755, 66 A.L.R. 1225; Ex parte Kneedler, 243 Mo. 632, 147 S. W. 983, 40 L.R.A.(N.S.) 622, Ann. Cas. 1913C, 923; People v. Rosenheimer, 209 N. Y. 115, 102 N. E. 530, 46 L.R.A. (N.S.) 977, Ann. Cas. 1915A, 161; Scott v. State, 90 Tex. Crim. Rep. 100, 233 S. W. 1097, 16 A.L.R. 1420.

Annotation: 66 A.L.R. 1234; 101 A.L.R. 918; Ann. Cas. 1913C, 925, s. Ann. Cas. 1915A, 165.

A highway law providing that any person operating a motor vehicle, who, knowing that injury has been caused to a person or to property, due to the culpability of the operator or to accident, leaves the place of the injury or accident without stopping and giving his name, residence, and license number to the injured party or to a police officer, shall be guilty of a felony, is not invalid under Const. Art. 1, § 6, providing that no person shall be compelled in any criminal case to be a witness against himself; since, because of their size and weight, great power and speed, and the fatalities caused by them, the legislature might absolutely prohibit the use of a motor vehicle on a public highway, and, therefore, assuming that the statute impairs the constitutional privilege, the legislature had power to require a waiver of that privilege as a condition to the use of the highways by a motor vehicle, at least to the extent to which it has required such waiver. People v. Rosenheimer, 209 N. Y. 115, 102 N. E. 530, 46 L.R.A.(N.S.) 977, Ann. Cas. 1915A, 161.

A statute which makes it a crime for a person who has caused injury to another person by the operation of a motor vehicle on a public highway to fail to stop, give his name and residence and motor license number, give pertinent information to the injured person or some other person thereabout, and to report the matter to the sheriff or the nearest police officer, does not violate the constitutional guaranty of § 10 of the Bill of Rights against compulsory self-incrimination. State v. Razey, 129 Kan. 328, 282 P. 755, 66 A.L.R. 1225.

A statute providing that any person operating a motor vehicle, who, knowing that injury has been caused to a person or property, leaves the place without stopping or giving his name, residence, and operator's license number, shall be guilty of a felony, is a valid police regulation, not in violation of the constitutional provision that no person shall be compelled to testify against himself in a criminal cause, the statute, at most, only affording a means of identification which might be used in a subsequent criminal prosecution; and so, even if, in a particular case, the constitutional privilege warranted the withholding of the information, that privilege might be set up as a defense to a prosecution under the statute, although it would not generally invalidate the statute. Ex parte Kneedler, 243 Mo. 632, 147 S. W. 983, 40 L.R.A.(N.S.) 622, Ann. Cas. 1913C, 923.

[15] People v. Rosenheimer, 209 N. Y. 115, 102 N. E. 530, 46 L.R.A.(N.S.) 977, Ann. Cas. 1915A, 161.

Annotation: 66 A.L.R. 1236.

[16] People v. Rosenheimer, 209 N. Y. 115, 102 N. E. 530, 46 L.R.A.(N.S.) 977, Ann. Cas. 1915A, 161.

[17] **Statutes providing certain requirements of the driver** in case of accident, such as stopping, and punishing a failure to do so as a misdemeanor, have been held not to be unconstitutional on the ground that by the uncertainty of the language used, there was delegated to the court and jury legislative power to create or define the offense charged, contrary to the provision of the Constitution that the legislative power is vested in the Senate and House of Representatives. Annotation: 87 A.L.R. 555.

is a defense to a prosecution under a statute requiring an automobilist who strikes a person to stop and render him necessary assistance.[18] However, a person is not relieved from the duty placed upon him to stop, be ready to give his name and address, and render necessary assistance, by the fact that the person struck was made unconscious,[19] or instantly killed.[20]

7. HOMICIDE

a. IN GENERAL

§ 787. Generally.—Although it was a crime at common law to cause the death of, or injury to, a human being by doing a lawful act without the exercise of the proper degree of care to avoid the danger of injury to others, or by doing an unlawful act,[1] yet, in view of the frequency of tragedies in connection with the operation of motor vehicles, legislation on the subject has been deemed desirable, and the crime is now generally defined and made punishable by statute ordinarily as manslaughter, though sometimes as murder. These statutes seem to contemplate only unintentional killing or injury, but, of course, if the driver of a motor vehicle should intentionally strike a person with his car with intent to kill, and should thereby kill him, it would be murder independently of the statutes relating to the operation of motor vehicles. It is generally held, under either such statutes or general principles of criminal law, that the driver of a motor vehicle may be guilty of homicide for causing a death through the operation of such vehicle in a negligent or reckless manner, or in violation of law;[2] and this is true although the person who is

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[18] Scott v. State, 90 Tex. Crim. Rep. 100, 233 S. W. 1097, 16 A.L.R. 1420.

[19] Annotation: 16 A.L.R. 1427, s. 66 A.L.R. 1228.

Although a person injured by being struck by an automobile is unconscious, and no other person is present, the driver, if he leaves such person without having seen someone who may demand the information, is guilty of violating a statute which provides that any person operating a motor vehicle, knowing that injury has been caused to a person, shall forthwith bring his motor vehicle to a stop, return to the scene of the accident, and give to any person demanding the same his name and address, the number of his driver's license, the registration number of his motor vehicle, and the name and address of each occupant thereof. Annotation: 16 A.L.R. 1427, s. 66 A.L.R. 1228.

[20] Annotation: 66 A.L.R. 1230.

[1] See HOMICIDE [Also 13 R. C. L. p. 858, § 161].

[2] District of Columbia v. Colts, 282 U. S. 63, 75 L. ed. 177, 51 S. Ct. 52; Story v. United States, 57 App. D. C. 3, 16 F. (2d) 342, 53 A.L.R. 46, writ of certiorari denied in 274 U. S. 739, 71 L. ed. 1318, 47 S. Ct. 576; State v. Goetz, 83 Conn. 437, 76 A. 1000, 30 L.R.A.(N.S.) 458; State v. Campbell, 82 Conn. 671, 74 A. 927, 135 Am. St. Rep. 293, 18 Ann. Cas. 236; People v. Townsend, 214 Mich. 267, 183 N. W. 177, 16 A.L.R. 902; People v. Harris, 214 Mich. 145, 182 N. W. 673, 16 A.L.R. 910; Schultz v. State, 89 Neb. 34, 130 N. W. 972, 33 L.R.A. (N.S.) 403, Ann. Cas. 1912C, 495; Ex parte Liotard, 47 Nev. 169, 217 P. 960, 30 A.L.R. 63; State v. Cope, 204 N. C. 28, 167 S. E. 456, citing R. C. L.; State v. Stansell, 203 N. C. 69, 164 S. E. 580, citing R. C. L.; State v. Palmer, 197 N. C. 135, 147 S. E. 817, citing R. C. L.; Keller v. State, 155 Tenn. 633, 299 S. W. 803, 59 A.L.R. 685; Copeland v. State, 154 Tenn. 7, 285 S. W. 565, 49 A.L.R. 605; State v. Hopkins, 147 Wash. 198, 265 P. 481, 59 A.L.R. 688, writ of certiorari denied in 278 U. S. 617, 73 L. ed. 540, 49 S. Ct. 21; State v. Whatley, 210 Wis. 157, 245 N. E. 93, 99 A.L.R. 749; Clemens v. State, 176 Wis. 289, 185 N. W. 209, 21 A.L.R. 1490.

Annotation: 99 A.L.R. 756; 30 L.R.A. (N.S.) 458, s. 33 L.R.A.(N.S.) 403, and L.R.A. 1918B, 954; 18 Ann. Cas. 239; Ann. Cas. 1918E, 1146.

See infra, §§ 788, 789, for particular discussion of homicide caused while operating automobile in a negligent manner or in violation of law.

One who drives an automobile recklessly, carelessly, and negligently, and at a rate of speed forbidden by the statute, upon the public streets or highways, and thereby causes the death of another, is guilty of criminal homicide. Schultz v. State, 89 Neb. 34, 130 N. W. 972, 33 L.R.A. (N.S.) 403, Ann. Cas. 1912C, 495.

One causing death by driving an automobile on the highway at night without the lights required by statute, and at a speed in excess of that permitted by statute, may be found guilty of manslaughter in the fourth degree under statutes making every killing by the act or culpable negligence of another, which is not justifiable or excusable, or which is not by statute declared to be some other degree of crime, manslaughter in the fourth degree, and defining excusable homicide as that committed by accident and misfortune in doing any lawful act by lawful means, with usual and ordinary caution, and without recklessly driving the machine, as soon as he sees a pedestrian in danger, uses every effort to avoid injuring him, provided that the operator's prior recklessness was responsible for his inability to control the car and prevent the accident which resulted in the death of the pedestrian.[3]

§ 788. As Result of Unlawful Act.—If a person drives his automobile in such a manner as to violate the laws in respect thereto, and while so doing strikes another and causes his death, he may be prosecuted for murder or manslaughter—in most cases, the latter.[4] Under statutes providing that the killing of another in the doing of an unlawful act not amounting to a felony is manslaughter, a person who, while driving an automobile in violation of a statute or ordinance regulating speed or prescribing precautions to be observed by automobile drivers, and as a result of such violation kills another, is guilty of manslaughter.[5] The rule applies to one driving while intoxicated, or at excessive speed, or in any manner violative of law.[6] The violation of a statute forbidding a speed in excess of a definite rate may render the operator guilty of manslaughter if it is clearly shown that such unlawful speed was the proximate cause of death.[7]

§ 789. As Result of Negligence.—A person causing the death of another

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unlawful intent. Clemens v. State, 176 Wis. 289, 185 N. W. 209, 21 A.L.R. 1490.

In Keller v. State, 155 Tenn. 633, 299 S. W. 803, 59 A.L.R. 685, it is held that driving while intoxicated is an act malum in se supplying intent.

[3] State v. Campbell, 82 Conn. 671, 74 A. 927, 135 Am. St. Rep. 293, 18 Ann. Cas. 236; People v. Camberis, 297 Ill. 455, 130 N. E. 712, citing R. C. L.; State v. Stansell, 203 N. C. 69, 164 S. E. 580, citing R. C. L.

Annotation: 30 L.R.A.(N.S.) 459; 18 Ann. Cas. 239.

[4] People v. Seiler, 57 Cal. App. 195, 207 P. 396, citing R. C. L.; People v. Camberis, 297 Ill. 455, 130 N. E. 712, citing R. C. L.; People v. Falkovitch, 280 Ill. 321, 117 N. E. 398, Ann. Cas. 1918B, 1077; Schultz v. State, 89 Neb. 34, 130 N. W. 972, 33 L.R.A. (N.S.) 403, Ann. Cas. 1912C, 495.

Annotation: Ann. Cas. 1918B, 1082.

The unlawful act relied on by the state as the basis for a charge of manslaughter may fall under more than one statute, and in such a case it is error to compel the state to elect upon which statute it relies for a conviction. State v. Schaeffer, 96 Ohio St. 215, 117 N. E. 220, L.R.A.1918B, 945, Ann. Cas. 1918E, 1137.

[5] People v. Townsend, 214 Mich. 267, 183 N. W. 177, 16 A.L.R. 902; State v. Sudderth, 184 N. C. 753, 114 S. E. 828, 27 A.L.R. 1180; State v. Schaeffer, 96 Ohio St. 215, 117 N. E. 220, L.R.A.1918B, 945, Ann. Cas. 1918E, 1137; Keller v. State, 155 Tenn. 633, 299 S. W. 803, 59 A.L.R. 685; State v. Hopkins, 147 Wash. 198, 265 P. 481, 59 A.L.R. 688, writ of certiorari denied in 278 U. S. 617, 73 L. ed. 540, 49 S. Ct. 21.

Annotation: 99 A.L.R. 756.

One who, while driving an automobile at from 25 to 30 miles an hour on the wrong side of a street on which he sees many children playing, kills a three-year-old child while crossing the street at a regular crossing, is guilty of manslaughter under a statute defining manslaughter as the unlawful killing of another, without malice, either on a sudden quarrel or unintentionally, while the slayer is engaged in the commission of an act made unlawful by a valid statute, and under another statute prohibiting the operation of a motor vehicle at a speed greater than is "reasonable or proper having regard for width, traffic, use and the general and usual rules of such road or highway or so as to endanger the property, life or limb of any person." State v. Schaeffer, 96 Ohio St. 215, 117 N. E. 220, L.R.A.1918B, 945, Ann. Cas. 1918E, 1137.

In People v. Townsend, 214 Mich. 267, 183 N. W. 177, 16 A.L.R. 902, it was held that the driving of an automobile while intoxicated, in violation of a statute, was "an unlawful and culpably negligent act," and a conviction of manslaughter was sustained on proof that the death of a person riding in the automobile as a passenger resulted proximately therefrom.

In Schultz v. State, 89 Neb. 34, 130 N. W. 972, 33 L.R.A.(N.S.) 403, Ann. Cas. 1912C, 495, the court held that one who drives an automobile wilfully and recklessly at an unlawful rate of speed on a public street, and thereby causes the death of another, is guilty of criminal homicide.

[6] Annotation: 99 A.L.R. 756.

In State v. Sudderth, 184 N. C. 753, 114 S. E. 828, 27 A.L.R. 1180, it appeared that the prosecutor's car was struck by that of the defendant while the latter was violating the law as regards the operation of motor vehicles, in that he was driving on the wrong side of the road and at an improper rate of speed. It was pointed out that the party in default may be prosecuted for murder or manslaughter if a person on the highway is killed as a result of such illegal driving.

[7] Annotation: 16 A.L.R. 914.

The driving of an automobile while intoxicated is malum in se, although the statute merely prohibits it under penalty. People v. Townsend, 214 Mich. 267, 183 N. W. 177, 16 A.L.R. 902.

while operating an automobile in a wanton and reckless manner, or, as sometimes said, in a grossly negligent manner, may be guilty of manslaughter.[8] This is true where one, while intoxicated, drives an automobile upon the highway,[9] or permits or authorizes another, who is intoxicated, to drive his car, and a person is killed by reason of the negligent operation of the car.[10]

Driving an automobile at a greatly excessive rate of speed in violation of the statutes may constitute an act so wanton and reckless as to evince an utter disregard of the safety of others, and necessarily to imply an intent to injure, so as to constitute gross negligence.[11] Under a statute making a killing by culpable negligence without design to effect death, in cases where such killing would be murder at common law, manslaughter in the first degree, the circumstances must, to constitute such manslaughter, be such as to present the elements of common-law murder.[12]

Where a charge of manslaughter by the operation of an automobile is based on a statute providing that the killing of another by a reckless or grossly negligent act shall constitute manslaughter, the fact that the automobile was operated in violation of a statute or ordinance regulating speed or prescribing precautions to be observed is not conclusive of guilt, but is a circumstance bearing on the question whether the operation of the automobile was in fact criminally negligent.[13] Thus, the fact that the accused drove his automobile

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[8] State v. Goetz, 83 Conn. 437, 76 A. 1000, 30 L.R.A.(N.S.) 458; People v. Falkovitch, 280 Ill. 321, 117 N. E. 398, Ann. Cas. 1918B, 1077; Schultz v. State, 89 Neb. 34, 130 N. W. 972, 33 L.R.A.(N.S.) 403, Ann. Cas. 1912C, 495; State v. Schaeffer, 96 Ohio St. 215, 117 N. E. 220, Ann. Cas. 1918E, 1137; Clemens v. State, 176 Wis. 289, 185 N. W. 209, 21 A.L.R. 1490.

Annotation: 30 L.R.A.(N.S.) 458, s. 33 L.R.A.(N.S.) 403; L.R.A.1918B, 954; Ann. Cas. 1914A, 684; Ann. Cas. 1918E, 1146.

One is guilty of homicide who, with reckless disregard for the safety of others, so negligently drives an automobile in a public street as to strike and kill a pedestrian. State v. Goetz, 83 Conn. 437, 76 A. 1000, 30 L.R.A.(N.S.) 458.

One may be convicted of manslaughter in the fourth degree, even though the killing was involuntary and due to inadvertence, under statutes making every killing by the act or culpable neglect of another, which is not justifiable or excusable, or which is not by statute declared to be some other degree of crime, manslaughter in the fourth degree, and defining excusable homicide, as that committed by accident and misfortune in doing any lawful act by lawful means, with usual and ordinary caution, and without unlawful intent. Clemens v. State, 176 Wis. 289, 185 N. W. 209, 21 A.L.R. 1490.

However, a person is not guilty of involuntary manslaughter in killing a boy while attempting to drive an automobile into the gap between two wagons which had just passed each other, going in opposite directions, if it reasonably appeared to him that he could safely do so, and the boy, concealed behind the wagon which he was meeting, unexpectedly ran into the path of his car. Copeland v. State, 154 Tenn. 7, 285 S. W. 565, 49 A.L.R. 605.

[9] People v. Townsend, 214 Mich. 267, 183 N. W. 177, 16 A.L.R. 902.

[10] See supra, § 759.

[11] Clemens v. State, 176 Wis. 289, 185 N. W. 209, 21 A.L.R. 1490.

In State v. McCombs, 33 Wyo. 346, 239 P. 526, 41 A.L.R. 717, the court held that careless driving at an unreasonable speed likely to endanger life or limb is not necessarily criminal carelessness within the Wyoming statute defining manslaughter. The appellate court disapproved of the trial court's instruction that the defendant was negligent as a matter of law, and guilty of a felony, if he exceeded a speed of 20 miles per hour and thereby caused the death of a person, and based its holding on the reasoning that the statute is intended to make a case of manslaughter only where the negligence is culpable or criminal in its nature—wanton, and without regard to consequences.

[12] Maxon v. State, 177 Wis. 379, 187 N. W. 753, 21 A.L.R. 1484.

The fact that an automobile was driven at excessive speed by an intoxicated person, contrary to law, which resulted in the unintentional killing of another, will sustain a finding of malice sufficient to constitute murder at common law. Ibid.

[13] State v. Goetz, 83 Conn. 437, 76 A. 1000, 30 L.R.A.(N.S.) 458; State v. Campbell, 82 Conn. 671, 74 A. 927, 135 Am. St. Rep. 293, 18 Ann. Cas. 236; People v. Falkovitch, 280 Ill. 321, 117 N. E. 398, Ann. Cas. 1918B, 1077; People v. Harris, 214 Mich. 145, 182 N. W. 673, 16 A.L.R. 910; Schultz v. State, 89 Neb. 34, 130 N. W. 972, 33 L.R.A.(N.S.) 403, Ann. Cas. 1912C, 495.

Annotation: 99 A.L.R. 756.

In People v. Harris, 214 Mich. 145, 182 N. W. 673, 16 A.L.R. 910, the court held that one who violates a statute prohibiting the operation of a motor vehicle on a public highway at a greater rate of speed than is reasonable, or so as to endanger the life or limb of any person, not in any event to exceed 25 miles an hour, is guilty of manslaughter if a person is killed by his negligent operation of the car. It is at a rate of speed greater than that prescribed by statute, does not necessarily establish the degree of negligence required to convict. Gross negligence must be proved, as well as the fact that the death of another was the direct result of the negligent act.[14] Likewise, the fact that the defendant, at the time and place of the accident, was driving his automobile at a rate of speed greater than that allowed by law, is not of itself sufficient to justify a finding that the defendant was guilty of manslaughter, where the statute provided that rates of speed greater than those mentioned were prima facie evidence of negligence, since it was necessary that the defendant should be shown to have been actually guilty of criminal negligence.[15]

§ 790. Degree of Negligence Necessary.—In cases dealing with homicides, resulting from negligence in operating automobiles, the decisions of the courts have stated in different terms the kind of negligence required to constitute a crime. In some of them it is said to be negligence that is "culpable and gross;" in others, that it must be such as to show a reckless disregard of the safety of others, etc.; but all of the authorities are agreed, in the absence of statutory regulations denouncing certain acts as criminal, that in order to hold one a criminal there must be a higher degree of negligence than is required to establish negligent default on a mere civil issue, and that, in order to sustain a conviction of criminal homicide attributable to a negligent omission of duty when engaged in a lawful act, it must be shown that a homicide was not improbable under all the facts existing at the time, and which should reasonably have had an influence and effect on the conduct of the person charged.[16] Carelessness in driving an automobile at a speed that is unreasonable, or likely to endanger life or limb, is not necessarily criminal carelessness within the meaning of a statute making one guilty of manslaughter who causes the death of another by culpable negligence or criminal carelessness.[17]

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further held that the fact that the defendant was engaged in the commission of an unlawful act in transporting liquor at the time of the homicide was an element in the chain of cause and effect, so as to permit the introduction of evidence thereof, as bearing on the question of negligence and tending to prove a reason for the excessive speed.

[14] Annotation: 16 A.L.R. 916.

[15] Annotation: 16 A.L.R. 916.

[16] Copeland v. State, 154 Tenn. 7, 285 S. W. 565, 49 A.L.R. 605; State v. Whatley, 210 Wis. 157, 245 N. W. 93, 99 A.L.R. 749; State v. McComb, 33 Wyo. 346, 239 P. 526, 41 A.L.R. 717.

Annotation: 99 A.L.R. 829.

To warrant conviction under a statute declaring the killing of a human being by the gross negligence of another to be manslaughter, there must have been more than inadvertence or want of ordinary care; there must have been on the part of defendant either a wilful intent to injure or that reckless and wanton disregard of the rights and safety of another or his property which the law deems equivalent to an intent to injure. State v. Whatley, 210 Wis. 157, 245 N. W. 93, 99 A.L.R. 749.

In Copeland v. State, 154 Tenn. 7, 285 S. W. 565, 49 A.L.R. 605, the court says that a person who, when not exceeding the speed limit, drives an automobile against a boy suddenly running into the path of the car from behind a wagon, and kills him, cannot be convicted of manslaughter unless his conduct was so reckless and negligent as to evince a disregard for the life of persons in the highway.

In State v. Schaeffer, 96 Ohio St. 215, 117 N. E. 220, L.R.A.1918B, 945, Ann. Cas. 1918E, 1137, the court says that in a prosecution under the statute involved, for manslaughter by the negligent operation of an automobile, the court should charge the jury that the standard of conduct required of the defendant in the operation of his car is that of an ordinarily careful and prudent person, and that if the defendant did not operate the car "at a speed greater than is reasonable or proper, having regard for width, traffic, use, and the general and usual rules of such road or highway, or so as to endanger the property, life, or limb of any person," as would appear to such ordinarily careful and prudent person in the then situation, he is not guilty of manslaughter.

[17] State v. McComb, 33 Wyo. 346, 239 P. 526, 41 A.L.R. 717, wherein the court held that careless driving at an unreasonable speed likely to endanger life or limb is not necessarily criminal carelessness within the Wyoming statute defining manslaughter. The court disapproved of the trial court's instruction that the defendant was negligent as a matter of law, and guilty of a felony, if he exceeded a speed of 20 miles per hour and thereby caused the death of a person, and based its holding on the reasoning that the statute is in-

§ 791. **Wrongful or Illegal Act as Proximate Cause of Death.**—In order that a person shall be guilty of a criminal homicide arising from the operation of an automobile, it is essential that the injury inflicted by the accused be the proximate cause of the death charged in the indictment; if death resulted from some intervening cause, a prosecution for homicide cannot be maintained. The mere fact, however, that wounds inflicted by the defendant became infected, even though as a result of negligent treatment, does not prevent the defendant from being guilty of homicide.[18] It is necessary also, according to the general rule, in a prosecution for a criminal homicide arising from the negligent operation of an automobile, or its use for an unlawful purpose or in violation of law, that it be shown that such negligent operation, or use for an unlawful purpose or in violation of law,—the unlawful act,—was the proximate cause of the death; that is, there must be a causal connection between the act and the death.[19] In other words, the death must have been the natural and probable consequence of the negligent or unlawful act, and not the result of misadventure, or of an independent intervening cause in which accused did not participate, and which he could not foresee.[20] There must be something more than a mere coincidence of time and place between the wrongful act and the death.[1] Under this view the mere violation of a statute will not sustain a conviction of manslaughter where it appears that the killing was not the natural or probable result of the unlawful act.[2] In some cases, however, a distinction is made between acts which are malum in se and those which are merely malum prohibitum. The former are regarded as supplying a criminal intent, and as rendering the accused guilty, even though the killing was not the natural or probable result of the act.[3]

b. Murder

§ 792. **Generally.**—If the driver of a motor vehicle should intentionally

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tended to make a case of manslaughter only where the negligence is culpable or criminal in its nature—wanton and without regard to consequences.

[18] People v. Townsend, 214 Mich. 267, 183 N. W. 177, 16 A.L.R. 902.

One who drives an automobile with criminal negligence so that a passenger is thrown out, and the resulting shock, because of his alcoholic condition, causes delirium tremens resulting in death, is guilty of manslaughter if the illness would not have occurred and caused the death had the wounds from the fall not been received. State v. Block, 87 Conn. 573, 89 A. 167, 49 L.R.A.(N.S.) 913.

[19] State v. Schaeffer, 96 Ohio St. 215, 117 N. E. 220, L.R.A.1918B, 945, Ann. Cas. 1918E, 1137; Copeland v. State, 154 Tenn. 7, 285 S. W. 565, 49 A.L.R. 605.

Annotation: 99 A.L.R. 772.

In Copeland v. State, 154 Tenn. 7, 285 S. W. 565, 49 A.L.R. 605, it appeared that the accused, driver of an automobile, while attempting to pass a log wagon, struck and killed a boy running from behind it. The court reversed a conviction of manslaughter because of the failure of the trial court to charge that if death did not result from the accused's violation of the speed limit prescribed by the statute, there could be no conviction, unless the boy's death was the reasonable and probable result of the accused's negligent or reckless act, and that if he acted as would a man of reasonable care in attempting to pass the wagon, and death was the result of an accident caused by the boy's unexpectedly running from behind the wagon in front of the automobile, the homicide would not be unlawful.

[20] State v. Schaeffer, 96 Ohio St. 215, 117 N. E. 220, L.R.A.1918B, 945, Ann. Cas. 1918E, 1137; Copeland v. State, 154 Tenn. 7, 285 S. W. 565, 49 A.L.R. 605.

[1] Maxon v. State, 177 Wis. 379, 187 N. W. 753, 21 A.L.R. 1484.

[2] Annotation: 99 A.L.R. 774.

[3] Keller v. State, 155 Tenn. 633, 299 S. W. 803, 59 A.L.R. 685, wherein it was held that the driving of an automobile upon the public highway by one who is under the influence of an intoxicant, in violation of statute, is an act malum in se so as to supply the criminal intent necessary to render him guilty of involuntary homicide for killing a pedestrian on the highway, although the killing was not the natural or probable result of the act. Annotation: 99 A.L.R. 774.

Where it is provided by statute that if the death of any human being be caused by the operation of a motor vehicle by any person while intoxicated, such person shall be deemed guilty of manslaughter, the criminal liability is incurred by the mere act of driving while intoxicated. Annotation: 99 A.L.R. 775.

strike another with his car with intent to kill him, and should thereby kill him, it would be murder independently of statutes relating to the operation of motor vehicles.[4] It is not, however, essential that there should have been an actual intent upon the part of the operator to kill the deceased. The necessary malice may be inferred or implied where the driver acts so recklessly or wantonly as to manifest a depravity of mind and disregard of human life,[5] as where he drives an automobile in such a manner as directly to imperil human life and without regard for the presence of persons on a busy street;[6] for example, one who, when in an intoxicated condition, drove an automobile at a reckless speed along the principal street of a village, into collision with another car, which resulted in the death of its occupant, may be found guilty of murder in the second degree, which will charge the one responsible for his movements with guilt of a like offense.[7]

c. Defenses

§ 793. **Generally.**—Various defenses have been considered by the courts in prosecutions for involuntary homicide resulting from the operation of automobiles. Ordinarily, when a person is charged with killing another while driving his car negligently or in violation of law, he may defend on the ground that his unlawful or negligent act was not the proximate cause of death. At least this is generally true where the act is malum prohibitum,[8] though in some jurisdictions this would not be a defense if the act was malum in se,[9] or a statute created absolute liability for a homicide committed while engaged in doing an unlawful act.[10] Accident or misadventure may be a defense, even though the accused was driving at an unlawful rate of speed.[11]

That no definite rate of speed is fixed by the statute prohibiting the reckless driving of automobiles is no defense to a prosecution for homicide for killing a person by such driving.[12]

§ 794. **Lack of Intent.**—An intent to cause the death of another is not an element in the crime of manslaughter,[13] Hence, the lack of intention to kill is not a defense to a prosecution for causing the death of a person while negligently or unlawfully operating an automobile. And the fact that an accessory to the killing of a person by the negligent operation of an automobile by an intoxicated person did not intend to inflict injury will not prevent a conviction of involuntary manslaughter, where the statute provides that lack of criminal intent shall not be a defense in behalf of an accessory.[14]

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[4] Annotation: 99 A.L.R. 756.

[5] State v. Trott, 190 N. C. 674, 130 S. E. 627, 42 A.L.R. 1114.
Annotation: 99 A.L.R. 766.

[6] Babbitt, Motor Vehicle Law, 4th ed. p. 1509, § 2094.

[7] State v. Trott, 190 N. C. 674, 130 S. E. 627, 42 A.L.R. 1114.

[8] See supra, § 791.

[9] **Misadventure does not excuse** an involuntary homicide committed while the accused was engaged in an unlawful act which was malum in se, or in an unlawful act which was malum prohibitum, but shown to be the proximate cause of the homicide, especially where such act was in violation of a statute designed to safeguard human life and safety. State v. Budge, 126 Me. 223, 137 A. 244, 53 A.L.R. 241.

Driving a motor car while intoxicated is an offense per se, and a homicide resulting therefrom is not excusable on the ground of misadventure; but being under the influence of liquor to an extent not amounting to intoxication is an offense malum prohibitum, and a homicide resulting from the driving of a car under such conditions may be excusable on the ground of misadventure, in case the violation of the statute in no way contributed to the homicide. State v. Budge, 126 Me. 223, 137 A. 244, 53 A.L.R. 241.
See supra, § 791.

[10] See supra, § 791.

[11] **A homicide committed by one driving** an automobile at an unlawful rate of speed, no other element of negligence being present, was due to accident or misadventure, where the deceased unexpectedly stepped in front of the automobile without warning, at a point in the street where pedestrians might not be expected to cross, and the excess of the legal limit of speed does not appear to have contributed to the accident, although the contributory negligence of the deceased is not a defense. To acquit of manslaughter on the ground of misadventure, a jury is not obliged to find as a fact that the accused, at the time of the homicide, was not engaged in doing an unlawful act. State v. Budge, 126 Me. 223, 137 A. 244, 53 A.L.R. 241.

[12] Maxon v. State, 177 Wis. 379, 187 N. W. 753, 21 A.L.R. 1484.

[13] See Homicide [Also 13 R. C. L. p. 740, § 44].

§ 795. Intoxication.—In accordance with the general rule that voluntary drunkenness is not a defense to crime,[15] one cannot avoid criminal liability for a homicide committed in driving an automobile when intoxicated, on the ground that when he started on his trip he was so intoxicated that he did not appreciate his condition, or know and appreciate that operating the car while in such condition might cause a condition of things that would make him guilty of manslaughter.[16]

§ 796. Contributory Negligence of Deceased.—The familiar rule that contributory negligence of the person injured or killed by the negligence of the defendant in the operation of an automobile bars a recovery in a civil action[17] has no application to a prosecution for homicide due to criminal negligence in operating an automobile. In such case, the decedent's behavior may have a material bearing upon the question of the defendant's guilt, but if the culpable negligence of the latter is found to be the cause of the death, he is criminally responsible whether the decedent's failure to use due care contributed to the injury or not.[18] In some cases, the conduct of the decedent is material to the extent that it bears upon the question whether, under all the circumstances of the case, the defendant was negligent.[19]

§ 797. Former Jeopardy.—The defense of former jeopardy in criminal prosecutions is discussed under another title.[20] Here, however, it may be observed that a conviction of driving an automobile when intoxicated is not a bar to a prosecution for involuntary manslaughter by causing the death of a person while so doing.[1]

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[14] Ex parte Liotard, 47 Nev. 169, 217 P. 960, 30 A.L.R. 63.

[15] See CRIMINAL LAW [Also 8 R. C. L. p. 129, §§ 106 et seq.].

[16] People v. Townsend, 214 Mich. 267, 183 N. W. 177, 16 A.L.R. 902; State v. Trott, 190 N. C. 674, 130 S. E. 627, 42 A.L.R. 1114.

[17] See supra, §§ 419 et seq.

[18] State v. Campbell, 82 Conn. 671, 74 A. 927, 135 Am. St. Rep. 293, 18 Ann. Cas. 236; People v. Camberis, 297 Ill. 455, 130 N. E. 712, citing R. C. L.; State v. Custer, 129 Kan. 381, 282 P. 1071, 67 A.L.R. 909; Schultz v. State, 89 Neb. 34, 130 N. W. 972, 33 L.R.A.(N.S.) 403, Ann. Cas. 1912C, 495; State v. Palmer, 197 N. C. 135, 147 S. E. 817, citing R. C. L.; State v. Gray, 180 N. C. 697, 104 S. E. 647, citing R. C. L.; State v. Oakley, 176 N. C. 755, 97 S. E. 616, citing R. C. L.; State v. Sussewell, 149 S. C. 128, 146 S. E. 697, citing R. C. L.; Keller v. State, 155 Tenn. 633, 299 S. W. 803, 59 A.L.R. 685; Copeland v. State, 154 Tenn. 7, 285 S. W. 565, 49 A.L.R. 605; Vasque v. State, 121 Tex. Crim. Rep. 478, 52 S. W. (2d) 1056, citing R. C. L.; Maxon v. State, 177 Wis. 379, 187 S. W. 753, 21 A.L.R. 1484.

Annotation: 67 A.L.R. 922; 99 A.L.R. 833; L.R.A.1918B, 957; 30 L.R.A.(N.S.) 459; Ann. Cas. 1912C, 501.

Where a person wilfully, recklessly, carelessly, and negligently, and at an unlawful rate of speed as defined by the statute, drives his automobile upon the public streets and highways and thereby kills another, negligence of the driver of another car, in which the deceased was riding when he was killed, cannot be invoked, under ordinary circumstances, to relieve such person of criminal liability. Schultz v. State, 89 Neb. 34, 130 N. W. 972, 33 L.R.A. (N.S.) 403.

[19] State v. Custer, 129 Kan. 381, 282 P. 1071, 67 A.L.R. 909; Copeland v. State, 154 Tenn. 7, 285 S. W. 565, 49 A.L.R. 605; Maxon v. State, 177 Wis. 379, 187 N. W. 753, 21 A.L.R. 1484.

Annotation: 67 A.L.R. 922; L.R.A.1918B, 957; Ann. Cas. 1912C, 502.

The conduct of a boy who was killed by an automobile on a highway should be taken into consideration in determining whether, under the circumstances, the negligence of the driver of the car was the proximate cause of the death, or whether death resulted from an unavoidable accident. Copeland v. State, 154 Tenn. 7, 285 S. W. 565, 49 A.L.R. 605.

[20] See CRIMINAL LAW [Also 8 R. C. L. p. 134, §§ 114 et seq.].

[1] People v. Townsend, 214 Mich. 267, 183 N. W. 177, 16 A.L.R. 902.

8. LARCENY

§ 798. Generally.—By virtue of general larceny statutes,[2] or statutes relating expressly to larceny, the felonious taking of an automobile, or of automobile parts or accessories, is a criminal offense, but, in accordance with the general rule that the use of property of another by one who is lawfully in possession of it does not constitute larceny,[3] in the absence of a statute to the contrary, the use by a person of an automobile of which he is lawfully in possession for his own purposes, without the knowledge of the owner, does not constitute larceny.[4] To constitute an asportation within the law of larceny, "the least removal of the thing taken from the place where it was before" is sufficient, "though it be not quite carried off."[5] Starting an automobile parked in the street, and running it 150 feet, when it runs on to the curb and stops, is a sufficient asportation.[6] Attempting to start an automobile without moving it may constitute attempted larceny.[7]

9. LENDING LICENSE PLATES

§ 799. Generally.—In the absence of a statute to the contrary, a person who lends his license plates to another person does not commit a crime,[8] and if the person to whom they are loaned violates a speed regulation, the person loaning them is not criminally liable therefor.[9]

10. POSSESSION OF AUTOMOBILE WITH CHANGED OR DEFACED IDENTIFYING NUMBERS

§ 800. Generally.—Statutes in some jurisdictions make the possession of an automobile from which the manufacturer's serial numbers, or other identifying marks, have been removed, or on which they have been defaced or altered, a criminal offense, regardless of knowledge or intent concerning such fact on the part of the possessor.[10] Such statutes have generally been held constitutional as a valid exercise of the police power.[11] They do not unconstitutionally deprive a person of his liberty or property without due process of law,[12] or deny him the equal protection of the law.[13]

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[2] See LARCENY [Also 17 R. C. L. p. 1].

[3] See LARCENY [Also 17 R. C. L. p. 41, §§ 46 et seq.].

[4] State v. Robinson, 106 W. Va. 276, 145 S. E. 383, 62 A.L.R. 351.

Annotation: 62 A.L.R. 354.

Where the uncontradicted facts and circumstances shown on the trial of an indictment for larceny of an automobile are that the accused had lawful possession of the car, and, having such possession, used it to make a journey to see a distant relative, without the knowledge of the owner, and did not claim the car, but gave full and true information relative thereto, when questioned about it on the journey, a jury is not warranted in finding the accused guilty of a felonious intent. Such facts and circumstances do not justify a finding of guilt beyond a reasonable doubt. State v. Robinson, 106 W. Va. 276, 145 S. E. 383, 62 A.L.R. 351.

[5] Annotation: 19 A.L.R. 724.

[6] Annotation: 19 A.L.R. 728.

[7] Annotation: 19 A.L.R. 728.

[8] Annotation: 26 A.L.R. 1246.

[9] Annotation: 26 A.L.R. 1246.

[10] People v. Billardello, 319 Ill. 124, 149 N. E. 781, 42 A.L.R. 1146; People v. Johnson, 288 Ill. 442, 123 N. E. 543, 4 A.L.R. 1535.

Annotation: 4 A.L.R. 1538, s. 42 A.L.R. 1149; 11 A.L.R. 1435.

In People v. Johnson, 288 Ill. 442, 123 N. E. 543, 4 A.L.R. 1535, the court holds that scienter is not, under the Constitution, a necessary element of an offense which is malum prohibitum.

That a statute permits one in possession of a motor vehicle the original engine number of which has, without his knowledge or consent, been destroyed or altered, to obtain permission to cause a special number to be stamped on the engine, does not indicate an intention to relieve from the penalty imposed by the statute for possession of such vehicle with changed motor number, one who innocently purchased a vehicle the number of which had been changed. People v. Billardello, 319 Ill. 124, 149 N. E. 781, 42 A.L.R. 1146.

[11] People v. Billardello, 319 Ill. 124, 149 N. E. 781, 42 A.L.R. 1146, People v. Johnson, 288 Ill. 442, 123 N. E. 543, 4 A.L.R. 1535.

Annotation: 4 A.L.R. 1538, s. 42 A.L.R. 1149.

[12] People v. Billardello, 319 Ill. 124, 149 N. E. 781, 42 A.L.R. 1146.

11. TRANSPORTING OR RECEIVING IN INTERSTATE OR FOREIGN COMMERCE MOTOR VEHICLES KNOWN TO HAVE BEEN STOLEN

§ 801. Generally.—The National Motor Vehicle Theft Act of October 29, 1919,[14] sometimes referred to as the Dyer Act, makes it a criminal offense for anyone to transport in interstate or foreign commerce any motor vehicle known to have been stolen, and makes it a felony to receive a motor vehicle so moving. The constitutionality of this act as against an objection that its enactment was beyond the power of Congress under the commerce clause of the Federal Constitution has been upheld.[15] Under the provisions of the statute relating to the receiving of such motor vehicles, it is not essential to a conviction that the defendant knew of the interstate transportation, but only that it had been stolen.[16] The statute is violated if a person purchases a car with knowledge that it has been stolen, and drives it from one state to another, either for the purpose of ultimate future sale, or for the mere transportation or use of the purchaser.[17]

12. RECKLESS DRIVING

§ 802. Generally.—Reckless driving is expressly denounced by statute in many jurisdictions, by that name or in terms of the same import, as a criminal offense.[18] The punishment which may be imposed therefor varies in different jurisdictions.[19] As a general rule what constitutes reckless driving is to be determined from all the surrounding circumstances where the statute does not specifically declare what particular acts shall constitute the offense.[20] What constitutes reckless driving under some conditions may not be such under other conditions.[1] As a general rule, something more than mere negligence in the operation of an automobile is necessary to constitute the offense of reckless driving; generally the offense denotes operation of an automobile under such circumstances, and in such a manner, as to show a wilful or reckless disregard of consequences.[2] Under some statutes, however, negligence in the operation of an automobile is sufficient to constitute reckless driving.[3] Under other statutes reckless driving includes driving in a manner which un-

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[13] People v. Johnson, 288 Ill. 442, 123 N. E. 543, 4 A.L.R. 1535.

Annotation: 4 A.L.R. 1538, s. 42 A.L.R. 1149.

[14] 41 Stat. at L. 325, chap. 89, 18 U. S. C. A. § 408.

[15] Brooks v. United States, 267 U. S. 432, 69 L. ed. 699, 45 S. Ct. 345, 37 A.L.R. 1407.

Annotation: 27 A.L.R. 956, s. 37 A.L.R. 1412.

In Whitaker v. Hitt, 52 App. D. C. 149, 285 F. 797, 27 A.L.R. 951, the court holds that driving a stolen automobile from one state to another is interstate commerce within the jurisdiction of Congress, under the Federal Constitution.

Congress has power to punish the receiving, concealing, storing, bartering, selling, or disposing of a motor vehicle transported in interstate commerce with knowledge that it has been stolen. Brooks v. United States, 267 U. S. 432, 69 L. ed. 699, 45 S. Ct. 345, 37 A.L.R. 1407.

[16] Annotation: 27 A.L.R. 956, s. 37 A.L.R. 1412.

[17] Annotation: 27 A.L.R. 956, s. 37 A.L.R. 1412.

[18] People v. Grogan, 260 N. Y. 138, 183 N. E. 273, 86 A.L.R. 1266.

Annotation: 86 A.L.R. 1273 et seq.

[19] **Depriving one of his license to drive** an automobile may be a sufficient penalty for recklessly driving it. State v. Superior Ct. 139 Wash. 1, 245 P. 409, 45 A.L.R. 1530.

[20] People v. Grogan, 260 N. Y. 138, 183 N. E. 273, 86 A.L.R. 1266; State v. Miller, 119 Or. 409, 243 P. 72, affirmed in 273 U. S. 657, 71 L. ed. 825, 47 S. Ct. 344; State ex rel. Berry v. Superior Ct. 139 Wash. 1, 245 P. 409, 45 A.L.R. 1530; Maxon v. State, 177 Wis. 379, 187 N. W. 753, 21 A.L.R. 1484.

Annotation: 86 A.L.R. 1275.

[1] Annotation: 86 A.L.R. 1276.

[2] People v. Grogan, 260 N. Y. 138, 183 N. E. 273, 86 A.L.R. 1266, involving a statute which provided that reckless driving should include driving a motor vehicle in a manner unnecessarily interfering with the free and proper use of the highway, or unnecessarily endangering users thereof, and prohibiting reckless driving eo nomine.

Annotation: 86 A.L.R. 1278.

[3] Annotation: 86 A.L.R. 1278.

necessarily interferes with the free and proper use of the highway.[4] The violation of the rules governing traffic on the highways may, under the conditions existing at the time, constitute reckless driving, or an element of that offense.[5] Driving while intoxicated may be evidence of reckless driving, but proof of that fact is not ordinarily essential in order to establish the crime,[6] nor is an injury to the property or person of another an essential element unless declared so by statute.[7] One may be guilty of reckless driving even though no one else was upon the street.[8]

§ 803. **As Dependent upon Rate of Speed.**—In the absence of a statute or ordinance denouncing as reckless driving the operation of a motor vehicle in excess of a specified speed limit, the mere speed at which a motor vehicle was operated does not alone determine whether it was operated recklessly, but is only a circumstance to be considered in connection with other surrounding circumstances in determining the question.[9] Some statutes and ordinances expressly denounce as reckless driving the operation of an automobile in excess of the lawful rate of speed; under such statutes and ordinances the mere driving of an automobile at an unlawful speed constitutes the offense.[10] However, unless the offense of reckless driving is limited to violating the prescribed speed limit, the offense may be committed without exceeding such speed limit.[11] Some regulations provide that speed in excess of a stated rate, maintained for a specified distance, shall be deemed prima facie or presumptive evidence of reckless driving; such statutes and ordinances merely cast on the defendant the burden of showing that such speed was not reckless under the circumstances.[12] The fact that one was attempting to elude officers who had a warrant for his arrest constitutes no defense to a prosecution for reckless driving in excess of speed limits.[13]

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[4] People v. Grogan, 260 N. Y. 138, 183 N. E. 273, 86 A.L.R. 1266.

[5] State v. Miller, 119 Or. 409, 243 P. 72, affirmed in 273 U. S. 657, 71 L. ed. 825, 47 S. Ct. 344.
Annotation: 86 A.L.R. 1277.

Failure of the defendant to pass to the right of the intersection of the center of two streets before turning to the left, in connection with the speed at which he was driving, may constitute reckless driving. Annotation: 86 A.L.R. 1278.

[6] Annotation: 86 A.L.R. 1281.

[7] Annotation: 86 A.L.R. 1281.

[8] Com. v. Horsfall, 213 Mass. 232, 100 N. E. 362, Ann. Cas. 1914A, 682.

[9] People v. Grogan, 260 N. Y. 138, 183 N. E. 273, 86 A.L.R. 1266; State ex rel. Berry v. Superior Ct. 139 Wash. 1, 245 P. 409, 45 A.L.R. 1530; Maxon v. State, 177 Wis. 379, 187 N. W. 753, 21 A.L.R. 1484.
Annotation: 86 A.L.R. 1282.

Evidence that the defendant was operating an automobile on a boulevard past other automobiles and across street intersections at between 45 and 50 miles an hour is sufficient to sustain a conviction of reckless driving under a statute providing that "any person who drives any vehicle upon a highway in so negligent a manner as to indicate either a wilful or a wanton disregard of the safety of persons or property shall be guilty of reckless driving." Annotation: 86 A.L.R. 1282.

Under a statute merely prohibiting reckless driving, and declaring that a violation should constitute a misdemeanor, it has been held that proof that an automobilist drove through a village at a high rate of speed did not justify a conviction, where it appeared that he did so between midnight and dawn, when there was no traffic, that the neighborhood was sparsely settled, and that the highway was straight, with only one intersecting street. Annotation: 86 A.L.R. 1282.

[10] Annotation: 86 A.L.R. 1281.

[11] State v. Miller, 119 Or. 409, 243 P. 72, affirmed in 273 U. S. 657, 71 L. ed. 825, 47 S. Ct. 344.
Annotation: 86 A.L.R. 1281.

The presence of pedestrians on the highway may be a sufficient reason for finding one guilty of reckless driving, although he drove at less than the maximum rate of 30 miles an hour fixed by statute, since the degree of care required was commensurate with the danger involved. State v. Miller, 119 Or. 409, 243 P. 72, affirmed in 273 U. S. 657, 71 L. ed. 825, 47 S. Ct. 344.

A man may observe the speed limit and still be guilty of reckless driving, by zigzagging constantly so as to endanger others and wantonly interfere with their rights. Annotation: 86 A.L.R. 1283.

[12] People v. Grogan, 260 N. Y. 138, 183 N. E. 273, 86 A.L.R. 1266.
Annotation: 86 A.L.R. 1283.

[13] State v. Freeman, 122 Me. 294, 119 A. 668, 29 A.L.R. 881.
Annotation: 29 A.L.R. 883.

§ 804. Conduct Endangering Public.—Under some statutes prohibiting driving recklessly, or so as to endanger life, limb, or property, which have been construed as creating distinct offenses, a person may be convicted of reckless driving without proof that the life, limb, or property of any person was endangered.[14] Some statutes, however, provide that reckless driving shall include driving in a manner which unnecessarily endangers users of the highway,[15] while others provide that to drive in a reckless manner shall be construed to mean the operation of a motor vehicle upon the public highways in such manner as to endanger or inconvenience unnecessarily other users of such highway.[16] The fact that one exercised all possible care after discovering upon the highway a person whom he injured does not prevent a prosecution for reckless driving based upon his antecedent conduct.[17]

§ 805. Where Acts Are Otherwise Made Punishable.—The offense of reckless driving, which is expressly denounced by statutes in many jurisdictions by that name, or in terms of the same import, is to be distinguished from other offenses created by statutes regulating the operation of automobiles on highways and making violations of their provisions criminal offenses. Where an act in connection with the operation of an automobile is, by statute, made a separate offense for which a punishment is provided, the general rule is that the act itself cannot be punished as reckless driving, although in connection with particular circumstances it might constitute that offense.[18] This rule precluding the punishment as reckless driving of an act made a separate offense for which a punishment is provided has been applied in cases involving statutes making it an offense to drive an automobile while under the influence of intoxicating liquor.[19]

In some jurisdictions reckless driving, and operating an automobile so as to endanger the life, limb, or property of the public, are distinct offenses; and acts which would constitute the latter offense are not necessarily sufficient to constitute the former.[20] For example, where a statute provides that no person shall operate any motor vehicle on a highway recklessly, having regard to the width, traffic, and use of the highway, the intersection of streets, and the weather conditions, or so as to endanger the property or life or limb of any person,[1] or prohibits reckless driving, and provides that it shall include driving a motor vehicle in a manner which unreasonably interferes with the free and proper use, or unnecessarily injures users, of a public highway,[2] separate and distinct offenses are created.

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[14] Com. v. Horsfall, 213 Mass. 232, 100 N. E. 362, Ann. Cas. 1914A, 682.
Annotation: 86 A.L.R. 1280.

[15] People v. Grogan, 260 N. Y. 138, 183 N. E. 273, 86 A.L.R. 1266.

[16] Annotation: 86 A.L.R. 1280.

[17] Com. v. Horsfall, 213 Mass. 232, 100 N. E. 362, Ann. Cas. 1914A, 682.

[18] Annotation: 86 A.L.R. 1274.
In People v. Grogan, 260 N. Y. 138, 183 N. E. 273, 86 A.L.R. 1266, it was held that separate and distinct offenses, conviction or acquittal of which does not prevent a prosecution for committing the others, are created by a statute which prohibits reckless driving and provides that it shall include driving a motor vehicle in a manner which unreasonably interferes with the free and proper use, or unnecessarily injures users, of a public highway.

[19] Annotation: 86 A.L.R. 1274.
A statute declaring that whoever shall operate a motor vehicle in any way recklessly, or while under the influence of intoxicating liquor, so that the lives or safety of the public are in danger, shall be punished as prescribed, denounces two distinct offenses. Annotation: 86 A.L.R. 1275.

[20] Annotation: 86 A.L.R. 1275.

[1] Annotation: 86 A.L.R. 1275.
A defendant who was tried at the same time on three indictments, based on the same facts charging, respectively, manslaughter, operating a motor vehicle recklessly, and operating a motor vehicle so that the lives or safety of the public might be endangered, and was acquitted on the first two charges, was found guilty on the third. Annotation: 86 A.L.R. 1275.

[2] People v. Grogan, 260 N. Y. 138, 183 N. E. 273, 86 A.L.R. 1266.
A statute penalizing the operation of an

13. Violating Speed Laws

§ 806. **Generally.**—Statutes, in many jurisdictions, declare driving an automobile on a public highway in excess of a certain speed limit,[3] or at a speed greater than is reasonable and proper under the existing conditions of traffic, width of road, etc.,[4] to be a criminal offense.[5] The regulation of the speed of automobiles may be effected by the use of the words "ride or drive," and a person may be said to be driving an automobile if he is controlling the motive power.[6]

Intent and knowledge are immaterial elements under speed statutes.[7]

The fact that an individual was attempting to elude an officer who had a warrant for his arrest does not excuse his driving an automobile on the public highway in excess of the speed limit, and in a reckless manner, in violation of a statutory provision.[8]

§ 807. **Indefiniteness of Speed Regulation as Affecting Validity.**—Statutes or ordinances providing that no person shall operate or drive any motor vehicle recklessly or at a rate of speed greater than is reasonable and proper, having regard to the width, traffic, and use of the highways, and the general and usual rules of the road, or so as to endanger the property, life, or limb of any person, are regarded as not invalid on the ground that they are too vague, uncertain, and indefinite to sustain a criminal conviction;[9] nor is such a statute unreasonable.[10]

No definite rule can be stated as to when a statute forbidding the driving

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automobile in a manner which unnecessarily interferes with the free and proper use of the public highway, or unnecessarily endangers users of the public highway, is void for indefiniteness unless it can be read as condemning only the failure to exercise reasonable care, reasonable caution, or the reasonable foresight of a reasonably prudent and careful person. Ibid.

[3] Ex parte Slaughter, 92 Tex. Crim. Rep. 212, 243 S. W. 478, 26 A.L.R. 891; Weirich v. State, 140 Wis. 98, 121 N. W. 652, 22 L.R.A.(N.S.) 1221, 17 Ann. Cas. 802.

A toll road owned and operated by a private corporation is a "public highway" within the meaning of a statute regulating the operation of automobiles upon any public highway, since, as the danger of personal injury to travelers thereon is as great, and immunity therefrom is as important, as on an ordinary highway, it will be presumed, in the absence of express provision, that the legislature contemplated a remedy as broad as the mischief to be guarded against. Weirich v. State, 140 Wis. 98, 121 N. W. 652, 22 L.R.A.(N.S.) 1221, 17 Ann. Cas. 802.

Rules limiting the speed of vehicles upon streets under the control of a board of park commissioners may be adopted by them under statutes providing that they shall have the same power over such streets as is vested in them concerning parks, as to the use of which they have been given power to make rules, and a person may be convicted of driving in excess of the speed permissible under such regulations. Com. v. Crowinshield, 187 Mass. 221, 72 N. E. 963, 68 L.R.A. 245.

[4] Gallaher v. State, 193 Ind. 629, 141 N. E. 347, 29 A.L.R. 1059; Schultz v. State, 89 Neb. 34, 130 N. W. 972, 33 L.R.A.(N.S.) 403, Ann. Cas. 1912C, 495; State v. Schaeffer, 96 Ohio St. 215, 117 N. E. 220, L.R.A.1918B, 945, Ann. Cas. 1918E, 1137.

[5] Annotation: 26 A.L.R. 897, s. 29 A.L.R. 1066.

As to the liability of public officials or employees, such as fire departments, police officers, etc., for exceeding speed limits provided by statute or ordinance, see supra, § 760.

[6] Com. v. Crowninshield, 187 Mass. 221, 72 N. E. 963, 68 L.R.A. 245.

[7] Annotation: 11 A.L.R. 1436; 29 A.L.R. 884.

[8] State v. Freeman, 122 Me. 294, 119 A. 668, 29 A.L.R. 881.

Annotation: 29 A.L.R. 883.

[9] Gallaher v. State, 193 Ind. 629, 141 N. E. 347, 29 A.L.R. 1059; Schultz v. State, 89 Neb. 34, 130 N. W. 972, 33 L.R.A.(N.S.) 403, Ann. Cas. 1912C, 495; State v. Schaeffer, 96 Ohio St. 215, 117 N. E. 220, L.R.A. 1918B, 945, Ann. Cas. 1918E, 1137; Maxon v. State, 177 Wis. 379, 187 N. W. 753, 21 A.L.R. 1484.

Annotation: 26 A.L.R. 898, s. 29 A.L.R. 1066; L.R.A.1918B, 945.

Such a statute, as applied to one charged with manslaughter in killing a child while driving in violation thereof, is not a violation of the right of the accused to demand the nature and cause of the accusation against him by reason of its generality and indefiniteness, provided the indictment advises the accused of the "nature and cause of the accusation." State v. Schaeffer, 96 Ohio St. 215, 117 N. E. 220, L.R.A.1918B, 945, Ann. Cas. 1918E, 1137.

[10] Schultz v. State, 89 Neb. 34, 130 N. W. 972, 33 L.R.A.(N.S.) 403, Ann. Cas. 1912C, 495.

of a motor vehicle in designated localities will be considered void for indefiniteness. Some courts take the view that statutes forbidding the driving of a motor vehicle at more than a specified speed upon a highway where the territory contiguous thereto "is closely built up,"[11] or making it a crime to operate an automobile around a curve without having the car under control, or without reducing the speed thereof to a reasonable and proper rate,[12] are void for uncertainty and indefiniteness; but, on the other hand, the view has been taken that a statute forbidding the driving of an automobile in excess of a certain speed "in the business portion" of cities was not so uncertain and indefinite as to render it void as a violation of the constitutional provision with reference to due process of law.[13]

§ 808. —Indefiniteness as to Rate of Speed.—Ordinarily, the courts will not substitute their opinions for the judgment of the legislature as to the reasonableness of an act fixing the rate of speed at which motor vehicles may be lawfully driven.[14] Therefore it may be said generally, though not without recognizing authority to the contrary, that statutes or ordinances providing that no person shall operate or drive any motor vehicle recklessly or at a rate of speed greater than is reasonable and proper, having regard to the width, traffic, and use of the highways and the general and usual rules of the road, or so as to endanger the property, life, or limb of any person, are not invalid on the ground that they are too vague, uncertain, and indefinite to sustain a criminal conviction.[15]

14. Taking or Using Car Without Owner's Consent

§ 809. Generally.—Taking or using another's automobile without his consent is made a criminal offense in many jurisdictions.[16] Under some statutes it constitutes larceny.[17] Even though no statute makes it criminal to use the automobile of another without his consent, the agreement of two or more persons to take and use another's automobile without authority may be punishable as a criminal conspiracy, and a person may be guilty of malicious mischief in damaging another's automobile while driving it furiously, without knowing or caring whether he injures it or not.[18]

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[11] Ex parte Slaughter, 92 Tex. Crim. Rep. 212, 243 S. W. 478, 26 A.L.R. 891.

Annotation: 26 A.L.R. 898, s. 29 A.L.R. 1066.

[12] State v. Lantz, 90 W. Va. 738, 111 S. E. 766, 26 A.L.R. 894.

Annotation: 26 A.L.R. 902, s. 29 A.L.R. 1066.

[13] Annotation: 11 A.L.R. 1436; 26 A.L.R. 898, s. 29 A.L.R. 1066.

[14] Schultz v. State, 89 Neb. 34, 130 N. W. 972, 33 L.R.A.(N.S.) 403, Ann. Cas. 1912C, 495.

[15] Schultz v. State, 89 Neb. 34, 130 N. W. 972, 33 L.R.A.(N.S.) 403, Ann. Cas. 1912C, 495; State v. Schaeffer, 96 Ohio St. 215, 117 N. E. 220, L.R.A.1918B, 945, Ann. Cas. 1918E, 1137; Maxon v. State, 177 Wis. 379, 187 N. W. 753, 21 A.L.R. 1484.

Annotation: 26 A.L.R. 898, s. 29 A.L.R. 1066.

The provisions of a Georgia statute making it penal to operate an automobile at a rate of speed greater than is reasonable and proper, having regard to the traffic and use of the highways, or so as to endanger the life or limb of any person or the safety of any property, have been held invalid on the ground that the statute was too uncertain and indefinite in its terms to be capable of enforcement in a criminal action. Annotation: 26 A.L.R. 902, s. 29 A.L.R. 1066.

[16] Stovall v. New York Indem. Co. 157 Tenn. 301, 8 S. W. (2d) 473, 72 A.L.R. 1368.

[17] **Under a statute** providing that unauthorized use of an automobile shall constitute the crime of larceny, a chauffeur who uses his employer's automobile without his consent, and contrary to his instructions, is guilty of larceny although the car is being driven for the purpose of testing it. Rose v. Balfe, 223 N. Y. 481, 119 N. E. 842, Ann. Cas. 1918D, 238.

[18] State v. Davis, 88 S. C. 229, 70 S. E. 811, 34 L.R.A.(N.S.) 295.

C. Prosecutions

1. In General

§ 810. Generally.—Prosecutions for crimes incident to ownership or operation of automobiles, and relating to automobiles, such as the larceny and the transportation of, or receiving, stolen automobiles, are largely governed by the rules which apply in criminal prosecutions generally.[19]

The following sections discuss matters relating to indictments,[20] evidence,[1] and trial,[2] which are distinctive to the crimes under discussion.

2. Indictments and Informations

a. In General

§ 811. Generally.—The general rules governing the sufficiency, etc., of indictments are discussed under another title;[3] only special applications of them to the crimes under discussion are considered here. Of course, in all such cases the indictment or information must allege the essential elements of and the facts constituting the offense charged.[4] It cannot be supplemented or pieced out by affidavits in the magistrate's court.[5] Generally, where the statute alleged to have been violated contains a statement of all the facts necessary to constitute the crime, an indictment charging such offense in the language of the statute,[6] or in substantially the language of the statute, is sufficient.[7]

b. Charging Particular Offenses

§ 812. Assault and Battery.—The allegations which are distinctive to indictments or informations for assault are discussed under another title.[8] Here, however, it may be observed that in charging the striking and injuring of a person with an automobile, it is sufficient to charge an assault without charging all the details going to make up the assault.[9]

§ 813. Failure to Stop after Injury.—An indictment or information under a statute containing some or all of the following provisions, namely, that any person operating a motor vehicle, who, knowing that an injury has been caused to a person or property due to his culpability, or to accident, leaves without giving his name, residence, and operator's license number to the injured party or a police officer, or reporting the same to the nearest police station or judicial officer, shall be guilty of a felony,[10] need not allege that the accident occurred on a public highway;[11] nor need an indictment under a statute requiring an automobilist who strikes a person to render assistance to him allege that accused "knowingly" struck him, or that accused failed to render aid knowing that he had struck him.[12]

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[19] See Criminal Law [Also 8 R. C. L. p. 38]; Indictments and Informations [Also 14 R. C. L. p. 150]; Trial; and titles dealing with particular crimes.

[20] See infra, §§ 811 et seq.

[1] See infra, §§ 820 et seq.

[2] See infra, §§ 831 et seq.

[3] See Indictments and Informations [Also 14 R. C. L. p. 150].

[4] People v. Grogan, 260 N. Y. 138, 183 N. E. 273, 86 A.L.R. 1266.

[5] Ibid.

[6] State v. Lantz, 90 W. Va. 738, 111 S. E. 766, 26 A.L.R. 894.
Annotation: 99 A.L.R. 775.

[7] Annotation: 99 A.L.R. 775.

[8] See Assault and Battery, Vol. 4, p. 178, § 98.

[9] Brimhall v. State, 31 Ariz. 522, 255 P. 165, 53 A.L.R. 231.

[10] See supra, § 780.

[11] People v. Curtis, 217 N. Y. 304, 112 N. E. 54, Ann. Cas. 1917E, 586.

[12] Scott v. State, 90 Tex. Crim. Rep. 100, 233 S. W. 1097, 16 A.L.R. 1420.

§ 814. Driving While Intoxicated.—The sufficiency of indictments or complaints for driving an automobile while intoxicated is governed by the rules applicable to prosecutions generally.[13] A complaint charging the accused with driving an automobile while under the influence of intoxicating liquor need not specifically mention the statute alleged to have been violated,[14] but the particular elements of the offense defined in the statute under which the prosecution was instituted must be included—for instance, the driving or operation of the car on a public highway;[15] or, where the statute includes injury to a person or property, such an injury must be alleged.[16] It is not necessary to use the words of the statute defining the offense; words of similar import may be used.[17]

§ 815. Homicide through Negligent or Unlawful Use of Automobile.—Indictments or informations for manslaughter caused by the negligent or unlawful operation of automobiles are governed largely by rules applicable to indictments for homicide caused by any other act of the accused, and more particularly by those especially applicable to indictments for homicide.[18] In charging involuntary homicide the indictment should allege that the accused at the time of the homicide was negligently or unlawfully driving his automobile.[19] In a number of decisions the view is taken that an information which charges that the defendant "negligently, carelessly, recklessly, unlawfully, and feloniously" operated a motor vehicle on a public thoroughfare, and thereby struck and killed the decedent, is sufficient without averring in detail in what such negligence, etc., consisted,[20] though there is some authority to the contrary.[1] A distinction between involuntary manslaughter committed while perpetrating an unlawful act not amounting to a felony, and the offense arising out of some negligence or fault in doing a lawful act in a grossly negligent manner, is sometimes made. In the former case it is held sufficient to allege the unlawful act with sufficient particularity to identify it, and then to charge that as a consequence the defendant caused the death of the deceased, and that there is no need to aver in detail the specific acts of the accused; but in case of manslaughter committed through gross or culpable negligence while doing a lawful act, the duty which was neglected or improperly performed must be charged, as well as the acts of the accused constituting failure to perform or improper performance.[2] Accordingly, the view is taken that an information for homicide committed by driving an automobile while intoxicated is not insufficient because it fails to state the specific act or acts which brought about the death.[3] Where a statute provides that it shall be sufficient to charge that accused did unlawfully kill deceased, the acts by which the unlawful killing was done need not be set out.[4] Under statutory short forms of indictment, it seems that merely charging that the accused unlawfully killed the deceased is sufficient.[5] Generally it is not necessary to charge that the deceased was a "human being," but this fact, of course, must appear in the indictment.[6] And it is not necessary to describe the particular character or kind of motor vehicle with which the killing was accomplished.[7]

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[13] See INDICTMENTS AND INFORMATIONS [Also 14 R. C. L. pp. 171 et seq.].

[14] Annotation: 42 A.L.R. 1513, s. 49 A.L.R. 1400 and 68 A.L.R. 1374.

[15] **Charging that the offense** was committed "on a public thoroughfare, to wit, Weequahickpart," is sufficient. Annotation: 12 B. R. C. 144.

[16] Annotation: 49 A.L.R. 1400, s. 68 A.L.R. 1374.

[17] Annotation: 68 A.L.R. 1374.

[18] See HOMICIDE [Also 13 R. C. L. p. 893, §§ 198 et seq.].

[19] Annotation: 99 A.L.R. 776.

An information for involuntary manslaughter must charge accused with the commission of some unlawful act, or with negligently doing some act lawful in itself, or with negligent omission to perform a legal duty, and that death resulted therefrom. People v. Townsend, 214 Mich. 267, 183 N. W. 177, 16 A.L.R. 902.

[20] Schultz v. State, 89 Neb. 34, 130 N. W. 972, 33 L.R.A.(N.S.) 403, Ann. Cas. 1912C, 495.

An indictment for involuntary manslaughter committed by the reckless driving of an automobile, alleging that the act was done feloniously, unlawfully, and recklessly, is sufficient, although it does not charge that the killing was "wilful," as an act done feloniously is done with the deliberate purpose of committing a crime. People v. Falkovitch, 280 Ill. 321, 117 N. E. 398, Ann. Cas. 1918B, 1077.

[1] People v. Townsend, 214 Mich. 267, 183 N. W. 177, 16 A.L.R. 902.

[2] Ibid.

[3] People v. Townsend, 214 Mich. 267, 183

An indictment for involuntary manslaughter charging that two persons named feloniously, violently, wantonly, recklessly, and negligently struck another named person with an automobile driven by one of them is sufficiently definite and precise to charge each person named as a principal in the crime.[8]

Where an indictment for manslaughter charges the defendant with having unlawfully killed a particular person, sometimes otherwise known by another name, and there is no evidence tending to prove the alias, or that both names were the names of the same person, such failure is not a fatal variance because it is not prejudicial to the merits of the case or the substantial rights of the defendant.[9]

§ 816. **Larceny; Sufficiency of Description.**—Indictments for the larceny of automobiles, automobile equipment, or accessories, the same as indictments for larceny of property generally,[10] should describe the subject of the larceny with reasonable certainty, which means that the property should be so described as to individualize the transaction to such an extent that the description as made will enable the court to determine that the property alleged to have been taken is a subject of larceny, show the jury that the things stolen are those on which the indictment is founded, reasonably inform the accused of the instance meant in conformity with the usual constitutional guaranty that a person accused of crime shall have right to demand the nature and cause of the accusation, so that he may properly prepare his defense, and be such that the judgment rendered after trial on the indictment may be pleaded in bar of a subsequent prosecution for the same offense.[11] An indictment which describes the make, type, value, and ownership of the automobile is generally recognized as sufficient.[12] Even though it is advisable to describe the make of the car alleged to have been stolen, a failure to do so does not render the indictment fatally defective.[13]

N. W. 177, 16 A.L.R. 902, wherein it is held that an information charging accused with operating an automobile when intoxicated, and that such operation directly contributed to the death of a guest in the machine, is sufficient to charge involuntary manslaughter.

[4] State v. McComb, 33 Wyo. 346, 239 P. 526, 41 A.L.R. 717.

[5] State v. Schaeffer, 96 Ohio St. 215, 117 N. E. 220, L.R.A.1918B, 945, Ann. Cas. 1918E, 1137.

Annotation: 99 A.L.R. 776.

In State v. Schaeffer, 96 Ohio St. 215, 117 N. E. 220, L.R.A.1918B, 945, Ann. Cas. 1918E, 1137, the court holds that the short form of indictment provided by statute in Ohio is not in conflict with the constitutional guaranty that the accused shall be advised of "the nature and cause of the accusation against him."

[6] Annotation: 99 A.L.R. 775.

[7] People v. Falkovitch, 280 Ill. 321, 117 N. E. 398, Ann. Cas. 1918B, 1077.

The accused is presumed to know the provisions of the statute defining the term "motor vehicle," and that a Ford automobile comes within the statutory definition. Ibid.

[8] Story v. United States, 57 App. D. C. 3, 16 F. (2d) 342, 53 A.L.R. 246, writ of certiorari denied in 274 U. S. 739, 71 L. ed. 1318, 47 S. Ct. 576.

[9] State v. Schaeffer, 96 Ohio St. 215, 117 N. E. 220, L.R.A.1918B, 945, Ann. Cas. 1918E, 1137.

[10] See LARCENY [Also 17 R. C. L. p. 55].

[11] Jackson v. State, 173 Miss. 776, 163 So. 381, 100 A.L.R. 789; State v. Robinson, 106 W. Va. 276, 145 S. E. 383, 62 A.L.R. 351.

Annotation: 100 A.L.R. 791.

[12] Jackson v. State, 173 Miss. 776, 163 So. 381, 100 A.L.R. 789.

Annotation: 100 A.L.R. 792.

[13] State v. Robinson, 106 W. Va. 276, 145 S. E. 383, 62 A.L.R. 351.

Annotation: 100 A.L.R. 792.

§ 817. Reckless Driving.—In charging the crime of reckless driving, an indictment or information, like indictments or informations generally,[14] must allege the material facts which constitute the offense with precision and accuracy.[15] The information or indictment cannot be supplemented or pieced out by affidavits in the magistrate's court.[16] An information charging the violation of a statute prohibiting reckless driving, in that defendant operated an automobile at a rapid and dangerous rate of speed which endangered the lives of others, will not support a conviction of so driving as unnecessarily to endanger the safety of users of the public highway and unnecessarily to interfere with such users.[17]

§ 818. Violation of Speed Laws.—Indictments charging violations of speed laws must conform to the general requisites of indictments charging the commission of crime.[18] It may be observed, however, that an indictment charging a violation of a statute prohibiting the operation of motor vehicles upon certain parts of the public roads in excess of a certain speed is not bad because it fails to charge the particular point or place at which the alleged offense was committed, the act charged to have been committed being a violation of the law if committed anywhere within the county.[19]

§ 819. Other Offenses.—In addition to the offenses above discussed,[20] other miscellaneous allegations in particular offenses, such as the following, have been decided by the courts: An indictment for transporting a stolen automobile in interstate commerce sufficiently charges that accused knew that it was stolen by reciting that it had been stolen by a person named, and the circumstances of the transportation, and concluding, "all of which" the accused "then and there well knew;"[1] a complaint charging the violation of a statute describing the lights to be carried on automobiles is sufficient where it states that the automobile was equipped with a diffusing type of lens, since the meaning of the term may be proved at the trial.[2]

D. Evidence

1. In General

§ 820. Generally.—The general rules of evidence applicable in criminal prosecutions are discussed under another title;[3] only such evidence as is factually distinctive to crimes incident to the ownership or operation of automobiles, or such as relate to automobiles, like the larceny thereof, is discussed here.[4]

§ 821. Judicial Notice.—The court will take judicial notice that an automobile is a motor vehicle within the meaning of a statute prohibiting the driving of such vehicle on a public highway by one intoxicated,[5] but it will not take judicial notice of the meaning of the phrase "diffusing lens" in a statute regulating the lights to be carried by automobiles.[6]

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[14] See Indictments and Informations [Also 14 R. C. L. p. 173].

[15] People v. Grogan, 260 N. Y. 138, 183 N. E. 273, 86 A.L.R. 1266 (information).

[16] People v. Grogan, 260 N. Y. 138, 183 N. E. 273, 86 A.L.R. 1266.

[17] Ibid.

[18] See Indictments and Informations [Also 14 R. C. L. p. 150].

[19] State v. Lantz, 90 W. Va. 738, 111 S. E. 766, 26 A.L.R. 894.

[20] See supra, §§ 812 et seq.

[1] Brooks v. United States, 267 U. S. 432, 69 L. ed. 699, 45 S. Ct. 345, 37 A.L.R. 1407.

[2] Re Hinkelman, 183 Cal. 392, 191 P. 682, 11 A.L.R. 1222.

[3] See Evidence [Also 10 R. C. L. p. 847].

[4] See infra, §§ 821 et seq.

[5] Annotation: 68 A.L.R. 1357.

[6] Re Hinkelman, 183 Cal. 392, 191 P. 682, 11 A.L.R. 1222.

§ **822. Burden of Proof.**—In prosecutions for the various crimes under discussion here, as in prosecutions for all crimes,[7] the burden of proving the guilt of the accused rests upon the state.[8]

2. ADMISSIBILITY

a. IN GENERAL

§ **823. Generally.**—The admissibility of evidence in prosecutions incident to the ownership and operation of automobiles is governed by the rules relating to the admissibility of evidence generally.[9] Here, however, the admissibility of evidence which is more or less distinctive to the crimes under discussion, is briefly considered. As in criminal cases generally,[10] admissions of one involved in an automobile accident which caused the death of other persons, where made freely and voluntarily in response to questions put to him in the district attorney's office at a time when he was not under arrest, are admissible against him in a criminal prosecution based on the accident, even though the accused was not informed by the district attorney or the police of his constitutional rights.[11]

§ **824. To Prove Intoxication.**—In general phrase, the fact of intoxication is proved or disproved in the same manner as any other disputed fact, and the rules of evidence are much the same as in other judicial inquiries.[12] Hence, evidence of all facts and circumstances directly tending to establish or negative the intoxication of the accused is admissible.[13] Evidence as to the appearance, conduct, and remarks of the accused may be admitted as bearing upon the question.[14] The possession of whisky and the fact that the accused had been drinking are admissible.[15]

b. IN PROSECUTIONS FOR PARTICULAR CRIMES

§ **825. Homicide.**—The principles governing the admissibility of evidence in criminal cases generally apply to prosecutions arising out of a homicide committed by the negligent operation of an automobile, or its operation for an unlawful purpose or in violation of law.[16] In such prosecutions evidence of intoxication,[17] of violation of statute or ordinance relating to speed,[18] of defendant's flight from the scene of the accident with knowledge that a person had been injured or killed,[19] and of his being engaged in an unlawful enterprise at the time of the homicide,[20] is admissible. It is also competent to show that the defendant concealed his identity and residence after the accident, as showing consciousness of guilt.[1] The admissibility of other facts has also been considered by the court in such prosecutions.[2]

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[7] See EVIDENCE [Also CRIMINAL LAW, 8 R. C. L. p. 169, §§ 163 et seq.].

[8] **One accused of manslaughter** is not required to prove that the homicide occurred by misadventure, but the burden is on the state to show it was either due to a reckless disregard of the safety of others, or, if it resulted involuntarily while the accused was performing an unlawful act, that the act was malum in se, or, if malum prohibitum, that it was at least the proximate cause of the homicide. State v. Budge, 126 Me. 223, 137 A. 244, 53 A.L.R. 241.

[9] See EVIDENCE [Also CRIMINAL LAW, 8 R. C. L. p. 169, §§ 163 et seq., and EVIDENCE, 10 R. C. L. p. 847].

[10] See EVIDENCE [Also ADMISSIONS AND DECLARATIONS, 1 R. C. L. p. 472, § 7].

[11] State v. Whatley, 210 Wis. 157, 245 N. W. 93, 99 A.L.R. 749.

[12] Annotation: 42 A.L.R. 1506, s. 49 A.L.R. 1395 and 68 A.L.R. 1362.

For a general discussion of the admissibility of evidence, see EVIDENCE [Also 10 R. C. L. p. 847].

[13] Annotation: 42 A.L.R. 1506, s. 49 A.L.R. 1395 and 68 A.L.R. 1362.

[14] Annotation: 42 A.L.R. 1506, s. 49 A.L.R. 1395 and 68 A.L.R. 1362.

[15] Annotation: 42 A.L.R. 1506, s. 49 A.L.R. 1395 and 68 A.L.R. 1362.

[16] See EVIDENCE [Also CRIMINAL LAW, 8 R. C. L. p. 169, §§ 163 et seq.].

[17] Annotation: 99 A.L.R. 785.

[18] Annotation: 99 A.L.R. 787.

[19] Annotation: 99 A.L.R. 788.

[20] **Upon the question of the gross negligence of the driver** of an automobile which killed a pedestrian on the highway, so as to render him guilty of manslaughter, evi-

In a prosecution for homicide alleged to have been caused by negligence in operating an automobile, persons who are not experts, but who are familiar with automobiles, and who saw the automobile at the time in question, should be permitted to give their opinions as to the speed at which it was being operated.[3]

§ 826. Failure to Stop Where Injury Has Been Caused.—Upon the trial of an indictment for failure to give name, address, etc., to the injured person, evidence may properly be given showing how much such person was injured in an automobile collision as bearing upon the seriousness of the accident and tending to show that it should not have escaped the notice of the defendant; but subsequent suffering of the injured person, or the length of time he remained in the hospital and the details of the medical or surgical treatment which he received, can have no legitimate bearing upon any of the issues arising on the trial of the indictment and are inadmissible.[4] Under such an indictment, testimony of a witness that he had seen an automobile near the time and place of the accident, running at a high rate of speed, without being able to identify it, or to state any fact warranting an inference that it was the defendant's, is inadmissible.[5]

§ 827. Larceny.—Where larceny is divided into grades according to the value of property stolen,[6] it is necessary to determine the value of the parts of an automobile which have been stolen, and evidence relating thereto is admissible. Where the value of the automobile license plates is involved, the view has been taken that the cost of obtaining the registration of the automobile for a year, with the necessary license plates, determines the grade of larceny committed by stealing such plates, and not the replacement cost of plates for the car from which they were taken, and that evidence of the mere cost of replacement is not admissible.[7]

§ 828. Reckless Driving.—In prosecutions for violating a statute making

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dence is admissible that he was conveying liquor in violation of statute, causing haste which resulted in negligent management of the car. People v. Harris, 214 Mich. 145, 182 N. W. 673, 16 A.L.R. 910.

[1] People v. Benson, 321 Ill. 605, 152 N. E. 514, 46 A.L.R. 1056.

[2] Annotation: 99 A.L.R. 785 et seq.

The state cannot, in a prosecution for manslaughter in negligently driving an automobile, introduce, for the purpose of showing that accused was intoxicated, testimony of a witness before the coroner that he supposed he had been drinking because people said he had been. State v. McComb, 33 Wyo. 346, 239 P. 526, 41 A.L.R. 717.

Upon the trial of a chauffeur for homicide in running a car at a reckless rate of speed on a city street, and striking and killing a pedestrian, evidence is not admissible as to the reputation of accused as a skilful chauffeur and careful driver. State v. Goetz, 83 Conn. 437, 76 A. 1000, 30 L.R.A.(N.S.) 458.

In a prosecution for manslaughter, resulting from the death of one in an automobile collision, evidence of a friend of deceased, who stood at his left side in the rear seat of the machine in which he was riding at the time of the collision, that within a minute or so after the collision deceased said of the driver of the car, "I told the . . . fool to look out," was not material and therefore inadmissible as res gestæ. Schultz v. State, 89 Neb. 34, 130 N. W. 972, 33 L.R.A.(N.S.) 403, Ann. Cas. 1912C, 495.

In State v. Miller (1926) 119 Or. 409, 243 Pac. 72 (affirmed in (1927) 273 U. S. 657, 71 L. ed. 825, 47 S. Ct. 344), the court held that the question whether an automobile driver gave any signal of his approach before his car struck a pedestrian was relevant to the question whether he was driving his automobile in a careful and prudent manner.

[3] Annotation: 30 L.R.A.(N.S.) 460.

[4] People v. Curtis, 217 N. Y. 304, 112 N. E. 54, Ann. Cas. 1917E, 586.

[5] Ibid.

[6] See LARCENY [Also 17 R. C. L. p. 6].

[7] Cowan v. State, 171 Ark. 1018, 287 S. W. 201, 48 A.L.R. 1165.

Annotation: 48 A.L.R. 1167.

it an offense to drive a motor vehicle at a speed or in a manner dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the highway, and to the amount of traffic which actually was at the time, or which might reasonably have been expected to be, on the highway, evidence is admissible to show the amount of traffic usually on the highway, without regard to the amount at the time of the offense.[8]

3. SUFFICIENCY

§ 829. **Generally.**—In prosecutions for criminal offenses relating to automobiles, or incident to the operation and ownership thereof, as in criminal prosecutions generally,[9] the state must prove the elements of the offense beyond a reasonable doubt.[10] Thus, in prosecutions for leaving the scene of a known injury without stopping and giving information, it is essential to a conviction that the jury be satisfied beyond a reasonable doubt not only that an injury had been caused, but that the defendant knew that such injury had been caused and, notwithstanding such knowledge, left the scene of the accident without complying with the law.[11] Evidence has been held sufficient to show reckless driving where it appeared that the defendant drove his automobile into the back of a car parked close to the curb, or drove from side to side of the highway while running at a moderate speed, or repeatedly passed other cars, turning close in front of them,[12] or attempted to pass a car ahead at the time when it was passing a parked car,[13] or while under the influence of liquor, attempted to pass a vehicle ahead of him and crashed into an automobile approaching from the opposite direction on the proper side of the road, or drove rapidly at night without lights.[14] A person may be found guilty of driving an automobile at a speed greater than was reasonable and prudent, who, on a much traveled highway, drove at a high speed around a curve and into a hollow, the condition of which could not be seen until the edge of it was reached.[15] But mere proof of a collision with another car at a street intersection is not sufficient to sustain a court action for failure to exercise reasonable care in operating an automobile upon a public highway.[16]

One who has pleaded guilty to a charge of driving an automobile when intoxicated cannot object to conviction in a subsequent prosecution for involuntary manslaughter by causing death while so doing, on the ground of lack of evidence that he was driving the car.[17]

The sufficiency of proof to establish a criminal assault or homicide by the negligent or unlawful operation of an automobile depends largely upon the nature of the particular act or acts charged in the indictment.[18] The fact that an automobile was operated in violation of a statute or ordinance regulating speed or prescribing precautions to be observed is not conclusive of guilt, but is a circumstance bearing on the question whether the operation of the automobile was in fact criminally negligent.[19]

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[8] Elwes v. Hopkins [1906] 2 K. B. 1, 2 B. R. C. 198.
Annotation: 2 B. R. C. 201.

[9] See EVIDENCE [Also CRIMINAL LAW, 8 R. C. L. p. 218, §§ 215 et seq.].

[10] People v. Curtis, 217 N. Y. 304, 112 N. E. 54, Ann. Cas. 1917E, 586; Maxon v. State, 177 Wis. 379, 187 N. W. 753, 21 A.L.R. 1484.
Annotation: 49 A.L.R. 1397, s. 68 A.L.R. 1365.

[11] People v. Curtis, 217 N. Y. 304, 112 N. E. 54, Ann. Cas. 1917E, 586.

[12] Annotation: 86 A.L.R. 1277.

[13] Maxon v. State, 177 Wis. 379, 187 N. W. 753, 21 A.L.R. 1484.

[14] Annotation: 86 A.L.R. 1277.

[15] Gallaher v. State, 193 Ind. 629, 141 N. E. 347, 29 A.L.R. 1059.

[16] People v. Grogan, 260 N. Y. 138, 183 N. E. 273, 86 A.L.R. 1266.

[17] People v. Townsend, 214 Mich. 267, 183 N. W. 177, 16 A.L.R. 902.

[18] For annotation discussing in detail the facts which are sufficient or insufficient to sustain a charge of murder or manslaughter, see 99 A.L.R. 789.

Where the defendant is charged with two separate unlawful acts in the operation of an automobile, proof of either one, proximately causing the injury in question, will sustain a conviction.[20]

That an automobile turned over on its left side upon the highway when running 25 or 30 miles an hour is not sufficient to show that the cause of the accident was not its being struck on its left front by a car passing from the rear.[1]

The "operation" of a motor vehicle may be established by circumstantial evidence.[2]

Venue must, of course, be sufficiently proven, and if there is no evidence of the crime charged having been committed in the county alleged in the criminal charge, a conviction is not justified.[3]

§ 830. To Show Intoxication While Driving.—In order to support a conviction for driving while under the influence of intoxicating liquor, the accused must be proved to have been under the influence of intoxicating liquor. It is not sufficient to show that he appeared to be under such influence.[4] Nor can intoxication be inferred from the mere fact that the accused did not drive in a straight line.[5] As in other criminal prosecutions the evidence must be sufficient to show the guilt of the accused beyond a reasonable doubt.[6] If the evidence taken as a whole creates only a reasonably strong suspicion that the defendant was intoxicated, it is insufficient.[7]

E. TRIAL

§ 831. Province of Court and Jury.—In prosecutions for crimes incident to the ownership or operation of automobiles, as in criminal prosecutions generally,[8] it is the province of the jury to determine the facts and that of the court to state the law. Accordingly, the questions whether an unlawful act in which one operating an automobile was engaged contributed to, or was the proximate cause of, the death of a pedestrian,[9] and whether the driver of an automobile was in fact intoxicated at the time when he inflicted fatal injuries upon a pedestrian,[10] are for the jury to determine in prosecutions for homicide.

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[19] People v. Harris, 214 Mich. 145, 182 N. W. 673, 16 A.L.R. 910.

[20] Annotation: 16 A.L.R. 915.

It has been held that the evidence warranted a conviction for manslaughter where it appeared that the defendant, while intoxicated, drove his car in a zigzag course on the highway, and, in running on the wrong side of the road, struck a motorcycle, killing the driver, driving while intoxicated and reckless failure to keep on the right side of the road being expressly forbidden by statute. Annotation: A.L.R. 725, s. 41.

In Copeland v. State, 154 Tenn. 7, 285 S. W. 565, 49 A.L.R. 605, it is held that to render one guilty of manslaughter in killing one by driving an automobile against him, it must be shown that a homicide was not improbable under the facts as they existed, which should reasonably have influenced the conduct of accused.

Proof of the jarring of the occupant of a vehicle by the wrongful propelling of a motor vehicle against it will sustain a conviction for assault and battery, although such occupant was not thrown from the car, nor struck in any part of his body. State v. Sudderth, 184 N. C. 753, 114 S. E. 828, 27 A.L.R. 1180.

[1] People v. Benson, 321 Ill. 605, 152 N. E. 514, 46 A.L.R. 1056.

[2] Annotation: 42 A.L.R. 1502, s. 49 A.L.R. 1393 and 68 A.L.R. 1358.

[3] **Where defendant,** a resident of Hamilton county, while driving his automobile in Hardin county, was arrested for operating the same without having number plates for the current year displayed, and it did not appear that he had ever operated the machine in Hardin county prior to that date, the fact that he may have operated it in Hamilton county while he was in default will not justify his conviction in Hardin county, under an information charging the commission of the offense in that county. State v. Gish, 168 Iowa, 70, 150 N. W. 37, Ann. Cas. 1917B, 135.

[4] Doyle v. Harvey [1923] Vict. L. Rep 271, 12 B. R. C. 137.

Annotation: 12 B. R. C. 144.

[5] Annotation: 42 A.L.R. 1507, s. 49 A.L.R. 1397 and 68 A.L.R. 1365.

[6] Annotation: 49 A.L.R. 1397, s. 68 A.L.R. 1365.

[7] Annotation: 49 A.L.R. 1397, s. 68 A.L.R. 1365.

[8] See TRIAL [Also JURY, 16 R. C. L. p. 183, §§ 4 et seq.].

Uncertainty as to whether the accused or his companion was driving the car at the time the crime was charged to have been committed raises a question for the jury to determine.[11]

§ 832. Instructions—Generally.—In prosecutions for the crimes which are incident to or arise from the ownership or operation of automobiles, the correctness of various instructions has been passed upon by the courts. These relate to aggravated assaults,[12] reckless driving,[13] and involuntary manslaughter.[14]

§ 833. —As to Homicide.—Various instructions in prosecutions for homicide resulting from the negligent or unlawful operation or use of automobiles have been approved,[15] disapproved,[16] or regarded as not prejudicial[17] by the courts.

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[9] State v. Budge, 126 Me. 223, 137 A. 244, 53 A.L.R. 241.

[10] Ibid.

[11] **Whether one charged with driving an automobile while intoxicated,** or his companion, was the driver of the car on the occasion in question, is for the jury to determine where, though there is evidence tending to show that the companion was driving the car, a witness testified that he saw the car drive up and stop and the defendant get out of the driver's seat, and there is testimony that the officer who arrested the defendant said to him that he should have known better than to drive while intoxicated, to which he made reply. State v. Coomer, 105 Vt. 175, 163 A. 585, 94 A.L.R. 1038.

[12] **On a trial for aggravated assault** in injuring one by reckless operation of an automobile on a public highway, the court may call to the jury's attention the regulatory provisions of the statute governing the operation of automobiles on public highways. Brimhall v. State, 31 Ariz. 522, 255 P. 165, 53 A.L.R. 231.

[13] **In a prosecution for operating an automobile recklessly,** an instruction that the driver of an automobile must exercise a care "proportionate to that instrumentality or engine which he has in charge" was not erroneous, though, technically speaking, every traveler on a highway must exercise the care of an ordinarily prudent and cautious person under all circumstances, and the degree of care required varies with the time, place, surroundings, and means of transportation. Com. v. Horsfall, 213 Mass. 232, 100 N. E. 362, Ann. Cas. 1914A, 682.

[14] See infra, § 833.

[15] **On the trial of a person charged with homicide,** it is permissible for the court to define an unlawful rate of speed in the language of the statute regulating the use of motor vehicles upon the public streets and highways of the state. Schultz v. State, 89 Neb. 34, 130 N. W. 972, 33 L.R.A.(N.S.) 403, Ann. Cas. 1912C, 495.

It is proper for the court to read to the jury the terms of the statute. Annotation: 30 L.R.A.(N.S.) 459.

Where the accused is charged with manslaughter by the negligent operation of an automobile, the court should charge that the standard of conduct required of the defendant in the operation of his car is that of an ordinarily careful and prudent person, and that if he did not operate the car "at a speed greater than is reasonable or proper," as would appear to such ordinarily careful and prudent person in the then situation, he was not guilty of manslaughter. State v. Schaeffer, 96 Ohio St. 215, 117 N. E. 220, L.R.A.1918B, 945, Ann. Cas. 1918E, 1137.

Where all the evidence clearly and conclusively shows that the unlawful act relied upon by the state directly caused the killing, and there is no evidence to the contrary, the failure of the court to charge on assault, or assault and battery, is not error. State v. Schaeffer, 96 Ohio St. 215, 117 N. E. 220, L.R.A.1918B, 945, Ann. Cas. 1918E, 1137.

[16] **An instruction that if one tried** for manslaughter by the improper operation of an automobile was acting unlawfully at the time of the accident by exceeding the legal limit of speed, or was intoxicated, the principles governing trials for homicide by misadventure do not apply, and that, if he was performing a lawful act in a criminally negligent manner, he would be guilty, is not only erroneous, but might tend to mislead the jury as to the essential elements of the offense necessary to be proved by the state. State v. Budge, 126 Me. 223, 137 A. 244, 53 A.L.R. 241.

An erroneous instruction in a prosecution for manslaughter by the improper operation of an automobile, that only misadventure renders a homicide excusable, and that there can be no misadventure when an unlawful act is present, is not rendered harmless by correct instructions as to the definition of criminal negligence and the burden of proof, where it was admitted that the accused was exceeding the legal limit of speed at the time of the accident, so that the instruction complained of was virtually a direction to bring in a verdict of guilty. State v. Budge, 126 Me. 223, 137 A. 244, 53 A.L.R. 241.

[17] **Although the People's third instruction** in a prosecution for involuntary manslaughter committed by reckless driving of an automobile was erroneous in stating

F. WITNESSES

§ 834. Generally.—The rules relating to witnesses are fully discussed under another title.[18] Here, however, it may be observed that in prosecutions for manslaughter in the operation of motor vehicles, if the defendant denies all knowledge of having struck deceased, and testifies that he knew nothing about it at the time, his cross-examination as to whether, when notified, he went up to find out what he was accused of, is proper.[19] In such prosecutions, the state cannot impeach its own witnesses.[20]

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that a speed greater than the rates mentioned in the statute would be proof of negligence, when by statute they were only made prima facie evidence of negligence, defendant is not prejudiced where other instructions charged that proof of negligence is not sufficient to warrant conviction, and that defendant's violation of law would not, of itself, justify a conviction. People v. Falkovitch, 280 Ill. 321, 117 N. E. 398, Ann. Cas. 1918B, 1077.

In a prosecution for involuntary manslaughter committed by reckless driving of an automobile, where there is no claim and no evidence of any intent to kill, the view has been taken that an instruction that intent may be proved by direct testimony, etc., although having no place in the case, cannot mislead the jury. People v. Falkovitch, 280 Ill. 321, 117 N. E. 398, Ann. Cas. 1918B, 1077.

[18] See WITNESSES [Also 28 R. C. L. p. 411].

[19] State v. Schaeffer, 96 Ohio St. 215, 117 N. E. 220, L.R.A.1918B, 945, Ann. Cas. 1918E, 1137.

[20] **The state, in a prosecution for manslaughter** by alleged negligent driving of an automobile, cannot impeach its own witness who has denied knowledge as to whether or not accused had been drinking, by asking whether or not he did not testify before the coroner that he supposed that accused had been drinking, since the original answer of witness was not prejudicial to the state. State v. McComb, 33 Wyo. 346, 239 P. 526, 41 A.L.R. 717.

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TO

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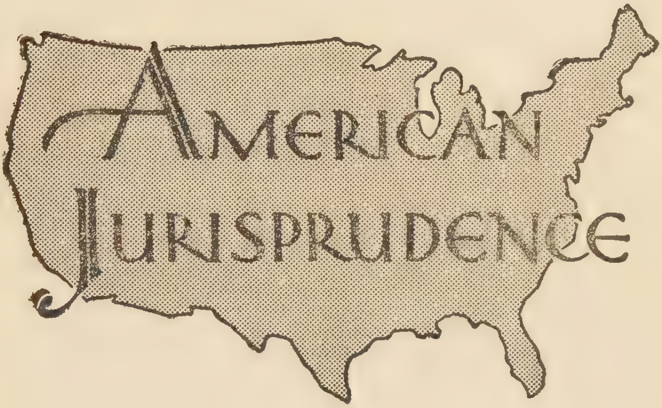

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AMERICAN JURISPRUDENCE

VOLUME 5

1963 SUPPLEMENT

EXPLANATORY NOTE

Titles and sections in this supplement follow the order of the original text. The omission of a title or of sections within titles indicates there has been no new material to add thereto.

New Footnote Material. Later cases, annotations and propositions supporting or illustrating the application of the original text are indicated thus: "p. 12, n. 9."

New Text. New text is indicated by the larger type. The more important developments in the law since publication of the original text are incorporated under new section headings, in text and footnote style. A list of the new sections added to each title appears at the beginning of that title.

New text material added to original sections is indicated by the following statement: "Page 12. *Add, following Note* 10." This means that the new text statement is to be read into the original text on the page indicated, following the note number indicated. Other new text material in an original section is indicated by the statement, *"Add new paragraph at end of section,"* and by other similar statements.

Index. The new material in the supplement is indexed in the cumulative supplements to Vols. 1–4 of the **General Index.**

ATTACHMENT AND GARNISHMENT
(Continued)

New sections added in this Supplement:

§ 768.1. *Taking Case from Jury.*

§ 788.1. *Waiver of Right.*

§ 846.1. *Effect of Release or Modification of Lien to Which Property Was Subject When Attachment Was Levied.*

§ 656. Constitutionality of Garnishment Statutes.

Page 13. *Add, following note* 18: A statute authorizing foreign attachment against foreign corporations, construed as authorizing such attachment in an action by a nonresident plaintiff upon a foreign cause of action, does not, as applied to a foreign corporation not doing or qualified to do business in the state but owning property in the state (stock in domestic corporations), deprive it of property without due process of law.[18.1]

No unconstitutional deprivation of property without due process of law involved in the action of the Supreme Court of Wisconsin in denying to a German corporation the right to priority of lien of foreign attachment, by garnishing in the hands of a local bank a fund belonging to a German citizen (principal defendant) who had been declared bankrupt by a German court, as against the claims of local intervening creditors, where the effect of sustaining the attachment would have been to remove the fund to a foreign country there to be administered in favor of foreign creditors, contrary to the public policy of Wisconsin forbidding discrimination against its own citizens.[18.2]

It has been held that attachment pursuant to local law, at the instance of a foreign creditor, of bonds of a foreign corporation, for a debt of their nonresident individual owner, does not deny such owner either the equal protection of the laws or the due process of law guaranteed by the Federal Constitution, where such bonds had been deposited with a custodian in the state, under the direction of the state court, in the exercise of admittedly lawful powers, and could not be removed therefrom without ob taining the authority of the state court—such authority not being affected by the fact that the bonds were registered in the name of the attachment debtor's minor children, they being so registered solely because of the previous action of the state court.[18.3]

[18.1] Standard Oil Co. v. Superior Court, 44 Del 538, 62 A2d 454, 14 ALR2d 405, app dismd without op 336 US 930, 93 L ed 1090, 69 S Ct 738, 739, reh den 336 US 955, 93 L ed 1109, 69 S Ct 879.
Anno: 14 ALR2d 432.

[18.2] Disconto Geselischaft v. Umbreit, 208 US 570, 52 L ed 625, 28 S Ct 337.
Anno: 14 ALR2d 444.

[18.3] De Bearn v. Safe Deposit & Trust Co. 233 US 24, 58 L ed 833, 34 S Ct 584.
Anno: 14 ALR2d 446.

§ 658. Garnished Property as Impounded.

Am Jur cited in Marvins Credit, Inc. v Westinghouse Electric Supply Co. (Mun Ct App Dist Col) 130 A2d 777.

§ 659. Generally.

Am Jur quoted in Midland Loan Finance Co. v. Kisor, 206 Minn 134, 287 NW 869

p. 14, n. 7. Cole v Randall Park Holding Co. 201 Md 616, 95 A2d 273, 41 ALR2d 1084.

§ 662. Generally.

Am Jur cited in United States v Atlantic Coast Line R. Co. (CA4th NC) 237 F2d 137.

Johnson v Dutch Mill Dairy, Inc. 237 Minn 117, 54 NW2d 1.

R. C. L. quoted in Valley Bank & T. Co. v. Parthum, 47 Ariz. 496, 56 P. (2d) 1342, rehearing denied in 48 Ariz. 87, 59 P. (2d) 335.

§ 665. Right to Discharge Prior Liens.

Am Jur cited in Hamilton Nat. Bank v. Long, 189 Tenn 562, 226 SW2d 293.

§ 669. Where No Property or Credits of Defendant Held at Time of Garnishment.

Am Jur cited in Everson v. Atlas Tie Co. 73 Idaho 91, 245 P2d 773.

§ 673. Liability for Interest.

Page 21. *Add, following note* 9: A successful plaintiff suing to enforce an attachment of a bank account has been held entitled to interest only from the date of his judgment, and not from that of the attachment.[9.1]

[9.1] Walters v. Bank of America Nat. Trust & Sav. Asso. 9 Cal. (2d) 46, 69 P. (2d) 839, 110 A.L.R. 1259.

§ 675. Liability as Limited by Ignorance of Service of Garnishment.

p. 22, n. 17.
It appears, however, that the account of a customer of a foreign branch of a bank is not subject to attachment or garnishment served on the parent bank at the home office. **Anno:** 136 ALR 491.

§ 678. Liability as Limited by Surrender of Payment under Legal Compulsion.

Am Jur cited in Sequoyah Feed & Supply Co. v First Nat. Bank 223 Ark 576, 267 SW2d 310.

§ 682. Duty to Make Defense or to Notify Defendant.

p. 24, n. 16. Cole v. Randall Park Holding Co. 201 Md 616, 95 A2d 273, 41 ALR2d 1084.

§ 685. Duty where Defendant Succeeds in Suit, and as to Surplus.

Am Jur cited in Standard Ins. Co. v Hodge (Okla) 294 P2d 567.

§ 694. Generally.

p. 31, n. 11. See also Vol. 4, § 258 (Supplement).

§ 696. Generally.

Am Jur cited in Sequoyah Feed & Supply Co. v. Robinson, 221 Ark 660, 255 SW2d 425.

§ 703. Generally.

Forms: 8 Am Jur Pl & Pr Forms 8:749.

§ 706. Pleadings, Motions, and Rules.

p. 39, n. 15.
Where a garnishee has admitted indebtedness to the defendant but alleges that the nature of the indebtedness renders it exempt from garnishment and the plaintiff has filed a traverse attacking the exemption statute as unconstitutional and alleging that defendant is not entitled to the exemption, the questions for determination upon such answer and traverse relate only to the claimed exemption from garnishment and do not include any question as to liability of the defendant to the plaintiff in attachment or as to the assignability of the claim giving rise to such indebtedness. Smith v. Georgia Granite Corp. 186 Ga. 634, 198 S. E. 772, 119 ALR 550.

§ 711. With Respect to Judgment in Main Action and in Garnishment.

Am Jur quoted in Seaporcel Metals, Inc. v Ciccone, — RI —, 166 A2d 130.

Am Jur cited in L. C. Jones Trucking Co. v. Superior Oil Co. 68 Wyo 384, 234 P2d 802.

p. 41, n. 17. Anno: 75 ALR 1359.

p. 41, n. 18 Anno: 75 ALR 1359

§ 719 Surrender or Payment of Garnished Property of Debtor to Officer or into Court.

Forms: 2 Am Jur Pl & Pr Forms 2:1056.

§ 720. Investiture of Garnished Property in Receiver or Trustee.

Forms: 2 Am Jur Pl & Pr Forms 2:1103.

§ 722. Generally.

Forms: 2 Am Jur Pl & Pr Forms 2:991–2:998.

§ 723. Form, Contents, Sufficiency, and Amendment.

Forms: 2 Am Jur Pl & Pr Forms 2:992–2:998.

Page 46. *Add, following note* 17: And it has been held that the affidavit in a garnishment proceeding did not conform with the provision authorizing its issuance in aid of judgment but was worded in accordance with the provision authorizing its issuance where the plaintiff sues for a debt, in which latter case the plaintiff is required to give a bond, does not affect the validity of the garnishment where no one raised the point that no bond had been given and everyone proceeded upon the theory that the garnishment was issued in aid of a judgment.[17.1]

[17.1] Holliday v. Salling, 54 Ariz 496, 97 P (2d) 221, 126 ALR 145.

§ 724. — Setting Forth Claim against Defendant.

Forms: 2 Am Jur Pl & Pr Forms 2:992–2:998.

§ 725. — Averment of Property of, or Debts Owing to, Defendant.

Forms: 2 Am Jur Pl & Pr Forms 2:992–2:998.

§ 726. — Setting Forth Grounds for Garnishment.

Forms: 2 Am Jur Pl & Pr Forms 2:991–2:998.

§ 727. Service on Garnishee.

Forms: 2 Am Jur Pl & Pr Forms 2:882, 2:887, 2:901, 2:999-2:1010, 2:1012–2:1014; 8 Am Jur Pl & Pr Forms 8:721, 8:725, 8:741.

Page 48. *Add, following note* 16: Where "personal service" is required in garnishment proceedings, leaving a summons of garnishment at the residence of the garnishee is not "personal service."[16.5]

[16.5] **Anno:** 172 ALR 523.

Page 48. *Add at end of section:* Questions as to what persons may serve garnishment process, are generally subject to statutory regulation. In any event, the relatively few cases indicate that the problem is largely one of determining whether the particular officer or individual who made service of the garnishment process was within the category of those authorized to do so by the applicable statutes.[19.5] The practice statutes and rules of practice in many jurisdictions variously authorize a summons to be served, and in some instances authorize service of process in general, by any person, persons over an authorized age, electors of a county, disinterested persons, etc.[19.51] Some courts have held, however, that such a statute could not be utilized for service of a process in garnishment.[19.52] In other cases, service of process in garnishment by private individuals has been upheld.[19.53]

[19.5] **Anno:** 75 ALR2d 1438.

It has been held that service of a writ of garnishment by a private individual, rather than by the sheriff as required by statute, is void, and no jurisdiction is acquired thereunder to render a judgment against the garnishee. Mendoza v Acme Transfer & Storage Co. 66 NM 32, 340 P2d 1080, 75 ALR2d 1433.

[19.51] See 42 Am Jur, Process § 25.

[19.52] **Anno:** 75 ALR2d 1443.

The provision of the Rules of Civil Procedure permitting process, "excepting writs of attachment . . .," to be served by any person not a party to the action, has been held not to permit a writ of garnishment to be served by one other than the sheriff, to whom the writ is required by statute to be addressed. Mendoza v Acme Transfer & Storage Co. 66 NM 32, 340 P2d 1080, 75 ALR2d 1433.

[19.53] **Anno:** 75 ALR2d 1444.

§ 728. Form, Contents, and Sufficiency of Writ or Summons.

Forms: 2 Am Jur Pl & Pr Forms 2:882. 2:887, 2:901, 2:999–2:1107, 2:1010; 8 Am Jur Pl & Pr Forms 8:721, 8:725, 8:741.

§ 729. Service on Officer of Garnishee Corporation.

Forms: 2 Am Jur Pl & Pr Forms 2:887, 2:1010, 2:1011; 8 Am Jur Pl & Pr Forms 8:721, 8:742.

Page 49. *Add, following note* 7: By the phrase "any other officer," in a statute providing that to attach a bank deposit a copy of the writ and notice must be left "with the manager or any other officer" of the bank at the office or branch at which the deposit account is carried, is intended any representative of the bank whose duties, functions, and responsibilities are such that service upon him will reasonably inform the bank of such service, even though he is not an officer, but only an employee with executive responsibilities.[7.1] Service of garnishee process upon a corporation in the manner prescribed by law charges it with full knowledge thereof; and where a bank conducts its business through several departments, service upon one department is notice to all.[7.2]

[7.1] Walters v. Bank of America Nat. Trust & Sav. Asso. 9 Cal. (2d) 46, 69 P. (2d) 839. 110 A.L.R. 1259.

Such a requirement is satisfied by service upon an assistant cashier who, though not an officer, is the person designated by the bank to see that proper notice of any attachment is carried through the bank. Walters v. Bank of America National Trust & Sav. Asso. 9 Cal. (2d) 46, 69 P. (2d) 839, 110 A.L.R. 1259.

[7.2] Kossover v. Willimantic Trust Co. 122 Conn. 166, 187 A. 907. 107 A.L.R. 693.

§ 730. Service on Member of Garnishee Firm.

Forms: 2 Am Jur Pl & Pr Forms 2:887. 2:1010; 8 Am Jur Pl & Pr Forms 8:721.

§ 731. Return.

Forms: 2 Am Jur Pl & Pr Forms 2:887, 2:1027, 2:1030; 8 Am Jur Pl & Pr Forms 8:721.

§ 732. Generally.

Forms: 2 Am Jur Pl & Pr Forms 2:1015. 2:1016, 2:1021.

§ 734. Waiver of Defects.

Page 50. *Add following note* 19: In ordinary garnishment proceedings it is readily observable that matters in personam may be easily waived or relinquished by the garnishee through a general appearance, answer, answer to interrogatories, or similar general pleading or participation in the proceedings. He may, therefore, easily renders himself amenable to the jurisdiction of the court and waive or relinquish defects or omissions having to do with matters of process, etc., which affect him alone, by appearing generally and making a disclosure respecting his obligations to the principal defendant.[19.5] By general pleading a garnishee may waive a right to assert that he is not amenable to the jurisdiction of the court by reason of a defect or irregularity occurring subsequent to service of process upon him, if the defect or irregularity concerns a matter affecting his personal status and does not involve avoidance of an express provision of a statute which is jurisdictional in nature or imposes in that regard a condition to the further exercise of jurisdiction over him, or the rendition of judgment against him.[19.51] If jurisdiction is otherwise established and a valid judgment against the principal defendant has been rendered, a judgment against a garnishee will be sustained even though he became amenable to the jurisdiction of the court, through general pleading, by a waiver or other relinquishment of the right to object to some act or omission which related only to jurisdiction over his person, or affected only his personal status as a party.[19.52] If all that is lacking in a garnishment proceeding is jurisdiction of the person of a garnishee who is a nonresident of the state, the garnishee may, by general pleading, waive the right to object upon that ground.[19.53]

In garnishments where the jurisdiction over the res is the principal concern the garnishee cannot, by general pleading, waive or relinquish the necessity for the existence or performance of the statutory requirements for obtaining jurisdiction, whatever may be his power over matters personal to him. The conditions of the statute precedent to the acquirement of jurisdiction of the res must be complied with, whether relating to the initial steps, issuance and service of process and returning evidence thereof, intermediate procedure, requirements relating to either the principal defendant or the garnishee, the final determination of the rights of the parties and the status of the res, and the rendition of a judgment.[19.55]

Garnishment in which the principal defendant cannot be served personally is, of course, the subject of special statutory provisions. It includes proceedings against nonresident principal defendants and those who for other reasons cannot be personally served, and in the decided cases of this character instances of matters which are considered susceptible of waiver by the garnishee through generally pleading are rare, if not nonexistent, although in theory the rule permitting a garnishee to waive something which can affect him alone may subsist.[19.57]

[19.5] Coffee v Haynes, 124 Cal 561, 57 P 482, 71 Am St Rep 99.

Cromwell v Royal Canadian Ins. Co. 49 Md 366, 33 Am Rep 258; Peters v League, 13 Md 58, 71 Am Dec 622; Cockey v Leister, 12 Md 124, 71 Am Dec 588.

People's Wayne County Bank v Stott, 246 Mich 540, 224 NW 352, 64 ALR 427.

Marx v Hart, 166 Mo 503, 66 SW 260, 89 Am St Rep 715.

Bristol v Brent, 36 Utah 108, 103 P 1076, 140 Am St Rep 804, 21 Ann Cas 1125.

Anno: 41 ALR2d 1097–1109.

[19.51] **Anno:** 41 ALR2d 1109.

[19.52] **Anno:** 41 ALR2d 1111–1114.

[19.53] **Anno:** 41 ALR2d 1114.

[19.55] United Collieries, Inc. v Martin, 248 Ky 808, 60 SW2d 125, 89 ALR 971.

Friedman v First Nat. Bank, 39 Okla 486, 135 P 1069, 49 LRA NS 548

Bristol v Brent, 36 Utah 108, 103 P 1076, 140 Am St Rep 804, 21 Ann Cas 1125.

Pennsylvania R. Co. v Rogers, 52 W Va 450, 44 SE 300, 62 LRA 178.

Anno: 41 ALR2d 1118–1136.

[19.57] National Bank v Furtick, 16 Del (2 Marv) 35, 42 A 479, 44 LRA 115, 69 Am St Rep 99.

Cole v Randall Park Holding Co. 201 Md 616, 95 A2d 273, 41 ALR2d 1084; Cromwell v Royal Canadian Ins Co. 49 Md 366, 33 Am Rep 258; Stone v Magruder (Md) 10 Gill & J 383, 32 Am Dec 177; Shivers v Wilson (Md) 5 Harr & J 130, 9 Am Dec 497.

McKinney v Mills, 80 Minn 478, 83 NW 452, 81 Am St Rep 278

Bristol v Brent, 36 Utah 108, 103 P 1076, 140 Am St Rep 804, 21 Ann Cas 1125.

Dorr v Rohr, 82 Va 359, 3 Am St Rep 106.

Anno: 41 ALR2d 1097, 1136–1155.

Under the rule that pleading by a garnishee in an attachment does not necessarily amount to a manifestation of consent to jurisdiction, a motion to quash on jurisdictional grounds may be filed either by the garnishee or by the defendant, after pleas by the garnishee. Cole v Randall Park Holding Co. 201 Md 616, 95 A2d 273, 41 ALR2d 1084.

It has been held that a foreign corporation not subject to suit as a garnishee within the state does not confer jurisdiction by filing a plea of nulla bona and answering interrogatories. Cole v Randall Park Holding Co. 201 Md 616, 95 A2d 273, 41 ALR2d 1084.

p. 51, n. 1. Anno: 41 ALR2d 1118–1155.

§ 735. — Defective Service.

p. 51, n. 2. Anno: 41 ALR2d 1100 et seq.

It has been held that by a general appearance or answer, or their equivalents, a garnishee waives or relinquishes the right to assert that by reason of a matter connected with process or service of process he did not become amenable to the jurisdiction of the court, if it can be ascertained from the record that jurisdiction otherwise is established and the matter affects only his person or personal status as a party to the proceeding. **Anno:** 41 ALR2d 1100.

p. 51, n. 4. Anno: 41 ALR2d 1123–1129, 1148–1155.

It has been held that a garnishee may not voluntarily waive or accept service of the proceedings required by law to make a seizure of effects or property in his hands. Cole v Randall Park Holding Co. 201 Md 616, 95 A2d 273, 41 ALR2d 1084.

It has been held that, because in garnishment proceedings jurisdiction to adjudicate respecting the res can be acquired only by compliance with conditions precedent thereto imposed by the statute, a general appearance, answer, or pleading by the garnishee will not operate to cure defects in the process or service, jurisdictional in nature, so as to give the court issuing the process such jurisdiction. **Anno:** 41 ALR2d 1123.

p. 51, n. 5. Anno: 41 ALR2d 1104.

§ 736. — Defects and Irregularities in Petition or Affidavit for Garnishment.

p. 51, n. 6. Anno: 41 ALR2d 1099.

p. 51, n. 7. Shivers v Wilson (Md) 5 Harr & J 130, 9 Am Dec 497.

Anno: 41 ALR2d 1119, 1141.

§ 737. — By Appearance.

p. 51, n. 8. Anno: 41 ALR2d 1099–1118.

p. 51, n. 9. The primary purpose of an attachment to bring the defendant into court has been held served where the defendant appears and pleads, and the case proceeds as an ordinary action at law, with the attachment providing a fund for the payment of the plaintiff's claim, if he prevails. Cole v Randall Park Holding Co. 201 Md 616, 95 A2d 273, 41 ALR2d 1084.

p. 51, n. 10. Anno: 41 ALR2d 1114-1118.

Page 51. *Add following note* 10: The fact that a garnishee has in response to garnishment process entered a general appearance or pleading cannot be construed to waive or relinquish his right, under the garnishment statute and procedure, to further notice of or the performance of other acts in reference to subsequent proceedings, conditional to a final adjudication of the parties' rights and liabilities and affecting the existence, status, or disposition of the res.[10.5]

[10.5] **Anno:** 41 ALR2d 1129.

§ 738. Generally.

Forms: 2 Am Jur Pl & Pr Forms 2:1052–2:1055.

§ 739. Judgment and Termination of Suit.

Forms: 2 Am Jur Pl & Pr Forms 2:1052–2:1055.

p. 52, n. 15. Annotation: 115 A.L.R. 598.

§ 740. Effect of Appeal.

Forms: 2 Am Jur Pl & Pr Forms 2:1052–2:1055.

Am Jur quoted in Nelson v. Kittelson, 71 SD 535, 27 NW2d 200

p. 53, n. 3.

According to some cases, in order to justify the garnishee in refusing to pay the money over to the defendant on demand, the plaintiff must have caused the issuance of a supersedeas and given supersedeas bond. Annotation: 115 ALR 608.

p. 53, n. 4. The fact that the time for the taking of an appeal has not yet expired, or that the garnishee has been notified by the garnishor of the latter's intention to take an appeal, short of actual appeal perfected before such demand, has been held not to be a sufficient excuse for the garnishee's failure to turn the money over to the defendant upon demand. Annotation: 115 ALR 608.

After a judgment adverse to the plaintiff in garnishment, the garnishee may not withhold the money from the principal defendant, but must on demand turn it over to the defendant, except where at the time of demand the plaintiff has actually taken and perfected an appeal from such judgment, and except where the garnishment lien is continued by proper court order or stay of proceedings. Annotation: 115 A.L.R. 607, 608.

p. 53, n. 5. See also APPEAL AND ERROR, Vol. 3, p. 201, § 548.

§ 741. Abandonment, Withdrawal, and Release.

Forms: 2 Am Jur Pl & Pr Forms 2:1052–2:1055.

§ 742. Death of Defendant.

Forms: 2 Am Jur Pl & Pr Forms 2:1052–2:1055.

p. 54, n. 17. Anno: 131 ALR 1146.

§ 743. Dissolution of Defendant Corporation.

Forms: 2 Am Jur Pl & Pr Forms 2:1052–2:1055.

§ 744. Insolvency and Bankruptcy.

Forms: 2 Am Jur Pl & Pr Forms 2:1052–2:1055.

§ 745. Dissolution or Vacation on Motion.

Forms: 2 Am Jur Pl & Pr Forms 2:1052–2:1055.

§ 746. — Who May Make Motion.

Forms: 2 Am Jur Pl & Pr Forms 2:1052–2:1055.

§ 747. Grounds of Motion.

Forms: 2 Am Jur Pl & Pr Forms 2:1052–2:1055.

§ 748. — Lack of Jurisdiction.

Forms: 2 Am Jur Pl & Pr Forms 2:1052–2:1055.

§ 749. — Defects and Irregularities in Proceedings.

Forms: 2 Am Jur Pl & Pr Forms 2:1052–2:1055.

p. 56, n. 1. Anno: 41 ALR2d 1143.

§ 750. — Nonliability of Property to Garnishment.

Forms: 2 Am Jur Pl & Pr Forms 2:1042–2:1052–2:1055.

§ 751. — Nonliability of Garnishee to Process.

Forms: 2 Am Jur Pl & Pr Forms 2:1052–2:1055.

§ 752. Generally.

Forms: 2 Am Jur Pl & Pr Forms 2:1013, 2:1019, 2:1020 2:1032 2:1034 2:1037 2:1050, 2:1051: 18 Am Jur Pl & Pr Forms 18:171, 18:173, 18:174.

§ 754. Generally.

Forms: 2 Am Jur Pl & Pr Forms 2:1035–2:1037, 2:1039, 2:1049.

§ 755. Verification.

Forms: 2 Am Jur Pl & Pr Forms 2:1035–2:1037, 2:1039, 2:1049.

§ 756. Duty of Garnishee to Answer Interrogatories.

Forms: 2 Am Jur Pl & Pr Forms 2:1035–2:1037, 2:1039, 2:1049.

Page 59. *Add, following note* 18: It appears to be a general rule that a garnishee is not confined in his answer to a process of garnishment, to statements of matters as to which he has personal knowledge, but that he may properly incorporate in such answer allegations which are based upon information and belief.[18.1]

[18.1] Musolino LoConte Co. v. Costa, 304 Mass 253, 23 NE(2d) 155, 125 ALR 250.
Anno: 125 ALR 253.

§ 757. Disclosure of Assets of Defendant.

Forms: 2 Am Jur Pl & Pr Forms 2:1035–2:1037, 2:1039, 2:1049.

§ 758 Disclosure of Defenses to Garnishment.

Forms: 2 Am Jur Pl & Pr Forms 2:1035–2:1037, 2:1039, 2:1049.

§ 759. Compelling Garnishee to Answer.

Forms: 2 Am Jur Pl & Pr Forms 2:1036, 2:1037.

§ 760. Waiver of Right to Have Disclosure.

Forms: 2 Am Jur Pl & Pr Forms 2:1036, 2:1037.

§ 761. Generally.

Forms: 2 Am Jur Pl & Pr Forms 2:1036, 2:1037.

p. 60, n. 12.
An answer upon information and belief by one summoned as trustee of the goods, effects, and credits of the principal defendant does not prevent contradiction by allegation and proof by plaintiff under a statute providing that the answer and statements of a trustee on oath shall be considered as true in determining how far he is chargeable. Musolino LoConte Co. v. Costa, 304 Mass 253, 23 NE(2d) 155, 125 ALR 250.

Page 60. *Add, following note* 14: As a general proposition, allegations in a garnishee's answer based upon information and belief have been accorded such weight as to entitle the garnishee, in the absence of contradiction, to a discharge, where the statements tended to show that there was nothing due from the garnishee to the debtor.[14.1]

[14.1] **Anno:** 125 ALR 255.
An answer by one summoned as trustee of the goods and effects of the principal defendant may be made upon information and belief, and in the absence of qualification upon examination by interrogatories, or of contradiction by allegation and proof of the true facts, such answer will be conclusive. Musolino LoConte Co. v. Costa, 304 Mass 253, 23 NE(2d) 155, 125 ALR 250.

§ 762. Generally.

Forms: 2 Am Jur Pl & Pr Forms 2:1043–2:1047.

§ 763. Effect of Failure to Take Issue to Disclosure.

Forms: 2 Am Jur Pl & Pr Forms 2:1045–2:1047.

Am Jur cited in Phelps v. Schmuck, 151 Kan 521, 100 P2d 67.

p. 61, n. 3. Coward v Barnes, — Ark —, 334 SW2d 894, 82 ALR2d 854.

§ 764. Exceptions by Defendant.

Forms: 2 Am Jur Pl & Pr Forms 2:1045–2:1047.

§ 768. —Under Statutory Provision.

p. 63, n. 20.
Waiver of benefit of statutory provisions, see Brenizer v. Supreme Council, R. A. 141 NC 409, 53 SE 835, 6 LRA NS 235.

§ 768.1. (New text.) Taking Case from Jury.

The trial court in a proper case may direct a verdict,[21] and substantially the same rules apply to directed verdicts in favor of the plaintiff as apply to such verdicts in favor of the defendant.[22] A verdict may be directed when, disregarding conflicting evidence and indulging every legitimate inference which may be drawn from the evidence in favor of the party against whom the verdict is directed, it can be said that there is no evidence sufficiently substantial to support a verdict in favor of such party if such a verdict should be rendered.[23] Where the scintilla rule does not prevail, as is true in most jurisdictions,[24] the propriety of directing a verdict is not affected by the presence of a scintilla of evidence in support of the case of the opposing party.[25]

[21] Walters v. Bank of America Nat. Trust & Sav. Asso. 9 Cal. (2d) 46, 69 P. (2d) 839, 110 A.L.R. 1259.

A motion for directed verdict may be granted upon motion of the plaintiff where, upon the whole evidence, the cause of action alleged in the complaint is supported and no substantial support is given to the defense alleged by the defendant. Walters v. Bank of America Nat. Trust & Sav. Asso. 9 Cal. (2d) 46, 69 P. (2d) 839, 110 ALR 1259.

[22] Walters v. Bank of America Nat. Trust & Sav. Asso. 9 Cal. (2d) 46, 69 P. (2d) 839, 110 A.L.R. 1259.

[23] Walters v. Bank of America Nat. Trust & Sav. Asso. 9 Cal. (2d) 46, 69 P. (2d) 839, 110 A.L.R. 1259.

[24] See TRIAL.

[25] Walters v. Bank of America Nat. Trust & Sav. Asso. 9 Cal2d 46, 69 P2d 839, 110 ALR 1259.

§ 771. Estoppel against Garnishee to Make Defenses.

Am Jur quoted in Bear Creek Co. v. James, 115 CalApp2d 725, 252 P2d 723.

§ 774. General Denial of Indebtedness to, or Possession of Effects of, Defendant.

Forms: 2 Am Jur Pl & Pr Forms 2:1033, 2:1041.

§ 778. Exemption of Defendant.

Forms: 2 Am Jur Pl & Pr Forms 2:1038.

p. 67, n. 17. Congress Candy Co. v. Farmer, 73 ND 174, 12 NW2d 796, 150 ALR 1316.

§ 779. Adverse Claim to Garnished Property Generally.

Page 68. *Add, following note* 3: The view has been taken that the fact that funds in an attached bank deposit are the property of a third person is not available as a defense to the bank.[3.1]

[3.1] Walters v. Bank of America (Cal) 59 P (2d) 983, 106 ALR 55, modified on rehearing in 9 Cal(2d) 46, 69 P(2d) 839, 110 ALR 1259.

§ 780. Assignment by Defendant.

Forms: 2 Am Jur Pl & Pr Forms 2:1040.

Am Jur quoted in Hamilton v. Temple, 60 Ohio App 94, 19 NE(2d) 650 (notes 5, 10).

§ 786. Generally.

RCL cited in Brown v. Maguire's Real Estate Agency, 343 Mo 336, 121 SW(2d) 754.

p. 72, n. 15. Henderson v. Northwest Air Lines, 231 Minn 503, 43 NW2d 786 (holding that a garnishee's right to a setoff includes all causes of action arising out of contract existing at the time the action was commenced even if arising under contracts other than that upon which the plaintiff bases his claim for garnishment).

Plante v. M. Shortell & Son, 92 NH 38, 24 A2d 498, 139 ALR 1325

Anno: 57 ALR2d 702 et seq.

Page 73. *Add, following note* 16: A bank may set off against the amount of a deposit that has been attached or garnished the amount of any matured indebtedness due it by the depositor.[16.1] The bank's intention to apply a credit of the depositor to an indebtedness owing by him to the bank is sufficiently manifested when it pleads such application in diminution of its liability as garnishee.[16.2] The right of setoff may be exercised prior to or after the service of the writ of garnishment. It is not necessary that book entries be made prior to the service.[16.3]

[16.1] Walters v. Bank of America (Cal) 59 P(2d) 983, 106 ALR 55, modified on rehearing in 9 Cal(2d) 46, 69 P(2d) 839, 110 ALR 1259.

Annotation: 106 ALR 62, s. 110 ALR 1268.

[16.2] Walters v. Bank of America (Cal) 59 P(2d) 983, 106 ALR 55, modified on rehearing in 9 Cal(2d) 46, 69 P(2d) 839, 110 ALR 1259.

[16.3] Annotation: 106 ALR 64, s. 110 ALR 1268

p. 73, n. 17. Anno: 57 ALR2d 708.

An abuse of discretion has been held not committed by the trial court in a garnishment action in refusing the guarnishee an equitable setoff with respect to an unmatured obligation of the principal defendant to the garnishee, where it does not appear that the principal defendant is insolvent or that the garnishee will have difficulty in collecting the obligation upon maturity. Mattek v Hoffman, 272 Wis 503, 76 NW2d 300, 57 ALR2d 696.

§ 787. Availability of Setoff or Counterclaim with Respect to Time of Maturity or Time of Acquisition of Claim.

Am Jur cited in Johnson v. Dutch Mill Dairy, Inc. 237 Minn 117, 54 NW2d 1.

p. 73, n. 1. Anno: 57 ALR2d 711.

p. 73, n. 2. Anno: 57 ALR2d 708.

That the garnishment statute expressly extends to all debts "due or to become due" to the principal defendant has been held not to authorize the garnishee to set off claims against the principal defendant which have not yet matured. Mattek v Hoffman, 272 Wis 503, 76 NW2d 300, 57 ALR2d 696.

A garnishee has been held not entitled to a setoff with respect to an obligation which, though absolutely due from the principal defendant to the garnishee, is payable in the future at a time subsequent to the service of the garnishee process. Mattek v Hoffman, 272 Wis 503, 76 NW2d 300, 57 ALR2d 696

Page 73. *Add, following note* 2: There is a difference of opinion as to the right of a bank to set off an immature indebtedness of a depositor against the latter's account which has been attached or garnished by a creditor. One line of authorities holds that it may not be so set off.[2.1] Other cases hold to the contrary.[2.2]

[2.1] Annotation: 106 A.L.R. 65, s. 110 A.L.R. 1268.

[2.2] Annotation: 106 A.L.R. 65, s. 110 A.L.R. 1268.

p. 74, n. 3. Annotation: 106 A.L.R. 68, s. 110 A.L.R. 1268.

Page 74. *Add, following note* 3: Other cases take a contrary view.[3.1] In some states the right to setoff after insolvency is denied at law but permitted in equity.[3.2]

Where the claim of the garnishee against the debtor consisted of notes not matured at the date the garnishment process was served, the trend has been to deny the garnishee a setoff, at least in the absence of special circumstances.[3.5] The same has been true where the garnishee sought to offset his potential liability as surety for the debtor, where there has been no default by the debtor as of the date of garnishment.[3.51] Nor has the garnishee been able to use by way of setoff a claim against the debtor which at the time of the garnishment was only in the process of being acquired by the garnishee, whose ownership thereof was then incomplete or prospective.[3.52] Such results are clearly consonant with the general rule of disallowing any setoff not consisting of an enforceable demand at the time the garnishment took place.[3.53]

The garnishee has generally been allowed a setoff where prior to the service on him of the garnishment the debtor had defaulted on notes for which the garnishee had gone surety,[3.54] on other obligations which the garnishee was compelled to discharge,[3.55] on contractual and similar obligations due the garnishee,[3.56] as well as for damages incurred by the garnishee as a result of the debtor's breach of contract with him.[3.57] The fact that a garnishee's claim had been reduced to judgment after garnishment had been served has ordinarily been found immaterial on the validity of the claim as a setoff.[3.58] One of the most elementary objections to permitting a party, whether a garnishee or not, to have a setoff is the fact that it consists of a claim which is contingent or unliquidated. Hence, uncertainty whether in fact the debtor would ever be liable to the garnishee in the manner or amount alleged, and the anticipatory character of the claim of the garnishee have caused courts to reject setoffs urged by garnishees.[3.59]

3.1 Annotation: 106 A.L.R. 69, s. 110 A.L.R. 1268.

3.2 Annotation: 106 A.L.R. 70, s. 110 A.L.R. 1268.

3.5 Anno: 57 ALR2d 703–706.

However, both the debtor's insolvency or nonresidence and statutory provisions have been found to warrant the allowance of the garnishee's note against the debtor as an offset to his liability, even though the note was not due when the garnishment service was effected. **Anno:** 57 ALR2d 705.

3.51 Anno: 57 ALR2d 708.

3.52 Anno: 57 ALR2d 716.

3.53 Anno: 37 ALR2d 703.

3.54 Anno: 57 ALR2d 710.

3.55 Wanzer v Truly (US) 17 How 584, 15 L ed 216.

Anno: 57 ALR2d 713.

3.56 Van Camp Hardware & Iron Co. v Plimpton, 174 Mass 208, 54 NE 538, 75 Am St Rep 296.

Anno: 57 ALR2d 706.

3.57 North Chicago Rolling Mill Co. v St. Louis Ore & Steel Co. 152 US 596, 38 L ed 565, 14 S Ct 710.

Anno: 57 ALR2d 712.

3.58 Anno: 57 ALR2d 716.

3.59 Anno: 57 ALR2d 717.

§ 788. Necessity of Pleading Set-off or Counterclaim Specially.

Forms: 8 Am Jur Pl & Pr Forms 8:742.

§ 788.1. (New text.) Waiver of Right.

The bank may waive its right to apply a depositor's account to his indebtedness to the bank as against a garnishing or attaching creditor.[4.1] A bank cannot defeat an attachment of a deposit by assuming to apply it by way of setoff to a note then due where, without any further deposit having been depositor up to the full amount of the deposit and recredits the depositor's account with the amount of the deposit and debits a like amount on the note.[4.2]

4.1 Walters v. Bank of America Nat. Trust & Sav. Asso. 9 Cal. (2d) 46, 69 P. (2d) 839, 110 A.L.R. 1259.

Annotation: 106 A.L.R.70, s. 110 A.L.R. 1269.

4.2 Walters v. Bank of America Nat. Trust & Sav. Asso. 9 Cal. (2d) 46, 69 P. (2d) 839, 110 A.L.R. 1259.

Annotation: 110 A.L.R. 1269.

This is contrary to the conclusion reached on a previous hearing of the same case in Walters v. Bank of America Nat. Trust & Sav. Asso. (Cal) 59 P(2d) 983, 106 ALR 55, modified on rehearing in 9 Cal(2d) 46, 69 P(2d) 839, 110 ALR 1259.

§ 789. Generally.

Forms: 8 Am Jur Pl & Pr Forms 8:634.

§ 798. Judgment on Disclosure.

Forms: 2 Am Jur Pl & Pr Forms 2:1057.

§ 804. Generally.

p. 81, n. 2. Anno: 166 ALR 274 et seq.

Page 81. *Add, following note* 2: Although courts differ on the question whether a judgment should be satisfied in order to protect the garnishee[2.5] a number of decisions support the view that, as a general rule, a judgment against the garnishee constitutes a good defense to an action by the principal defendant against him on the original indebtedness.[2.51] The garnishee's successful denial of liability in the garnishment proceedings, resulting in a judgment in his favor, is generally held not to constitute a bar to an action against him by the principal defendant. In some states it is expressly so provided by statute.[2.52] A garnishee who suffers a judgment to go against him by default may not, upon ascertaining that in fact he owes the principal defendant nothing, recover from him the amount paid pursuant to the judgment.[2.53] In a number of cases the court has ordered the stay of an execution of a judgment obtained by the principal defendant against the garnishee in order to prevent subjecting the latter to the necessity of paying the debt twice.[2.54] It is universally recognized that unless the garnishee has failed to notify the principal defendant of the pendency of the garnishment proceedings, has not made a bona fide disclosure, or has not properly defended the rights of his creditor in such proceedings, the satisfaction of a judgment rendered against the garnishee constitutes a good defense to an action by the principal defendant against the garnishee on the original indebtedness.[2.55]

2.5 See infra, notes 5, 6.

2.51 Anno: 166 ALR 274.

See Adams v. Filer, 7 Wis 306, 73 Am Dec 410 (dictum in action by third party against garnishee).

2.52 Anno: 166 ALR 276.

2.53 Anno: 166 ALR 277.

2.54 Anno: 166 ALR 282.

2.55 Huron Holding Corp. v. Lincoln Mine Operating Co. 312 US 183, 85 L ed 725, 61 S Ct 513 reh den 313 US 598, 85 L ed 1550, 61 S Ct 840 (foreign garnishment judgment); Harris v. Balk, 198 US 215, 49 L ed 1023, 25 S Ct 625, 3 Ann Cas 1084 (foreign garnishment judgment); Wallace v. M'Connell, 13 Pet (US) 136, 10 L ed 95 (dictum in action instituted by principal defendant in Federal court prior to garnishment proceedings in state court).

Bessemer Sav. Bank v. Anderson, 134 Ala 343, 32 So 716, 92 Am St Rep 38 (dictum); East Tennessee, V. & G. R. Co. v. Kennedy, 83 Ala 462, 3 So 852, 3 Am St Rep 755 (foreign garnishment judgment); Gunn v. Howell, 35 Ala 144, 73 Am Dec 484 (foreign garnishment judgment); Hitt v. Lacey, 3 Ala 104, 36 Am Dec 440.

Lancashire Ins. Co. v. Corbetts, 165 Ill 592, 46 NE 631, 36 LRA 640, 56 Am St Rep 275 (dictum in action by second garnisher against garnishee).

Baltimore & O. S. W. R. Co. v. Adams, 159 Ind 688, 66 NE 43, 60 LRA 396 (foreign garnishment judgment).

Bowen v. Port Huron Engine & Thresher Co. 109 Iowa 255, 80 NW 345, 47 LRA 131, 77 Am St Rep 539 (based on statute; dictum).

Scott v. Coleman, 5 Litt (Ky) 349, 15 Am Dec 71 (dictum that payment of judgment without execution, good defense for garnishee)

Chicago, B. & Q. R. Co. v. Moore, 31 Neb 629, 48 NW 475, 58 Am St Rep 534 (foreign garnishment judgment).

Drew v. Towle (1855) 30 NH 531, 64 Am Dec 309; Drew v. Towle, 27 NH 412, 59 Am Dec 380.

Holmes v. Remsen, 4 Johns Ch 460, 8 Am Dec 581 (garnishment judgment of court of foreign country).

St. Louis & S. F. R. Co. v. Crews, 51 Okla 144, 151 P 879, Ann Cas 1918C 823 (dictum; foreign garnishment judgment).

See Virginia F. & M. Ins. Co. v. New York Carousel Mfg. Co. 95 Va 515, 28 SE 888, 40 LRA 237.

Anno: 166 ALR 282.

p. 82, n. 5. Anno: 166 ALR 281.

A number of decisions support the proposition that an unsatisfied judgment against the garnishee constitutes a good defense to an action against him by the principal defendant. **Anno:** 166 ALR 281. See Sessions v. Stevens, 1 Fla 269, 46 Am Dec 339 (action by assignee of principal defendant).

p. 82, n. 6.

Anno: 166 ALR 278.

In a number of decisions it has been held that an unsatisfied judgment against the garnishee will afford him no protection to an action against him by the principal defendant. **Anno:** 166 ALR 278. See Cook v. Field, 3 Ala 53, 36 Am Dec 436.

In Maine and Massachusetts early cases held that a judgment alone against the garnishee protected him against the principal defendant, but later cases in these jurisdictions appear to have repudiated this rule. **Anno:** 166 ALR 279, 280.

Page 82. *Add, following note* 6: A satisfied judgment against the garnishee has been held a good defense to an action by the principal defendant against the garnishee instituted prior to the garnishment proceedings.[6.5] Courts protect the garnishee against whom judgment has been rendered, if such judgment has been either satisfied or executed.[6.51] In most cases, the courts hold that a satisfied judgment against the garnishee may be pleaded in bar to an action by the principal defendant to recover on the same indebtedness.[6.52] Courts, however, do not agree as to whether a person who has satisfied a judgment rendered against him as garnishee is entitled to an injunction against the execution of a judgment subsequently recovered against him by the principal defendant.[6.53] It is generally held that payment of the judgment rendered against the garnishee discharges him pro tanto from his indebtedness to the principal defendant.[6.54] And it necessarily follows that if the amount paid in satisfaction of the judgment is equal to or larger than the indebtedness to the principal defendant, the garnishee is completely discharged.[6.55]

It is generally held that a judgment against a garnishee is not conclusive as to the amount of the indebtedness to the principal defendant, so as to constitute a bar to an action by the latter against the garnishee to recover the residue over and above the amount paid, or ordered to be paid, by the garnishee pursuant to the judgment against him.[6.56]

Satisfaction by a garnishee of a judgment rendered against him as debtor of the principal defendant is generally held not to constitute a defense to an action against him by the principal defendant to recover money exempt from garnishment where the garnishee failed, in the garnishment proceedings, to claim the exemption.[6.57] It is generally held that a satisfied judgment of a court of a foreign state against the garnishee is a bar to an action in the domestic state by the principal defendant against the garnishee to recover on the same indebtedness, notwithstanding the fact that according to the laws of the domestic state the wages garnished are exempt.[6.58]

There is a conflict among the decisions on the question whether payment by a garnishee of a foreign judgment against him as debtor of the principal defendant constitutes a good defense to an action by the latter against the former in the domestic state where the garnishee failed, in the foreign garnishment proceedings, to claim that the wages attached were exempt from garnishment in the domestic state. Thus, in a number of cases it has been held that the garnishee has to claim the exemption in the foreign garnishment proceedings in order to be protected against an action by the principal defendant in the domestic state.[6.59] However, in a number of other cases it has been held that a satisfied judgment against a garnishee in a foreign state constituted a good defense to an action by the principal defendant in the domestic state even though the garnishee failed to claim the exemption in the foreign garnishment proceedings.[6.6]

Where the garnishee claims the exemption in the foreign garnishment proceedings it is generally held that a satisfaction of a judgment rendered against him constitutes a good defense to an action by the principal defendant in the domestic state against the garnishee. Some courts emphasize the fact that the garnishee, in addition to claiming the exemption in the garnishment proceedings, also notifies the principal defendant of the pendency of such proceedings.[6.61]

[6.5] Hitt v. Lacey, 3 Ala 104, 36 Am Dec 440.
Anno: 166 ALR 287.

[6.51], [6.52] **Anno:** 166 ALR 287.

[6.53] **Anno:** 166 ALR 288.

[6.54] Wallace v. M'Connell, 13 Pet (US) 136, 10 L ed 95 (dictum in action by principal defendant in Federal court prior to garnishment proceedings in state court).

Baltimore & O. S. W. R. Co. v. Adams, 159 Ind 688, 66 NE 43, 6 LRA 396.

Brown v. Dudley (1856) 33 NH 511; Drew v. Towle, 30 NH 531, 64 Am Dec 309.

St. Louis & S. F. R. Co. v. Crews, 51 Okla 144, 151 P 879, Ann Cas 1918C 823 (dictum).

Anno: 166 ALR 290.

A judgment against a garnishee and satisfaction thereof may be set up as a pro tanto payment in an action by the principal defendant against the garnishee, notwithstanding the fact that the principal defendant was not before the court in the garnishment proceeding. Wallace v. M'Connell, 13 Pet (US) 136, 10 L ed 95 (dictum in action instituted by principal defendant in Federal court prior to garnishment proceeding in state court).

[6.55] Harris v. Balk, 198 US 215, 49 L ed 1023, 25 S Ct 625, 3 Ann Cas 1084.
Anno: 166 ALR 293.

[6.56] Kosanic v. Preferred Auto. Ins. Co. 314 Mich 18, 22 NW2d 55, 166 ALR 266.

Drew v. Towle, 27 NH 412, 59 Am Dec 380.

Anno: 166 ALR 294

The fact that an insurance company issuing an automobile insurance policy under which, in addition to its agreement to pay damages for personal injuries to third persons, it agreed to defend suits against the insured arising from ownership of the automobile insured, and to pay for damages to the automobile resulting from collision, has been garnisheed on a judgment for personal injuries recovered against the insured in an action which the insurance company refused to defend, and after filing a disclosure denying its liability in toto, is compelled by the garnishment judgment to pay the personal injury judgment, does not preclude the insured from thereafter bringing an action against the insurance company to enforce its liability under the separate agreements to defend suits and to pay for damages to the insured's automobile. Kosanic v. Preferred Auto. Ins. Co. 314 Mich 18, 22 NW2d 55, 166 ALR 266.

Where an automobile liability insurance company, when garnisheed upon a judgment for personal injuries recovered against the insured, filed its disclosure denying liability in toto, without disclosing any liability, either due or to become due, to the insured on account of attorney fees incurred in the defense of the suit in which the judgment was recovered or for the payment of damages to the insured's automobile, it cannot, when later sued by the insured under clauses of the policy by which it agreed to defend suits against the insured, and to pay damages to the insured's automobile resulting from collision, be permitted to enrich itself by taking advantage of its failure to disclose its full liability in the garnishment suit and in that way escape liability for attorney fees and for damages to the plaintiff's automobile under its contract of insurance. Kosanic v. Preferred Auto. Ins. Co. 314 Mich 18, 22 NW2d 55, 166 ALR 266.

Some courts emphasize the fact that the judgment against the garnishee is not conclusive as to the amount of the indebtedness of the garnishee to the principal defendant where the latter has not appeared in the garnishment proceedings and contested the measure of such indebtedness. **Anno:** 166 ALR 297.

6.57 Southern R. Co. v. Fulford, 125 Ga 103, 54 SE 68, 5 Ann Cas 168.

Missouri P. R. Co. v. Whipsker, 77 Tex 14, 13 SW 639, 8 LRA 321, 19 Am St Rep 734.

Anno: 166 ALR 304.

In some decisions the general rule mentioned above appears to be limited to situations where the garnishee had notice of the exemption. However, according to other decisions, the garnishee who fails to claim the exemption is not protected, even though he has no notice of the exemption. **Anno:** 166 ALR 305, 306.

6.58 **Anno:** 166 ALR 308.

But, a judgment against a garnishee and satisfaction thereof in Missouri, subsequent to a judgment rendered in Illinois in an action by the principal defendant against the garnishee to recover exempt wages, were held in Becker v. Illinois C. R. Co. 250 Ill 40, 95 NE 42, 35 LRA NS 1154, not to bar payment of the Illinois judgment.

6.59 **Anno:** 166 ALR 308.

See Missouri P. R. Co. v. Sharitt, 43 Kan 375, 23 P 430, 8 LRA 385, 19 Am St Rep 143.

6.6 **Anno:** 166 ALR 310.

See Carson v. Memphis & C. R. Co. 88 Tenn 646, 13 SW 588, 8 LRA 412, 17 Am St Rep 921.

6.61 **Anno:** 166 ALR 311.

See Baltimore & O. S. W. R. Co. v. Adams, 159 Ind 688, 66 NE 43, 60 LRA 396 (garnishee notifying principal defendant).

§ 806. Where Judgment or Garnishment Erroneous and Irregular Merely.

p. 83, n. 9. Anno: 166 ALR 289.

§ 809. Where Garnishee Makes Payment before Judgment or Defaults.

Am Jur cited in Everson v. Atlas Tie Co. 73 Idaho 91, 245 P2d 773.

p. 83, n. 12. Anno: 166 ALR 288.

§ 810. Where Garnishment was in Foreign Court.

p. 84, n. 16. Anno: 148 ALR 996; 166 ALR 286.

§ 813. Generally.

Forms: 18 Am Jur Pl & Pr Forms 18:171, 18:173, 18:174.

p. 85, n. 2. As to priority between encumbrances or notices of equity introduced between the attachment and the execution, see Sanborn McDuffee Co. v. Keefe, infra, § 829 (Supplement).

§ 814. Generally.

p. 86, n. 15. Anno: 143 ALR 789, s. 56 ALR2d 112 (reasonableness, adequacy, or excessiveness of specific fees).

It has been held that attorneys' fees are allowed a garnishee to reimburse him for the cost of filing an answer, and appearing in the trial court if his answer is controverted, and attorneys' fees will be denied a garnishee upon his securing the vacation of a judgment rendered by default against him without jurisdiction due to service of the writ of garnishment by a private individual rather than by the sheriff. Mendoza v Acme Transfer & Storage Co. 66 NM 32, 340 P2d 1080, 75 ALR2d 1433.

§ 815. Attachment Lien.

Forms: 8 Am Jur Pl & Pr Forms 8:745.

p. 86, n. 20. As to lien holder's right to enjoin waste, see WASTE.

§ 816. Attachment as Satisfaction of Plaintiff's Claim.

Forms: 8 Am Jur Pl & Pr Forms 8:745.

§ 817. Garnishment Lien.

Forms: 8 Am Jur Pl & Pr Forms 8:745.

§ 818. View that Garnishment Constitutes No Lien until Judgment.

Forms: 8 Am Jur Pl & Pr Forms 8:745.

§ 819. Binding Effect on Garnishee Personally.

Forms: 8 Am Jur Pl & Pr Forms 8:745.

§ 820. Generally.

Am Jur quoted in Marshall v. Anderson, 169 Kan 534, 220 P2d 187.

R. C. L. quoted in Kassow v. Feldman, 22 Pa. D. & C. 427.

p. 89, n. 1. Dickson v. Simpson, 172 Tenn 680, 113 S. W. (2d) 1190, 116 A.L.R. 380.

Page 89. *Add, following note* 1: An attachment lien covers only the actual interest of the debtor in the property levied on, existing at the time of the levy, and does not extend to an interest in the property subsequently acquired by him.[1.1]

[1.1] Dufield v. Davis, 152 Kan 404, 103 P(2d) 778, 128 ALR 1389

p. 91, n. 4. Walters v. Bank of America (Cal) 59 P(2d) 983, 106 ALR 55, modified on rehearing in 9 Cal(2d) 46, 69 P(2d) 839 110 ALR 1259.

§ 821. Effect as Subrogation.

Am Jur cited in Midland Loan Finance Co. v Kisor, 206 Minn 134, 287 NW 869

p. 91, n. 7. Dickson v. Simpson, 172 Tenn. 680, 113 S. W. (2d) 1190, 116 A.L.R. 380.

§ 824. Effect on Title.

p. 92, n. 15. See Zittman v. McGrath, 341 US 446, 95 L ed 1096, 71 S Ct 832 (under New York law).

§ 825. Commencement.

Am Jur cited in United States v Metropolitan Life Ins. Co. (CA4th W Va) 256 F2d 17.

United States v Eiland (CA4th W Va) 223 F2d 118.

R. C. L. cited in Hospelhorn v. General Motors Corp. 169 Md 564, 182 A 442.

p. 93, n. 19. Harris v. Lipson, 167 Va. 365, 189 S. E. 349, 108 A.L.R. 912.

Mere issuance of an attachment against real estate creates no lien on the real estate; and in order to create a lien it is necessary for the officer to cause his return to show that he made a levy and for the return to mention and describe the real property with such substantial accuracy as to cause it to be readily identified. Harris v. Lipson, 167 Va. 365, 189 S. E. 349, 108 A.L.R. 912.

Page 93. *Add, following note* 20: An unexecuted writ of attachment directed against real estate constitutes in itself neither an attachment nor a lien thereunder[21] and has no more legal effect on the title or interest of the owner than a mere summons or subpœna to appear in the proceedings.[22]

[21] It becomes an attachment only when it is properly executed. Harris v Lipson, 167 Va. 365, 189 S. E. 349, 108 A.L.R. 912.

[22] Harris v Lipson, 167 Va 365, 189 S. E. 349, 108 A.L.R. 912.

§ 826. Duration.

p. 94, n. 7. Anno: 166 ALR 770, 799.

The extinguishment of a judgment by the expiration of the statutory period of its life terminates rights secured under the pending garnishment proceedings. Hillman v. Gray, 163 Wash 406, 1 P2d 318, 75 ALR 1356. **Anno:** 75 ALR 1359.

§ 827. Contingent and Inchoate Character of Lien.

Am Jur cited in Puissegur v. Yarbrough, 29 Cal2d 409, 175 P2d 830.

Reich v Spiegel, 208 Misc 225, 140 NYS2d 722.

p. 94, notes 9, 10. United States v. Security Trust & Sav. Bank, 340 US 47, 95 L ed 53, 71 S Ct 111 (under California law).

§ 829. Generally

p. 95, n. 2.

However, an attachment of the property of a foreign corporation after it has ceased to do business or exercise its franchises gives no priority over other creditors where the rule is that such a corporation is insolvent and that its assets constitute a trust for the benefit of creditors. Voightman v. Southern R. Co. 123 Tenn 452, 131 SW 982, Ann Cas 1912C 211.

Page 96. *Add, following note 8:* If an attachment is lawful title to the property obtained by a levy of execution based on the attachment, it is good as against encumbrances or notice of equities introduced between the attachment and the execution.[8.1] The priority of a claim of the Federal government over an attachment is elsewhere discussed.[8.5]

[8.1] Sanborn, McD. Co. v. Keefe, 88 N. H. 236, 187 A. 97, 106 A.L.R. 1097.

[8.5] See United States [also 26 RCL Pocket Supp., United States, § 45].

§ 830. As to Right to Reformation of Contract.

p. 96, n. 10. Anno: 79 ALR2d 1211.

§ 843. Generally.

Am Jur cited in Fidelity Union Trust Co. v. Guaranty Trust Co. 135 NJ Eq 222, 37 A (2d) 853.

p. 105, n. 14. Dummer v Smedley, 110 Mich 466, 68 NW 260, 38 LRA 490.

§ 846.1. (New text) Effect of Release or Modification of Lien to Which Property Was Subject When Attachment was Levied.

The effect of the release or modification of a lien to which property was subject at the time an attachment was levied against it may be made manifest in a number of ways. For example, the question may arise whether the lienor or the attaching creditor has the superior right to procure a sale of the property for the purpose of paying his claim or to procure the application of the proceeds of a prior sale of the property to the payment of his claim. The question is occasionally presented whether, under such circumstances, the lienor or the attaching creditor is entitled to possession of the property, or whether the lienor must account to the attaching creditor for the value of the property affected by the release or modification of the lien. And in some instances the question arises whether after the release or modification of the lien, some third person may be subrogated to the rights of the original lienor as against the intervening claim of the attaching creditor. It will be readily seen that whether the release or modification of a prior lien has any effect upon the rights of an attaching creditor depends in many instances upon the nature of the lien, the character of the release or modification, and the circumstances under which the lien was released or modified. However, certain factors which are common to a number of the decisions and which the courts have expressly or impliedly relied upon in answering the broad question with which all, or nearly all, of the cases involving the effect upon an attachment of the release or modification of a lien to which the property was subject at the time the attachment was levied are concerned—namely whether under the facts and circumstances of the case, the prior lienor is to be given some advantage over the attaching creditor, or vice versa—may be listed. Thus, as illustrative of the considerations which have influenced the courts to favor the prior lienor in the circumstances under consideration may be suggested: (1) the existence of some form of fraud, mistake, or illegality in connection with the execution of the release or modification of the lien,[11.5] and (2) a lack of evidence showing an intention on the part of the lienor to subordinate his lien to the rights of intervening encumbrancers. And as illustrative of the considerations which appear to have influenced the courts to favor the attaching creditor may be suggested: (1) evidence of a bona fide payment of the debtor secured by the prior lien, (2) facts showing an intention on the part of the lienor to divest himself of any interest in the property,[11.6] and (3) a showing that the value of the goods at the time of the attachment was in excess of the amount of the prior lien.[11.7]

[11.5] **Anno:** 128 ALR 1392, 1393.

[11.6] **Anno:** 128 ALR 1393.

In Dufield v. Davis, 152 Kan 404, 103 P(2d) 778, 128 ALR 1389, it was held that a chattel mortgagee who released her mortgage to enable the mortgagor to obtain an additional loan from a finance company which insisted that it be given a first mortgage on the property as a condition to making the loan, and took back a new mortgage expressly made subject to the mortgage given the finance company, had a lien against the property prior to the lien of an attaching creditor of the mortgagor whose attachment was levied after the execution of the original mortgage (and was admittedly subject thereto), but prior to the release thereof.

[11.7] **Anno:** 128 ALR 1393.

§ 849. — Effect of Failure to Comply with Filing or Recording Laws.

Am Jur quoted in Meade v. Wells, 309 Ky 748, 218 SW2d 972.

§ 864. Generally.

Am Jur cited in First Nat. Bank v Martin, 16 Alaska 313.

§ 873 Corporate Stock.

See Corporations, Vol. 13, p. 428, § 357.

§ 881. Assignment for Benefit of Creditors in Another State.

p. 124, n. 20. Correct the cross reference to read: Vol. 4, p. 434, § 181.

§ 882. Generally.

RCL cited in Bugbee v. Stoller-Hilgers Silk Mills, 45 RI 56, 119 A 760.

§ 884. Priority as to Bankruptcy Proceedings.

p. 126, n. 17. Annotation: 107 A.L.R. 1138.

§ 891. — Rule as Affected by Possession of Receiver Acquired before Attachment.

p. 131, n. 8.

The right of a receiver appointed by a foreign tribunal to wind up an insolvent partnership situated within its jurisdiction, to take possession of money due to such partnership from domestic debtors, will not be recognized as against the claims of nonresident creditors of the insolvent partnership who have attached such money under the domestic laws after the appointment of the receiver, but before he obtained actual possession of the money or an enforceable lien thereon, even although he has received a general assignment of the partnership property. Catlin v. Wilcox Silver Plate Co. 123 Ind 477, 24 NE 250, 8 LRA 62, 18 Am St Rep 338.

§ 893. Attachment or Garnishment and Right of Retainer.

p. 133, n. 14. Loverett v. Veatch, 268 Ky. 797, 105 S. W. (2d) 1052, 110 A.L.R. 1378.

Annotation: 110 A.L.R. 1389.

§ 896. Generally.

Forms: 2 Am Jur Pl & Pr Forms 2:1061–2:1070, 2:1087–2:1090.

p. 135, n. 10.

Since in an attachment proceeding the giving of the required bond is jurisdictional, the failure to give the bond in such a suit at law renders it null and void. Grimmett v. Barnwell, 184 Ga 461, 192 S. E. 191, 116 A.L.R. 257.

An officer has no authority to take possession of property under a levy of attachment, where the attachment creditor has not given the bond required by statute. Manuel v. Cassada, 190 Va 906, 59 SE2d 47, 18 ALR2d 395.

§ 897. Discretion of Court to Permit Filing of Bond for Amount Smaller than That Required by Statute.

Forms: 2 Am Jur Pl & Pr Forms 2:1061–2:1070, 2:1087–2:1092.

§ 898. Construction of Bonds in Attachment Proceedings.

Forms: 2 Am Jur Pl & Pr Forms 2:1061–2:1070, 2:1087–2:1089.

RCL quoted in Jansen v. Pollastine, 10 Alaska 316.

§ 900. Sufficiency to Procure or Sustain Attachment or Garnishment; Amendments and Additional Bonds.

Forms: 2 Am Jur Pl & Pr Forms 2:1061–2:1070, 2:1090–2:1093.

p. 138, n. 15. Anno: 47 ALR2d 977-979, 983, 987-989 (attachment bonds); 47 ALR2d 990 (garnishment bonds).

p. 138, n. 17. Corbin v St. Lucie River Co. (Fla) 78 So2d 396, 47 ALR2d 968.

Anno: 47 ALR2d 972 et seq.

p. 138, n. 17. It has been held that an attachment defendant not fully protected by the amount of the undertaking set by the clerk may apply to the court for a bond of a larger amount. Finn v Witherbee, 126 Cal App2d 45, 271 P2d 606, 45 ALR2d 1215.

It has been held that, the main proceeding not being affected, a garnishment bond insufficient in amount may be amended to provide the defendant with additional security. Corbin v St. Lucie River Co. (Fla) 78 So2d 396, 47 ALR2d 968.

p. 138, n. 18. Anno: 47 ALR2d 972-977, 979 987 (attachment bonds), 989-991 (garnishment bonds).

It has been held that the rule requiring strict compliance with the statutory requirements for attachment and garnishment prevails as to the remedy, but not as to amendments in form that aid in the furtherance of justice, where the purpose of the proceeding is not departed from or materially affected. Corbin v St. Lucie River Co. (Fla) 78 So2d 396, 47 ALR2d 968.

§ 901. Generally.

Forms: 2 Am Jur Pl & Pr Forms 2:967, 2:979, 2:1071, 2:1075–2:1087.

p. 139, n. 3. Nicolai-Neppach Co. v. Smith, 154 Or. 450, 58 P. (2d) 1016, 60 P. (2d) 979, 107 A.L.R. 1124.

Annotation: 107 A.L.R. 1138.

p. 140, n. 5. Annotation: 107 A.L.R. 1138.

§ 902. Duty to Give Bond and Procure Return of Property to Mitigate Damages.

Forms: 2 Am Jur Pl & Pr Forms 2:979, 2:1071, 2:1075, 2:1077, 2:1080–2:1083.

Am Jur cited in American Surety Co. v. Florida Nat. Bank & T. Co. (C. C. A. 5th) 94 F. (2d) 126 (n. 10).

Adams v Thibault, — Wash2d —, 297 P2d 954; Hoff v Lester, 25 Wash2d 86, 168 P2d 409, 164 ALR 751.

§ 903. Requirement of Bail or Security as Condition of Right to Appear and Defend.

Forms: 2 Am Jur Pl & Pr Forms 2:1071, 2:1075, 2:1077, 2:1080–2:1083.

§ 904. Right of Sureties to Reimbursement, Subrogation, Contribution, Possession, and Injunctive Relief.

Forms: 2 Am Jur Pl & Pr Forms 2:1071, 2:1075, 2:1077, 2:1080–2:1083.

§ 905. Generally.

Forms: 2 Am Jur Pl & Pr Forms 2:1071, 2:1075, 2:1077, 2:1080–2:1083.

§ 906. Waiver of Defects and Irregularities.

Forms: 2 Am Jur Pl & Pr Forms 2:1071, 2:1075, 2:1077, 2:1080–2:1083.

Am Jur quoted in Noel v. Ecton, 309 Ky 189, 217 SW2d 223.

§ 907. Formal Approval.

Forms: 2 Am Jur Pl & Pr Forms 2:1071, 2:1075, 2:1077, 2:1080–2:1083; 19 Am Jur Pl & Pr Forms 19:275.

§ 908. Obligation Valid as Common-law Recognizance Despite Defectiveness as Statutory Bond.

Forms: 2 Am Jur Pl & Pr Forms 2:1071, 2:1075, 2:1077, 2:1080–2:1083.

Am Jur cited in Perfection Hardwood Flooring Co. v Bowling (Ky) 300 SW2d 550.

§ 909. Bond Void Where Attachment Void.

Forms: 2 Am Jur Pl & Pr Forms 2:1071, 2:1075, 2:1077, 2:1080–2:1083.

§ 910. Attacking the Bond.

Forms: 2 Am Jur Pl & Pr Forms 2:1071, 2:1075, 2:1077, 2:1080–2:1083.

§ 911. Accrual of Liability.

Forms: 2 Am Jur Pl & Pr Forms 2:1071, 2:1075, 2:1077, 2:1080–2:1083.

Page 145. *Add, following note 8:* In accordance with the rule that a useless or unnecessary demand on the obligor need not be made,[8.5] in actions on bonds given to secure the release of property from an attachment it is generally held that subsequent bankruptcy on the part of the debtor, whose attached property was released by such undertaking, relieves the judgment creditor from the necessity of making demand for the return of such property before seeking to enforce the bond given to secure its release from attachment.[8.6]

[8.5] See 50 Am Jur 1018, SURETYSHIP, § 174

[8.6] Anno: 130 ALR 1167.

§ 912. Measure of Liability.

Forms: 2 Am Jur Pl & Pr Forms 2:1071, 2:1075, 2:1077, 2:1080 2:1083.

§ 913. Generally.

Forms: 2 Am Jur Pl & Pr Forms 2:1071, 2:1075, 2:1077, 2:1080–2:1083.

§ 914. Amendments—New Cause of Action as Test.

Forms: 2 Am Jur Pl & Pr Forms 2:1071, 2:1075, 2:1077, 2:1080 2:1083.

Am Jur cited in Davis v. Shemper, 210 Miss 201, 208, 49 So 253, 50 So2d 143.

Rushing v Ashcraft, 211 NC 627, 191 SE 332.

§ 915. — Prejudice Caused Surety as Test.

Forms: 2 Am Jur Pl & Pr Forms 2:1071, 2:1075, 2:1077, 2:1080 2:1083.

§ 916. Judgment or Favorable Outcome for Defendant.

Forms: 2 Am Jur Pl & Pr Forms 2:1071, 2:1075, 2:1077, 2:1080–2:1083.

§ 917. Death of Defendant.

Forms: 2 Am Jur Pl & Pr Forms 2:1071, 2:1075, 2:1077, 2:1080–2:1083.

p. 150, n. 9. See annotation in 131 ALR 1152.

§ 918. Bankruptcy of Defendant.

Forms: 2 Am Jur Pl & Pr Forms 2:1071, 2:1075, 2:1077, 2:1080–2:1083.

p. 151, n. 16. Nicolai-Neppach Co. v. Smith, 154 Or. 450, 58 P. (2d) 1016, 60 P. (2d) 979, 107 A.L.R. 1124.

Annotation: 107 A.L.R. 1138.

Even for the value of property sold by the attachment debtor, sureties are released by the adjudication in bankruptcy, since the provision of the Bankruptcy Act renders such an attachment null and void. Nicolai-Neppach Co. v. Smith, 154 Or. 450, 58 P. (2d) 1016, 60 P. (2d) 979, 107 A.L.R. 1124.

p. 151, n. 17. Annotation: 107 A.L.R. 1139.

p. 151, n. 18. Correct the annotation citation to read: 36 ALR 452, s. 107 ALR 1139.

§ 919. Insolvency of Defendant.

Forms: 2 Am Jur Pl & Pr Forms 2:1071, 2:1075, 2:1077, 2:1080–2:1083.

§ 920. Generally.

Forms: 2 Am Jur Pl & Pr Forms 2:1071, 2:1075, 2:1077, 2:1080–2:1083.

§ 921. Defects and Irregularities.

Forms: 2 Am Jur Pl & Pr Forms 2:1071, 2:1075 2:1077 2:1080–2:1083.

p. 152, n. 3. Adams v Thibault, 49 Wash2d 24, 297 P2d 954, 57 ALR2d 1372.

§ 922. Defective Levy, Return, Inventory, and Appraisement.

Forms: 2 Am Jur Pl & Pr Forms 2:1071, 2:1075, 2:1077, 2:1080–2:1083.

§ 923. — Defective Grounds for Attachment.

Forms: 2 Am Jur Pl & Pr Forms 2:1071, 2:1075, 2:1077, 2:1080–2:1083.

§ 924. — Property Not Liable to Attachment or Garnishment.

Forms: 2 Am Jur Pl & Pr Forms 2:1071, 2:1075, 2:1077, 2:1080–2:1083.

§ 925. — Defendant's Lack of Title, or Title in Surety.

Forms: 2 Am Jur Pl & Pr Forms 2:1071, 2:1075, 2:1077, 2:1080–2:1083.

§ 926. Generally.

Forms: 2 Am Jur Pl & Pr Forms 2:1071, 2:1075, 2:1077, 2:1080–2:1083.

Am Jur quoted in Hoft v. Coastwise Shipping & Lighterage Co. 215 NC 690, 3 SE(2d) 20 (n. 12).

Page 157. *Add new paragraph following note* 14: It has been held that although where the issuance and return of an execution unsatisfied is a prerequisite to the commencement of an action on a bond given to prevent an attachment, such issuance and return unsatisfied of an execution is not required where bankruptcy proceedings against the judgment debtor make the issuance of an execution a vain act and one violative of an order of the bankruptcy court enjoining interference with the bankrupt's property; and this, even though there was a period of time between the recovery of the judgment and the institution of bankruptcy proceedings during which execution might have been issued.[14.5]

[14.5] Stewart v. Slater, 61 Idaho 628, 105 P (2d) 729, 130 ALR 1158.

Anno: 130 ALR 1163.

§ 927. Parties.

Forms: 2 Am Jur Pl & Pr Forms 2:1071, 2:1075, 2:1077, 2:1080–2:1083.

§ 928. Pleadings and Defenses.

Forms: 2 Am Jur Pl & Pr Forms 2:1071, 2:1075 2:1077, 2:1080–2:1083.

Page 157. *Add, following note* 4: A court rule as to the time for filing a plea in abatement within a certain time after entry of the action applies to abatable matter in an action upon an attachment-releasing bond commenced after recovery of default judgment in the action in which the bond was given, even though the matter of abatement as regards that action did not arise until after the commencement of the action.[4.1]

[4.1] Ft. Fairfield Nash Co. v. Noltemier, 135 Me. 84, 189 A. 415, 108 A.L.R. 1276.

§ 929. Evidence.

Forms: 2 Am Jur Pl & Pr Forms 2:1071, 2:1075, 2:1077, 2:1080–2:1083.

Page 158. *Add, following note* 11: A party who introduces into evidence a deposition of a receiver of a corporation as to the value of its assets is bound by the statements therein.[11.1]

[11.1] Nicolai-Neppach Co. v. Smith, 154 Or. 450, 58 P. (2d) 1016, 60 P. (2d) 979, 107 A.L.R. 1124.

§ 930. Trial.

Forms: 2 Am Jur Pl & Pr Forms 2:1071, 2:1075, 2:1077, 2:1080 2:1083.

Page 158. *Add, following note* 13: Although evidence may be undisputed, there is a question for the jury if men of reasonable minds might draw different conclusions from the facts proved.[13.1] Only reasonable inferences may be drawn, however, and a jury may not speculate or indulge in frivolous and captious objections to uncontradicted testimony.[13.2] The court may properly direct a verdict against a party where his own evidence discloses facts destructive of his case.[13.3]

[13.1] Nicolai-Neppach Co. v. Smith, 154 Or. 450, 58 P. (2d) 1016, 60 P. (2d) 979, 107 A.L.R. 1124.

[13.2] Nicolai-Neppach Co. v. Smith, 154 Or. 450, 58 P. (2d) 1016, 60 P. (2d) 979, 107 A.L.R. 1124.

[13.3] Nicolai-Neppach Co. v. Smith, 154 Or. 450, 58 P. (2d) 1016, 60 P. (2d) 979, 107 A.L.R. 1124.

§ 931. Generally.

Forms: 20 Am Jur Pl & Pr Forms 20:341.
RCL quoted in Gould & Co. v. Mt. Baker Sav. & L. Asso. 185 Wash 253, 53 P(2d) 841.

§ 941. Process.

p. 165, n. 20.
The provision of § 11,230 of the Ohio General Code, found in a chapter dealing with limitation of actions, that an action shall be deemed commenced "within the meaning of this chapter" at the date of the summons served on a defendant or a codefendant united in interest with him, or, when service by publication is proper, at the date of the first publication, is confined to matters concerning the limitation of actions, and therefore does not so affect the provisions of § 11,279 of the Ohio General Code that "a civil action must be commenced by filing in the office of the clerk of the proper court a petition and causing a summons to be issued thereon," and § 11,819 of the Ohio General Code that in a civil action for the recovery of money, "at or after its commencement," the plaintiff may have an attachment against the property of the defendant on grounds enumerated as to render premature and void the issuance of an attachment after the filing of the petition and the issuance of a summons but before obtaining personal service or beginning publication for substituted service. Rorick v Devon Syndicate, 307 US 299, 83 L ed 1303, 59 S Ct 877, rehearing denied in 307 US 650, 83 L ed 1529, 59 S Ct 1041.

§ 947. Generally.

Page 169. *Add, following note* 7: It has been stated that any appearance, except to object to the jurisdiction of the court, is a general appearance and will dispense with service.[7.1]

[7.1] Fisher v. Globe Brewing Co. 170 Va. 509, 197 S. E. 490, 116 A.L.R. 1211.
Annotation: 116 A.L.R. 1215.
The filing of an affidavit of substantial defense to an action commenced by attachment constitutes a general appearance, giving the court jurisdiction to proceed to trial of the action, even though the attachment has been dismissed in accordance with a statute providing that if the principal defendant shall file an affidavit that he has a substantial defense to the merits of the plaintiff's claim, an attachment shall stand dismissed, ipso facto, unless the plaintiff shall, within ten days, file a bond. Fisher v. Globe Brewing Co. 170 Va. 509, 197 SE 490, 116 ALR 1211. **Anno:** 116 ALR 1215.

§ 952. Amendments.

Am Jur cited in Northern Montana Asso. v. Hauge, 111 Mont 56, 105 P(2d) 1102.

§ 954. Generally.

Forms: 2 Am Jur Pl & Pr Forms 2:1120.
p. 172, n. 19.
In the case of an attachment of the property of a nonresident who fails to appear after service by publication or some form of substituted service, the court has jurisdiction to render a judgment which is valid to the extent that it is satisfied by application of the property attached. Gulda v. Second Nat. Bank, 323 Mass 100, 80 NE2d 12, 15 ALR2d 605.

§ 955. Amount of Judgment.

Forms: 2 Am Jur Pl & Pr Forms 2:1120.

§ 956. Generally.

Forms: 2 Am Jur Pl & Pr Forms 2:1120.

§ 957. Conclusiveness and Collateral Attack.

Forms: 2 Am Jur Pl & Pr Forms 2:1120.
p. 174, n. 1. Anno: 148 ALR 996.

§ 958. — As to Persons Not Parties to Proceedings.

Forms: 2 Am Jur Pl & Pr Forms 2:1120.

§ 959. Full Faith and Credit.

Forms: 2 Am Jur Pl & Pr Forms 2:1120.
p. 175, n. 7.
A judgment in a suit against a foreign corporation by attachment and publication is not effectual and conclusive as a personal judgment and the fact that the corporation had property within the state or that the action arose therein, adds little to its conclusiveness. Tioga R. Co. v. Blossburg & C. R. Co. 20 Wall. (US) 137, 22 L ed 331.

§ 960. Of Judgment in Personam.

Forms: 2 Am Jur Pl & Pr Forms 2:1120.

§ 961. Of Judgment in Rem.

Forms: 2 Am Jur Pl & Pr Forms 2:1120.

§ 962. Right to Judgment.

Forms: 2 Am Jur Pl & Pr Forms 2:1120.

§ 963. Form of Judgment.

Forms: 2 Am Jur Pl & Pr Forms 2:1120.

§ 966. Generally.

Forms: 2 Am Jur Pl & Pr Forms 2:1132, 2:1146, 2:1147.

§ 967. Relief in Equity.

Forms: 2 Am Jur Pl & Pr Forms 2:1132, 2:1133, 2:1146, 2:1147.

§ 968. Notice of Claim.

Forms: 2 Am Jur Pl & Pr Forms 2:1132, 2:1136, 2:1137, 2:1146, 2:1147.

§ 969. Statement of Amount Due Claimant.

Forms: 2 Am Jur Pl & Pr Forms 2:1132, 2:1146, 2:1147.

§ 970. Intervention Generally.

Forms: 2 Am Jur Pl & Pr Forms 2:1131, 2:1132, 2:1134, 2:1135, 2:1146, 2:1147.
Am Jur cited in Patterson v Pollock, 84 Ohio App 489, 84 NE2d 606.

§ 971. Election between Intervention and Other Remedies Generally.

Forms: 2 Am Jur Pl & Pr Forms 2:1131, 2:1132, 2:1134, 2:1135, 2:1146, 2:1147.

§ 972. Right of Indorsee to Recover Amount Collected by Garnishment of Note.

Forms: 2 Am Jur Pl & Pr Forms 2:1131, 2:1132, 2:1134, 2:1135, 2:1146, 2:1147.

§ 973. Generally.

Forms: 2 Am Jur Pl & Pr Forms 2:1131, 2:1132, 2:1134, 2:1135, 2:1137, 2:1139, 2:1143, 2:1146, 2:1147.

Page 183. *Add, following note* 6: The general principles of estoppel[6.5] have been held to apply in attachment proceedings, with respect to the permissibility of intervention.[6.51]

[6.5] For a discussion of these principles, see 19 Am Jur 633, ESTOPPEL, §§ 33 et seq.
[6.51] **Anno:** 166 ALR 917 et seq. (setting out details, cases so applying such principles).

§ 974. Necessity of Bond and Affidavit of Just Claim to Intervene.

Forms: 2 Am Jur Pl & Pr Forms 2:1131, 2:1132, 2:1134, 2:1135, 2:1137, 2:1139, 2:1141–2:1143, 2:1146, 2:1147.

§ 975. Who May Intervene.

Forms: 2 Am Jur Pl & Pr Forms 2:1131, 2:1132, 2:1134, 2:1135, 2:1137, 2:1139, 2:1143, 2:1146, 2:1147.

§ 976. — Junior Attaching Creditor.

Forms: 2 Am Jur Pl & Pr Forms 2:1131, 2:1132, 2:1134, 2:1135, 2:1137, 2:1139, 2:1143, 2:1146, 2:1147.

§ 977. Time for Intervention.

Forms: 2 Am Jur Pl & Pr Forms 2:1131, 2:1132, 2:1134, 2:1135, 2:1137, 2:1139, 2:1143, 2:1146, 2:1147.

§ 978. Pleadings.

Forms: 2 Am Jur Pl & Pr Forms 2:1131, 2:1132, 2:1134, 2:1135, 2:1137, 2:1139, 2:1143, 2:1146, 2:1147.

p. 186, n. 10. Eliminate the Alabama citation in the footnote.

§ 979. Service, Process, and Notice.

Forms: 2 Am Jur Pl & Pr Forms 2:1131, 2:1132, 2:1134, 2:1135, 2:1137, 2:1139, 2:1143, 2:1146, 2:1147.

Page 186. *Substitute for the first sentence in the section and its footnote the following:* Local practice as to service, process, and notice is variant. Sometimes the notice is given to the sheriff, who may, in his discretion, serve a copy of the claim upon the plaintiff's attorney with notice that he requires indemnity.[15] In Pennsylvania notice of a rule for a sheriff's interpleader by the sheriff or a claimant must be given to the plaintiff, defendant, and any garnishee.[15.1]

[15] See 7 Carmody, N. Y. Prac. p. 571, § 483.

[15.1] See 10 Standard Pa. Prac. p. 545, § 356 (1931, June 22, P. L. 883, § 1; 12 PS § 2358).

§ 980. Issues and Defenses.

Forms: 2 Am Jur Pl & Pr Forms 2:1131, 2:1132, 2:1134, 2:1135, 2:1137, 2:1139, 2:1143, 2:1146, 2:1147, 2:1149.

§ 981. Evidence and Trial.

Forms: 2 Am Jur Pl & Pr Forms 2:1132, 2:1134, 2:1135, 2:1137, 2:1139, 2:1143, 2:1146, 2:1147, 2:1149.

§ 982. Judgment and Right to Proceeds after Sale.

Forms: 2 Am Jur Pl & Pr Forms 2:1132, 2:1134, 2:1135, 2:1137, 2:1139, 2:1143, 2:1146, 2:1147, 2:1149.

§ 983. Right of Intervener to Recover Counsel Fees.

Forms: 2 Am Jur Pl & Pr Forms 2:1132, 2:1134, 2:1135, 2:1137, 2:1139, 2:1143, 2:1146, 2:1147 2:1149.

p. 189, n. 17. Anno: 65 ALR2d 1442.

§ 984. Generally.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

Forms: 2 Am Jur Pl & Pr Forms 2:1151-- 13:767, 13:768, 20 Am Jur Pl & Pr Forms 20 2:1154, 2:1157; 13 Am Jur Pl & Pr Forms 342–20:344.

Am Jur cited in Blankenship v Staton (Ky) 348 SW2d 925.

City Lumber Co. v Barrett (Ky) 327 SW2d 402.

RCL quoted in Jansen v. Pollastrine, 10 Alaska 316.

p. 189, n. 1. Finn v Witherbee, 126 Cal App2d 45, 271 P2d 606, 45 ALR2d 1215.

p. 190, n. 2. Brown v Guaranty Estates Corp. 239 NC 595, 80 SE2d 645, 40 ALR2d 1094.

Page 190. *Add new paragraph following note* 4: A release of attached property obtained by duress of property does not preclude an action for malicious attachment.[4.1] Indeed, it has been stated broadly that the maintenance of such an action cannot be prevented by the settlement of the debt by the plaintiff and the payment of the costs.[4.2]

[4.1] Spaids v. Barrett, 57 Ill 289, 11 Am Rep 10.

[4.2] Brand v. Hinchman, 68 Mich 590, 36 NW 664, 13 Am St Rep 362.

And see to the same effect, Fortman v. Rottier, 8 Ohio St. 548, 72 Am Dec 606.

Anno: 93 Am St Rep 464.

p. 191, n. 12. Brown v Guaranty Estates Corp 239 NC 595, 80 SE2d 645, 40 ALR2d 1094.

§ 985. Statutory Modifications

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

Forms: 20 Am Jur Pl & Pr Forms 20:342–20:344.

Am Jur cited in Lukens v. First Nat. Bank, 151 Kan 937, 101 P(2d) 914.

Newby v U. S. Fidelity & Guaranty Co. 49 Wash2d 843, 307 P2d 275; Adams v Thibault, 49 Wash2d 24, 297 P2d 954, 57 ALR2d 1372.

RCL cited in Jansen v. Pollastrine, 10 Alaska 316.

p. 191, n. 16. Anno: 125 ALR 1220.

As to measure of damages under such statutes, see infra, §§ 1005, 1006 (Supp.).

p. 191, n. 18. Harris v. Lipson, 167 Va. 365, 189 S. E. 349, 108 A.L.R. 912.

Anno: 125 ALR 1222.

It seems to be assumed in Veitch v. Cebell, 105 Wis 260, 81 NW 411, 76 Am St Rep 914, that express statutory provisions for compensation of the defendant for any damages sustained in cases of "attachment," replevin, etc., did not include compensation for wrongful "garnishment," the court holding that damages for wrongful garnishment could not be recovered, since in such a case the statute provided only for recovery of costs. It was said: "The only remedy, if any, for a principal defendant whose funds are thus improperly tied up by garnishment [the case being one of garnishment of a bank deposit], would seem to be in an action for malicious prosecution." **Anno:** 125 ALR 1226.

An action based upon a wrongful or malicious ancillary attachment has been held to lie under a statute providing merely that when an "original attachment" shall have been wrongfully or vexatiously sued out, an action would lie. **Anno:** 125 ALR 1226.

p. 192, n. 19. See annotation in 125 ALR 1226

p. 192, n. 3. Adams v Thibault, 49 Wash2d 24, 297 P2d 954, 57 ALR2d 1372, overruling Gutter v Joiner, 56 Wash 202, 105 P 457.

Anno: 57 ALR2d 1376.

§ 986. Malice and Probable Cause.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

Forms: 20 Am Jur Pl & Pr Forms 20:342–20:344.

Am Jur cited in Jones v. Phillips Petroleum Co. (Mo App) 186 SW2d 868.

Brown v. Guaranty Estates Corp. 239 NC 595, 80 SE2d 645, 40 ALR2d 1103.

Hyde v. Southern Grocery Stores, 197 SC 263, 15 SE2d 353.

p. 192, n. 4. It has been held that the malice essential to support an action for malicious and wrongful attachment may be either actual malice or legal malice. Brown v Guaranty Estates Corp. 239 NC 595, 80 SE2d 645, 40 ALR2d 1094.

p. 192, n. 5. Pittsburg, J. E. & E. R. Co. v. Wakefield Hardware Co. 138 NC 174, 50 SE 571, 3 Ann Cas 720.

Probable cause may have existed though the attachment was unauthorized; a previous admission of the existence of the grounds for an attachment constitutes probable cause. **Anno:** 93 Am St Rep 464. But if the affidavit was false and if the plaintiff had no good reason to believe it true, there would be a clear absence of probable cause. Fortman v. Rottier, 8 Ohio St 548, 72 Am Dec 606.

§ 987. — Under Wrongful Attachment or Garnishment Statutes.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

Forms: 20 Am Jur Pl & Pr Forms 20:342–20:344.

Page 193. *Add, following note* 10: The fact that an attachment was quashed upon the ground that it was sued out without sufficient cause does not necessarily imply that there was a lack of good cause.[10.1]

[10.1] Harris v. Lipson, 167 Va. 365, 189 S. E. 349, 108 A.L.R. 912.

§ 988. When Cause of Action Arises.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

Forms: 20 Am Jur Pl & Pr Forms 20:342–20:344.

Am Jur cited in Ross v Peck Iron & Metal Co. (CA4 Va) 264 F2d 262.

Exchange Lumber & Mfg. Co. v Thomas, 71 Idaho 391, 233 P2d 406.

Blankenship v Staton (Ky) 348 SW2d 925.

Hyde v. Southern Grocery Stores, 197 SC 263, 15 SE2d 353.

§ 989. Necessity of Actual Levy and Interference.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

Forms: 20 Am Jur Pl & Pr Forms 20:342–20:344

p. 194, n. 2. Basham v. Citizens' Loan Co. 216 Ky 251, 287 SW 719.

Brown v Guaranty Estates Corp. 239 NC 595, 80 SE2d 645, 40 ALR2d 1094.

As to necessity for levy to impose liability on the attachment bond, see infra, § 993 (Supplement)

Page 194. *Add, following note 2:* A levy by indorsement upon the writ and notice to the defendant therein is sufficient in the case of certain property, even though actual possession thereof is not taken, if the property is in the constructive possession of the officer by the levy of the writ.[2.1]

[2.1] Rice v. Miller, 70 Tex. 613, 8 S. W. 317, 8 Am. St. Rep. 630.

p. 195. n. 3. Substitute the word "manual" in the text for the words "arrest or." Eliminate the Texas citation in the footnote.

§ 990. Successive Attachments and Garnishments.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

Forms: 20 Am Jur Pl & Pr Forms 20:342–20:344.

§ 991. Attachment and Garnishment of Property Not Liable to Process.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

Forms: 20 Am Jur Pl & Pr Forms 20:342–20:344

§ 992. Cause of Action of Third Persons.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

Forms: 20 Am Jur Pl & Pr Forms 20:342–20:344.

Am Jur cited in Peterson v. Wiesner, 62 Nev 184, 146 P2d 789.

§ 993. Generally.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

Forms: 2 Am Jur Pl & Pr Forms 2:1155–2:1158.

Am Jur cited in American Surety Co. v. Florida Nat. Bank & T. Co. (C. C. A. 5th) 94 F. (2d) 126 (n. 10).

RCL quoted in Jansen v. Pollastrine, 10 Alaska 316.

Page 197. *Insert, at the beginning of the section:* The giving of an attachment bond creates no damage and in itself confers no right to sue, but simply provides security for payment of recoverable damages.[19.1] Regardless of whether an action is predicated upon a wrongful attachment[19.2] or a malicious abuse of the process, damage resulting therefrom is essential to the right to sue on the bond.[19.21] Accordingly, some cases hold that the bond does not provide against a mere suing out of the writ of attachment and that the right to sue arises only when the property is actually levied upon, for until then there is no attachment.[19.3] However, other cases support the contention that the failure to levy goes not to the existence of the cause of action, but merely to the extent of damages.[19.31]

[19.1] **Harris v. Lipson, 167 Va. 365, 189 S. E. 349, 108 A.L.R. 912.**

[19.2] **Harris v. Lipson, 167 Va. 365, 189 S. E. 349, 108 A.L.R. 912.**

[19.21] **Harris v. Lipson, 167 Va. 365, 189 S. E. 349, 108 A.L.R. 912.**

The filing of a lis pendens against real estate based on attachment proceedings does not sustain an action on an attachment bond where no levy was made under the attachment, even though a purchaser, under written contract with the attachment defendant, refused to complete the contract, since the lis pendens would not have prevented the enforcement of the contract either during the pendency of the attachment proceedings or thereafter. Harris v. Lipson, 167 Va 365, 189 S. E. 349, 108 A.L.R. 912.

[19.3] **Harris v. Lipson, 167 Va. 365, 189 S. E. 349, 108 A.L.R. 912.**

Annotation: 108 A.L.R. 917.

[19.31] Annotation: 108 A.L.R. 917.

p. 197, n. 1. Harris v. Lipson, 167 Va. 365, 189 S. E. 349, 108 A.L.R. 912.

As regards liability on the attachment bond, attachment statutes should be read in connection with the statute providing that if property is distrained for rent not due or attached for any rent not accruing or taken under any attachment sued out without good cause, the owner of such property may, in an action against the party suing out the warrant of distress or attachment, recover damages for the wrongful seizure and also, if the property is sold, for the sale thereof. Harris v. Lipson, 167 Va. 365, 189 S. E. 349, 108 A.L.R. 912

p. 198, n. 4. Brown v Guaranty Estates Corp. 239 NC 595, 80 SE2d 645, 40 ALR2d 1094.

p. 198, n. 10. To recover on an attachment bond, it has been held necessary that the order of attachment be dissolved, dismissed, or set aside by the court, or that the attachment plaintiff fail to obtain a judgment against the attachment defendant. Brown v Guaranty Estates Corp. 239 NC 595, 80 SE2d 645, 40 ALR2d 1094

§ 994. Liability of Surety.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

Forms: 2 Am Jur Pl & Pr Forms 2:1155–2:1158.

RCL quoted in Jansen v. Pollastrine, 10 Alaska 316.

p. 198, n. 13. The surety on an attachment bond has been held not liable in tort for the act of the attachment plaintiff in maliciously suing out the order of attachment without probable cause and procuring its levy on the property of the attachment defendant. Brown v Guaranty Estates Corp. 239 NC 595, 80 SE2d 645, 40 ALR2d 1094.

A proceeding on an attachment bond has been held to be a statutory proceeding based on the contractual obligations of the attachment plaintiff and his surety embodied in the bond and the statute under which it is given. Brown v Guaranty Estates Corp. 239 NC 595, 80 SE2d 645, 40 ALR2d 1094.

It has been held that the sureties on an undertaking in support of a wrongful attachment may be held liable for actual damages resulting therefrom in accordance with their promise to pay the attachment debtor all costs and "damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking." Finn v Witherbee, 126 Cal App2d 45, 271 P2d 606, 45 ALR2d 1215.

p. 199, n. 14. Finn v Witherbee, 126 Cal App2d 45, 271 P2d 606, 45 ALR2d 1215.

§ 995. Discharge of Surety.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

Forms: 2 Am Jur Pl & Pr Forms 2:1155–2:1158.

§ 996. Estoppel.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

Forms: 2 Am Jur Pl & Pr Forms 2:1155–2:1158.

§ 997. Generally.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

Forms: 2 Am Jur Pl & Pr Forms 2:1161

§ 998. Lack of Malice and Advice of Counsel.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

Am Jur cited in City Lumber Co. v Barrett (Ky) 327 SW2d 402.

Stumpf v Pederson, 180 Okla 408, 70 P2d 101 (notes 14, 16).

Page 201. *Add, following note* 17: It should be noted that it has been said that statements to the effect that it is not necessary to prove malice in an action for malicious and wrongful attachment are not good law.[17.5]

[17.5] Brown v. Guaranty Estates Corp. 239 NC 595, 80 SE2d 645, 40 ALR2d 1103, disapproving of such statements in Kirkham v. Coe, 46 NC (1 Jones L) 423 and Tyler v. Mahoney. 168 NC 237, 84 SE 362

§ 999. Probable Cause.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

p. 201, n. 2. In this connection it is defendant's duty in attachment proceedings to mitigate his damages where he is financially able to do so. Adams v Thibault, 49 Wash2d 24, 297 P2d 954, 57 ALR2d 1372, overruling Gutter v Joiner, 56 Wash 202, 105 P 457.

§ 1000. Merits of Claim or Grounds for Attachment or Garnishment.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

Am Jur cited in Hyde v. Southern Grocery Stores, 197 SC 263, 15 SE(2d) 353.

Brown v. Peoples Nat. Bank of Washington, 39 Wash2d 776, 238 P2d 1191.

p. 201, n. 3. In this connection it is defendant's duty in attachment proceedings to mitigate his damages where he is financially able to do so. Adams v Thibault, 49 Wash2d 24, 297 P2d 954, 57 ALR2d 1372, overruling Gutter v Joiner, 56 Wash 202, 105 P 457.

p. 201, n. 4. Anno: 65 ALR2d 1426.

§ 1001. Defenses in Mitigation of Damages.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

p. 202, n. 9. In this connection it is defendant's duty in attachment proceedings to mitigate his damages where he is financially able to do so. Adams v Thibault, 49 Wash2d 24, 297 P2d 954, 57 ALR2d 1372, overruling Gutter v Joiner, 56 Wash 202, 105 P 457.

§ 1002. Defenses of Attaching Officer.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

Forms: 2 Am Jur Pl & Pr Forms 2:1162; 20 Am Jur Pl & Pr Forms 20:342, 20:343.

§ 1003. Defenses in Action on Bond.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

Page 204. *Add, following note* 6: The invalidity of the levy is ordinarily no defense to an action on the bond.[6.1]

[6.1] Annotation: 108 A.L.R. 918.

§ 1004. Running of Statute of Limitations.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

p. 204, n. 8. Brown v Westport Finance Co. (DC Mo) 145 F Supp 265.

p. 204, n. 11. First Nat. Bank v. Avery Planter Co. 69 Neb 329, 95 NW 622, 111 Am St Rep 541.

§ 1005. Generally.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

Am Jur quoted in Levy v J. A. Olson Co. 237 Miss 452, 115 So 2d 296.

Am Jur cited in Florida Transp. Co. v Dixie Sightseeing Tours, Inc. (Fla App) 139 So 2d 175.

Godwin v Vinson, 254 NC 582, 119 SE2d 616.

Page 205. *Add, following note* 18: The premium paid for a refunding bond executed to secure the release of money wrongfully attached may be allowed as damages against the one securing the attachment.[18.1]

[18.1] Gordon v. Kentucky Midland Coal Co. 152 Tenn 367, 278 SW 68, 42 ALR 1052.

Anno: 42 ALR 1057.

p. 205, n. 19. A recovery on an attachment bond has been held to be for the actual damages sustained by the attachment defendant by reason of the levy of the order of attachment on his property limited, as to the surety, by the amount of the bond. Brown v Guaranty Estates Corp. 239 NC 595, 80 SE2d 645, 40 ALR2d 1094.

Damages resulting from a wrongful attachment in excess of the sum specified in the attachment undertaking have been held not recoverable by the attachment defendant in the absence of malice and a want of probable cause. Finn v Witherbee, 126 Cal App2d 45, 271 P2d 606, 45 ALR2d 1215.

p. 206, n. 1. Anno: 65 ALR2d 1438.

p. 206, n. 2. Anno: 125 ALR 1225.

Page 206. *Add new paragraph at end of section:* Under statutes expressly or impliedly creating a right of action for wrongful attachment or garnishment in the absence of proof that the same was sued out maliciously and without probable cause, it is usually held that the defendant in the original proceeding is entitled to recover "actual" damages for the merely wrongful attachment.[2.1]

[2.1] **Anno:** 125 ALR 1223.

In Sarg v. Sugg, 186 Okla 37, 96 P(2d) 15, 125 ALR 1217, it was said that under a statute providing that "if the attachment or garnishment shall be discharged on motion prior to the final judgment, the defendant may, upon proper supplemental answer, recover his damages, as in other cases for such wrongful attachment or garnishment," there could be no issue of law upon the right of the defendant in attachment to recover "any damage he sustained," but that the damages he had sustained must be shown by proof, since the only damages that can be mandatorily awarded him without proof were nominal damages awarded under the statute relating to actions generally.

§ 1006. Exemplary Damages.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

Am Jur cited in Lee v. Dunbar (Mun Ct App Dist Col), 37 A(2d) 178.

p. 206, n. 3. Reliable Mut. Hail Ins. Co. v. Rogers, 61 Okla 226, 160 P 914, LRA1917B 350.

Anno: 125 ALR 1224 (under statutes providing for recovery of damages for wrongful attachment or garnishment).

Exemplary damages may be awarded against attaching officers who, although they have no personal acquaintance with, or ill-will against, defendant, wilfully and knowingly allow themselves to become tools of the attaching creditors, whose object is apparently malicious, and make an unlawful levy in a high-handed and oppressive way to oppress the debtor. Giddings v. Freedley (CCA 2d) 128 F 355, 65 LRA 327.

It has been held that punitive damages may be awarded in an action for malicious and wrongful attachment upon proof that the attachment plaintiff was actuated by actual, as distinguished from legal, malice in suing out the order of attachment. Brown v Guaranty Estates Corp. 239 NC 595, 80 SE2d 645, 40 ALR2d 1094.

p. 206, n. 4.

Only actual damages, and not exemplary or punitive damages, may be recovered in an action for wrongful attachment or garnishment where the levy was not made maliciously and without probable cause, under statutes requiring a bond for the payment of "all damages" sustained by reason of the wrongful attachment, which statutes had been construed as recognizing a like liability apart from an action on the bond. **Anno:** 125 ALR 1225.

p. 206, n. 5. Anno: 54 ALR2d 1379–1381.

p. 206, n. 6. Punitive damages are not favored by law and it is only in exceptional cases of negligence that the law will permit punitive damages to be awarded. Mills v Liquidators, 206 Or 212, 288 P2d 1060.

§ 1007. — In Action on Bond.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

§ 1008. Duty to Minimize Damages.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

Am Jur quoted in Levy v J. A. Olson Co. 237 Miss 452, 115 So 2d 296.

Am Jur cited in Lynch v Call (CA10 Utah) 261 F2d 130.

American Surety Co. v Florida Nat. Bank & T. Co. (CCA5) 94 F2d 126 (n 17); Stumpf v Pederson, 180 Okla 408, 70 P2d 101 (n 17).

§ 1009. Generally.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

§ 1010. Loss of Use of, or Injury to, Property.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.; Damages, **Am Jur Proof of Facts** pp 491 et seq.

Am Jur quoted in Levy v J. A. Olson Co. 237 Miss 452, 115 So 2d 296.

Am. Jur. cited in Stumpf v. Pederson, 180 Okla. 408, 70 P. (2d) 101 (n. 4).

p. 208, n. 20. Anno: 45 ALR2d 1222 et seq.

It has been held that the basis for recovery of the rental value of goods wrongfully attached is not that the goods were used while in custodia legis, but that they were kept from the plaintiff's possession. Finn v Witherbee, 126 Cal App2d 45, 271 P2d 606, 45 ALR2d 1215.

p. 208, n. 3. Anno: 45 ALR2d 1222.

Page 208. *Add at end of section:* Generally, a person deprived of the use of property by its having been wrongfully attached cannot recover the value of such use without proof of the value, nor can he recover where the value is speculative.[5.5] In a number of cases the question has risen whether the property would have been used by the attachment defendant if it had not been wrongfully attached; in the majority of such cases recovery was allowed against the attachment plaintiff or his security.[5.51] There can be no recovery of the value of the use of property wrongfully attached where such attachment did not result in loss of possession of, or ability to use, the property.[5.52]

[5.5] **Anno:** 45 ALR2d 1226–1229.

[5.51] **Anno:** 45 ALR2d 1229–1233.

The fact that at the time the defendant (the attachment plaintiff) wrongfully attached three recording machines owned by the plaintiff they were the subject of a loan by the plaintiff to a corporation in which he was interested has been held not to deprive the plaintiff of the right to recover from the defendant's sureties the rental value of such machines during the period of the attachment up to the amount covered by the surety bond. Finn v Witherbee, 126 Cal App2d 45, 271 P2d 606, 45 ALR2d 1215.

That an owner of goods offers them for sale has been held not to deprive him of the right to recover for loss of their use upon wrongful attachment. Finn v Witherbee, 126 Cal App2d 45, 271 P2d 606, 45 ALR2d 1215.

[5.52] Tsesmelis v Sinton State Bank (Tex Civ App) 35 SW2d 451, affd (Tex Com App) 53 SW2d 461, 85 ALR 319.

Anno: 45 ALR2d 1233.

§ 1011. Injury to Business, Credit, Loss of Profits, etc.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

Forms: 2 Am Jur Pl & Pr Forms 2:1154, 2:1158 2:1160.

Am. Jur. cited in Stumpf v. Pederson, 180 Okla. 408, 70 P. (2d) 101 (notes 10, 12).

p. 209, n. 6. It has been held that the actual damages recoverable by an attachment defendant for malicious and wrongful attachment may include compensation for the injury to his credit, business, or feelings. Brown v Guaranty Estates Corp. 239 NC 595, 80 SE2d 645, 40 ALR2d 1094.

§ 1012. Injury to Character, Mental Suffering, Sickness, Humiliation, etc.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

p. 211, n. 15. Brown v. Guaranty Estates Corp. 239 NC 595, 80 SE2d 645, 40 ALR2d 1094 (injuries to feelings).

§ 1013. Interest.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

Am Jur cited in Gray v American Surety Co. 129 Cal App2d 471, 277 P2d 436.

Subin v United States Fidelity & Guaranty Co. 12 App Div 2d 49, 208 NYS2d 278.

p. 211, n. 17. Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co. 127 La 971, 54 So 318, Ann Cas 1913E 679.

Anno: 111 ALR 1303; 36 ALR2d 381–383, 389, 393.

p. 211, n. 18. Anno: 111 ALR 1303, 36 ALR 2d 391.

p. 211, n. 19. Anno: 111 ALR 1303.

p. 212, n. 20. Anno: 111 ALR 1303.

§ 1014. For Defending Attachment or Garnishment.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

Am Jur quoted in Levy v J. A. Olson Co. 237 Miss 452, 115 So 2d 296.

Knighton v Bramlett, 226 SC 133, 83 SE2d 753.

Am Jur cited in Stumpf v. Pederson, 180 Okla. 407, 70 P. (2d) 101 (n. 3).

p. 212, n. 3. It has been held that the expenses involved in setting aside an attachment which is defective, and subject to dissolution by virtue of the defect regardless of the merits of the action, are properly regarded as damages resulting from the attachment. Great American Indem. Co v Sweetwater Mining Co. 74 Nev 219, 326 P2d 1105, 65 ALR2d 1422.

p. 212, n. 4. Anno: 65 ALR2d 1429.

p. 213, n. 5. Anno: 56 ALR2d 111 (amount); 65 ALR2d 1441.

p. 213, n. 6. Anno: 65 ALR2d 1441.

p. 214, n. 9. Anno: 65 ALR2d 1428.

p. 214, n. 10. Anno: 65 ALR2d 1428.

p. 214, n. 11. Anno: 65 ALR2d 1433.

p. 214, n. 14. The citation to 25 ALR should be to p. 586.

§ 1015. For Defending Main Action on Its Merits.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

p. 214, n. 16. Anno: 65 ALR2d 1433.

It has been held that statutory authorization of an award for a wrongful attachment, including attorneys' fees, does not extend to attorneys' fees and witnesses' expenses incurred in successfully defending the original action on the merits, where the attachment was not defective but failed only because of the failure to sustain the cause of action; in such case, the expenses are not attributable to the attachment but to the fact that the action was brought. Great American Indem. Co. v Sweetwater Mining Co. 74 Nev 219, 326 P2d 1105, 65 ALR2d 1422.

§ 1016. — Where Defense of Main Action Necessary to Defeat Attachment.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

Am Jur quoted in Reachi v. National Auto. & Casualty Ins. Co. 37 Cal2d 808, 236 P2d 151.

Olsen v. National Grocery Co. 15 Wash2d 264 130 P2d 78.

p. 215, n. 19. Anno: 56 ALR2d 111; 65 ALR2d 1436.

§ 1017. — Where Property Is Attached or Garnished on Ground of Nonresidence.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

p. 215, n. 2. Anno: 65 ALR2d 1437.

§ 1018. Apportionment of Fees Where Same Counsel Serves in Attachment and Main Proceedings.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.
p. 216, n. 4. Anno: 65 ALR2d 1432.

§ 1019. Generally.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.
Am Jur quoted in Powell **v.** Schultz (Mo App) 118 SW(2d) 25 (notes 12–13).

§ 1020. — Set-off, Counterclaim, Reconvention, Cross Complaint, Recoupment, Pleas and Abatement, etc.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.
Am Jur cited in Exchange Lumber & Mfg. Co. **v.** Thomas, 71 Idaho 391, 233 P2d 406.
Biedler v. Malz, 323 Ill App 265, 55 NE2d 300.
p. 218, n. 3. Anno: 68 ALR 462, 463.
A counterclaim for damages sustained through the seizure of the defendant's property under attachments maliciously instituted is not connected with the subject of a subsequent action brought on the same claims and causes of action. Anno: 68 ALR 473, 474.

§ 1021. Technical Form of Action.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.
Forms: 20 Am Jur Pl & Pr Forms 20:342, 20:343.
p. 219, n. 14.
When the writ of attachment is considered as void, trespass and not case is the proper form of common law remedy. Allison **v.** Rheam. 3 Serg. & R. (Pa) 139. 8 Am Dec 644.
p. 219, n. 18. It has been held that the statutory proceeding on an attachment bond may be prosecuted either by a motion in the original cause, or by an independent action. Brown v Guaranty Estates Corp. 239 NC 595, 80 SE2d 645, 40 ALR2d 1094.

§ 1022. Remedies of Third Persons.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.
Forms: 20 Am Jur Pl & Pr Forms 20:342, 20:343.

§ 1023. Contribution among attaching or Garnishing Creditors as to Liability for Wrongful Attachment.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

§ 1024. Generally.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.
p. 222, n. 3. Anno: 127 ALR 693.

§ 1025. Principal or Agent as Defendant.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.
Am Jur cited in Clark **v.** Andrews, 109 Cal App2d 193, 240 P2d 330.

§ 1026. Corporation Defendant.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

§ 1027. Joint Defendants.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

§ 1028. In Action on Bond.

Practice Aids: Attachment, Am Jur Proof of Facts pp 221 et seq.

§ 1029. — Defendants.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.
p. 224, n. 6. Brown v Guaranty Estates Corp. 239 NC 595, 80 SE2d 645, 40 ALR2d 1094.
p. 224, n. 7. Brown v Guaranty Estates Corp. 239 NC 595, 80 SE2d 645, 40 ALR2d 1094.

§ 1030. Generally.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.
Am Jur cited in General Acci. Fire & Life Assur. Corp. **v.** Mitchell, 120 Colo 531, 211 P2d 551.
R. C. L. cited in Kilbourne **v.** McAllister, 179 Okla. 267, 65 P. (2d) 516.
p. 225, n. 3. Anno: 65 ALR2d 1439.

§ 1031. In Action on Bond.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

§ 1032. Generally.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

§ 1033. Presumptions and Burden of Proof.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.
Am Jur cited in Latronica v Royal Indem. Co. 8 Ill App2d 337, 132 NE2d 16.
Rowan v State. 172 Md 190, 191 A 244 (n 13).

§ 1034. Admissibility.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

§ 1035. Writ and Record.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

§ 1036. — Admissions and Declarations.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

§ 1037. Weight and Sufficiency of Evidence.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.
p. 228, n. 16. Where the attachment defendant sues the attachment plaintiff for malicious and wrongful attachment, it has been held incumbent upon him to establish that the attachment plaintiff sued out the order of attachment maliciously and without probable cause for believing that the alleged ground for attachment existed, that the order of attachment was actually levied and the attachment defendant was thereby deprived of his right to use the property for any legitimate purpose, that the attachment proceeding legally terminated in favor of the attachment defendant, and that the attachment defendant suffered damage as a result of the levy. Brown v Guaranty Estates Corp. 239 NC 595, 80 SE2d 645, 40 ALR2d 1094.

§ 1038. Generally.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.
p. 229, n. 8. Anno: 143 ALR 788, s. 56 ALR 2d 111 (reasonableness, adequacy, or excessiveness of specific fees); 65 ALR2d 1440.

§ 1039. Generally.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.

§ 1040. Generally.

Practice Aids: Attachment, **Am Jur Proof of Facts** pp 221 et seq.
p. 230, n. 18. Anno: 65 ALR2d 1439.
p. 230, n. 19. Anno: 65 ALR2d 1439.

ATTORNEY GENERAL

New section added in this Supplement:

§ 8.5. — ***Intervention.***

§ 1. Scope of Article.

p. 232, n. 1. As to prohibition against attorney general, see PROHIBITION.

§ 2. Definition.

p. 232, n. 2. Commonwealth ex rel. Ferguson v Gardner (Ky) 327 SW2d 947, 74 ALR2d 1059.

The attorney general of Florida has been recognized as the chief law officer of the state, and, absent express legislative restriction, may exercise his power and authority in the premises as the public interest may require. Ervin v Collins (Fla) 85 So 2d 852, 59 ALR2d 706.

§ 3. Distinction between Prosecuting Attorneys and Attorneys General.

Am Jur cited in People ex rel. Castle v Daniels. 8 Ill2d 43, 132 NE2d 507 (dissent op).

§ 4. Appointment, Qualifications, and Tenure of Office.

Am Jur cited in Wilentz v. Hendrickson, 133 NJ Eq 447, 33 A(2d) 366.

§ 5. At Common Law.

Am Jur quoted in State ex rel. Williams v. Karston, 208 Ark 703, 187 SW2d 327.

State ex rel. Olsen v Public Service Com. 129 Mont 106, 283 P2d 594.

Am Jur cited in Darling Apartment Co. v. Springer, 25 Del Ch 420, 22 A2d 397, 137 ALR 803.

Johnson v. Com. 291 Ky 829, 165 SW(2d) 820.

Furman University v McLeod, 238 SC 475, 120 SE2d 865.

RCL quoted in Dunn Constr. Co. v. Craig, 191 Miss 682, 2 So(2d) 166, suggestion of error overruled in 191 Miss 715, 3 So(2d) 834.

RCL cited in Wilentz v. Hendrickson, 133 NJ Eq 447, 33 A(2d) 366.

Com. v. Margiotti, 325 Pa 17, 188 A 524.

p. 234, n. 5.

See Darling Apartment Co. v. Springer, 25 Del Ch 420, 22 A2d 397, 137 ALR 803.

The duties attached to the office of attorney general, created by a state Constitution which fails to specify the duties of the office, are those common-law duties which such officer had previously exercised as chief law officer of the realm. Kennington-Saenger Theatres v. State, 196 Miss 841, 18 So2d 483, 153 ALR 883.

p. 234, n. 6. Darling Apartment Co. v. Springer, 25 Del Ch 420, 22 A2d 397, 137 ALR 803.

Page 235. *Add, following note 9:* And in carrying out his power to investigate criminal acts, institute proceedings, and to try cases on the commonwealth's behalf, he may supersede and set aside the district attorney when in his judgment such action may be necessary.[9.5]

[9.5] Re Grand Jury Investigation, 365 Pa 330, 75 A2d 465.

§ 6. Under Modern Statutes.

Am Jur cited in Darling Apartment Co. v. Springer, 25 Del Ch 420, 22 A2d 397, 137 ALR 803.

State ex rel. McKittrick v Missouri Pub. Serv. Commission, 352 Mo 29, 175 SW2d 857.

National Asso. for the Advancement of Colored People v Eure, 245 NC 331, 95 SE2d 893.

RCL quoted in Dunn Constr. Co. v. Craig, 191 Miss 682, 2 So(2d) 166, suggestion of error overruled in 191 Miss 715, 3 So(2d) 834.

RCL cited in State ex rel. Rice v. Stewart, 184 Miss 202, 184 So 44, 185 So 247.

Wilentz v. Hendrickson, 133 NJ Eq 447, 33 A2d 366.

Com. v. Margiotti, 325 Pa 17, 188 A 524.

p. 235, n. 11.

Where the state constitution in providing for the appointment and term of office of an attorney general does not prescribe his duties, they are the same as at common law, save as enlarged or circumscribed by the legislature. Van Riper v. Jenkins, 137 NJ Eq 603, 45 A2d 844, 163 ALR 1343

It has been held that the statutory provision for exercise by the attorney general of all common-law duties and authority pertaining to his office under the common law has reference to his duties under the common law as it existed in England prior to 1607. Commonwealth ex rel. Ferguson v Gardner (Ky) 327 SW2d 947, 74 ALR2d 1059.

p. 235, n. 13. Anno: 23 LRA(NS) 691.

See Darling Apartment Co. v. Springer, 25 Del Ch 420, 22 A2d 397, 137 ALR 803.

As to power of attorney general to attack validity of divorce decree, see 17 Am Jur DIVORCE AND SEPARATION p 294 § 280, p 390 § 478.

p. 236, n. 15.

It has been held that although it was perfectly obvious that by statute the attorney general was the general and legal adviser of the various departments and officers of the state government and was entitled to appear and represent them in court, such statute did not require that the attorney general, standing in the position of an attorney to a client who happened to be an officer of the government, should step into the shoes of the client in wholly directing the defense and the legal steps to be taken in opposition or contrary to the wishes and demands of his client or the officer or department concerned. **Anno:** 137 ALR 819.

Notwithstanding the statutory right of the attorney general to represent state officers, and the statutory prohibition against employment of counsel by state officers in connection with public business, such officers were entitled to be represented in the supreme court by counsel of their own choosing where the matter at issue was the correctness of the ruling of the trial court striking the appearance of such counsel in the trial court as representatives of such state officers in an action against them to obtain payment of a claim against the state **Anno:** 137 ALR 819.

p. 236. n. 16. Anno: 137 ALR 827.

Page 236. *Add, following note* 16: In determining whether a statute confers implied authority upon a commission to appoint its own law officer in derogation of the prerogative of the attorney general to represent such state agency in the courts, the language of such statute must be considered in the light of the office of attorney general at common law and of the general understanding of the nature of the office and the public policy in regard thereto exhibited through the years.[16.5]

[16.5] Darling Apartment Co. v. Springer, 25 Del Ch 420, 22 A2d 397, 137 ALR 803, wherein, in holding that a statute authorizing the Delaware Liquor Commission "to engage the services of experts and of persons engaged in the practice of a profession" did not confer power to appoint a law officer for the commission independent of the attorney general to represent the state in the courts, the court said that in the absence of express legislative restriction the attorney general, as the chief law officer of the state, may exercise all of the powers incident to the office at common law; that the right of a mere administrative agency of the state to appoint it own law officer to conduct litigations in supersession of the attorney general must rest on a plain and unambiguous grant of authority; and that the statute involved in this case did not indicate a legislative purpose to grant the commission such authority where it did not mention "counsel," "attorney," or "actions," and did not suggest legal representation of any kind.

Anno: 137 ALR 818.

p. 236, n. 17. Anno: 137 ALR 820.

It has been held, however, that the state highway commission had no authority to employ an attorney, in spite of the undeniable necessity for the constant services of an attorney, where the statute creating such commission expressly provided that it "may do all things necessary in the construction or maintenance of said roads except where the power is by this or another statute expressly or by clear implication denied or restricted," and such statute made no reference to a previous statute which expressly forbade any state officer, board of trustees, or the head of any department or institution of the state to employ or be represented by other counsel or attorney at law than the attorney general or his assistants, unless an emergency should arise which in the opinion of the attorney general required the employment of other counsel. **Anno:** 137 ALR 828

In a condemnation proceeding brought by a state highway department, it was held that an assistant attorney general could not bind the department by a statement that, if a privately owned septic tank had to be moved, the department would take care of the removal. South Carolina State Highway v. Butterfield, 216 SC 463, 58 SE2d 737.

Page 236. *Add, following note* 17: And statutes which authorize various commissions, such as a state boundary commission, or a state public utilities commission, to employ special counsel, have been held valid.[17.5] But on the other hand, it has been held that the legislature had no power to confer upon the superintendent of the state insurance department power to conduct certain litigation with reference to insurance companies which had theretofore been a duty required of the attorney general under a Constitution providing that the executive department should consist of certain officers, including the attorney general, and that they "shall perform such duties as may be prescribed by law." And the same rule was held to apply to employment of counsel in prosecutions by the rivers and lakes commission and by the state board of pharmacy.[17.6]

[17.5] **Anno:** 137 ALR 820 et seq.

[17.6] Fergus v. Russel, 270 Ill 304, 110 NE 130, Ann Cas 1916B 1120.
Anno: 137 ALR 822.

§ 7. Generally.

p. 236, n. 2.

Congress may, in the exercise of the power conferred by Article 4, § 3, clause 2 of the Constitution to dispose of and make all needful rules and regulations respecting property belonging to the United States, limit the power of the Attorney General to prosecute claims for the government. United States v. California, 332 US 19, 91 L ed 1889, 67 S Ct 1658.

Page 237. *Add following note* 4: The Attorney General may, in the exercise of his general powers to institute and maintain court proceedings in order to safeguard national interests, file and maintain a suit to determine the ownership as between a state and the United States of lands under the ocean beyond the coast.[4.5]

[4.5] United States v. Louisiana, 339 US 699, 94 L ed 1216, 70 S Ct 914; United States v. California, 332 US 19, 91 L ed 1889, 67 S Ct 1658.

No implication of a limitation of the statutory power of the Attorney General to institute and maintain court proceedings to safeguard national interests, so as to preclude him from instituting a suit for determination of the respective rights of the United States and the State of California in lands under the ocean off the coast of California, can be drawn from fact that Congress twice failed to grant specific authority to file such a suit, or from a joint resolution quitclaiming to the adjacent states a 3-mile belt of all lands situated under the ocean beyond the low water mark except those which the government had previously acquired by purchase, condemnation, or donation, where a presidential veto of such resolution was sustained. United States v. California, 332 US 19, 91 L ed 1889, 67 S Ct 1658.

p. 237, n. 6.

The statutory provision (5 USCA § 310) that special assistants to the Attorney General may, "when thereunto specifically directed by the Attorney General, conduct any kind of legal proceeding" is for the protection of the United States, and does not require the naming of the persons or the particular cases to be prosecuted. Shushan v. United States (CCA 5th) 117 F(2d) 110, 133 ALR 1040, writ of certiorari denied in 313 US 574, 85 L ed 1531, 61 S Ct 1085, 1086.

p. 237, n. 7. See 28 US §§ 503 et seq. (1948 Revision).

p. 237, n. 11. The opinions of the attorney general are always valuable when passing upon questioned statutes, and, although not binding, are always considered and frequently resorted to. United States ex rel. Louisiana v. Jack, 244 US 397, 61 L ed 1222, 37 S Ct 605; Union Ins. Co. v. Hoge, 21 How.(US) 35, 16 L ed 61; Harrison v. Vose, 9 How. (US) 372, 13 L ed 179; Surgett v. Lapice, 8 How.(US) 48, 12 L ed 982; First Nat. Bank v. United States (CCA 8th) 206 F 374, 46 LRA(NS) 1139

p. 237, n. 12. It has been held that the Director of the Federal Bureau of Prisons is the "authorized representative" of the Attorney General, within the meaning of a statute providing that persons convicted of an offense against the United States shall be committed to the custody of the Attorney General or "his authorized representative," and is empowered to direct the transfer of federal prisoners from one institution to another. Mullican v United States, 252 F2d 398, 70 ALR2d 1217.

§ 8. Conducting Litigation—In General.

Am Jur cited in Johnson v. Com. 291 Ky 829, 165 SW(2d) 820.

State ex rel. Taylor v. Wade, 360 Mo 895, 231 SW2d 179.

Bonniwell v Flanders (ND) 62 NW2d 25, 40 ALR2d 1121.

p. 238, n. 15. Brown v Memorial Nat. Home Foundation, 162 Cal App 2d 513, 329 P2d 118, 75 ALR2d 427, cert den 358 US 943, 3 L ed 2d 352, 79 S Ct 353.

The attorney general of a state is entrusted with the management of all its legal affairs and the prosecution of all suits, civil or criminal, in which the state is interested, having the power to control and manage all litigation on behalf of the state, and to maintain all suits necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights. The attorney general alone has the right to represent the state as to all litigation in which the subject matter is of state-wide interest. Kennington-Saenger Theatres v. State, 196 Miss 841, 18 So(2d) 483, 153 ALR 883.

It has been held that the attorney general, as the chief law officer of the state, may institute legal proceedings necessary to protect the interests of the state and defend all actions affecting public interest. Bonniwell v Flanders, (ND) 62 NW 2d 25, 40 ALR2d 1121.

p. 238, n. 16. It has been held that the statutory provision that the attorney general shall appear for and represent the state before the court in all cases in which the state is interested does not authorize the attorney general to bring an action in the courts if no cognizable common-law or statutory cause of action can be stated. State v Taylor, 58 Wash 2d 252, 362 P2d 247, 86 ALR2d 1365.

p. 238, n. 3. Re Grand Jury Investigation, 365 Pa 330, 75 A2d 465

p. 238, n. 7. It has been held that the primary obligation of the attorney general is to protect the interests of the sovereign state and its departments and subdivisions, including that of aiding in the collection of all tax revenue to which the state is entitled. Commonwealth ex rel. Ferguson v Gardner (Ky) 327 SW2d 947, 74 ALR2d 1059.

Page 239. *Add, following note* 9: And it has been held that specific authority from the Governor or legislature to defend an action by a Federal savings and loan association to restrain state officers from seeking to prevent it from transacting business in the state without complying with the requirements of state law relating to building and loan associations, and for a judgment declaratory of the validity of the statute under which it is organized, is not required by a state statute providing that the attorney general shall appear for the state and prosecute or defend all actions and proceedings in which the state is interested or a party, and when requested by the Governor or either branch of the legislature shall appear for the state and prosecute or defend in any court or before any office any cause or matter in which the state or the people thereof may be in any wise interested.[9.1]

[9.1] First Federal Sav. & L. Asso. v. Loomis (First Federal Sav. & L. Asso. v. Martin) (CCA 7th) 97 F(2d) 831, 121 ALR 99, writ of certiorari dismissed in 305 US 666, 83 L ed 432, 59 S Ct 363.

§ 8.5. (New text) — Intervention.

The attorney general has been denied the power to intervene in civil suits of a private nature in some of the cases, on the ground that the duties imposed upon him by statute did not embrace such an intervention.[1] The attorney general has also been denied the right to intervene in civil suits of a private nature, under statutes authorizing intervention by any person having an interest in the matter in litigation.[2] However, the attorney general has been held to have the right to intervene in civil suits of a private nature involving the interests of the state, under statutes making it his duty to prosecute or defend cases pertaining to the public interest of the state.[3] And it is generally held that the attorney general may intervene in civil suits of a private nature involving the constitutionality of a statute, where the result to be reached in the suit may affect not only the immediate parties to the litigation but also the interests of the public generally.[4]

[1] **Anno:** 163 ALR 1347; 74 ALR2d 1066.

As to right of attorney general or other representative of state to intervene in divorce suit, see 17 Am Jur 294, DIVORCE AND SEPARATION, § 280.

As to right of state to intervene in civil suits of a private nature, see 30 Am Jur 940, PARTIES, § 68.

As to right of attorney general to intervene in suits to enforce a charitable trust, see 10 Am Jur 668, CHARITIES, § 115.5.

[2] **Anno:** 163 ALR 1347.

[3] Mundy v. McDonald, 216 Mich 444, 185 NW 877, 20 ALR 398 (holding that in an action of libel against a judge of the circuit court for filing in the office of the clerk of the circuit court a defamatory statement against the plaintiff, the attorney general may file a motion to dismiss the action on the ground that the declaration of the plaintiff was not sufficient in law because the declaration shows that the defendant was acting as a circuit judge at the time of the alleged libel and had published the matter alleged to be libelous in the exercise of his functions as a circuit judge, where a statute made it a duty of the attorney general to prosecute and defend cases pertaining to the public interest of the state).

Anno: 163 ALR 1348.

[4] Van Riper v. Jenkins, 137 NJ Eq 603, 45 A2d 844, 163 ALR 1343 (further holding that the right of the attorney general of the state to intervene in private litigation when a public issue concerning the welfare of the people is involved transcends the limitation of a court rule relative to intervention; that the attorney general of the state is entitled to intervene in a suit to enjoin a sheriff from taking fingerprints and photographs of persons under indictment and forwarding them to the superintendent of state police where the suit involves the constitutionality of a statute prescribing the doing of these things).

Anno: 163 ALR 1349.

§ 9. — As Affected by Private or Public Character of Litigation.

Am Jur cited in Boykin v. Martocello, 194 Ga 867, 22 SE(2d) 790.

§ 10. — Discretionary Power.

Am Jur cited in Hermann v. Morlidge, 298 Ky 632, 183 SW2d 807.

p. 240, n. 4.

A statute providing that when requested by the governor or either branch of the legislature, the attorney general should appear for the state in any cause or matter in which it or the people thereof should be interested has been construed as meaning that when, for any reason, the attorney general fails to institute or defend such cause or action, he shall be required to do so if either the governor or one branch of the legislature requests it. First Federal Sav. & Loan Asso. v. Loomis (First Federal Sav. & L. Asso. v. Martin) (CCA 7th) 97 F(2d) 831, 121 ALR 99, writ of certiorari denied in 305 US 666, 83 L ed 432, 59 S Ct 363.

§ 11. — Control over and Disposition of Litigation; Dismissal or Compromise; Waiver of State Immunity from Suit.

Am Jur quoted in State ex rel. Carmichael v. Jones, 252 Ala 479, 41 So2d 280.

Cooley v. South Carolina Tax Commission, 204 SC 10, 28 SE2d 445.

Am Jur cited in Dunn v Schmid, 239 Minn 559, 60 NW2d 14.

p. 241, n. 12.

In South Carolina State Highway v. Butterfield, 216 SC 463, 58 SE2d 737, involving a condemnation proceeding brought by a state highway department, it was held that the attorney general could not even bind his successor in office not to bring an action, or not to take an appeal, nor could he assent to or ratify anything which lies within the province of the legislature; and as he represents the state before the court, he does not appear as an attorney at law but exercises the functions imposed on him by law of which the authority to bind the department was not one.

p. 241, n 14

Anno: 86 ALR2d 524.

Where a state constitution, in stating that provision may be made by general law for bringing suit against the state, but that no special act authorizing such a suit shall ever be passed, indicates a policy prohibiting state consent to suit in one particular case in the absence of a general consent to suit in all similar causes of action, the Attorney General of the state will be deemed to be without power to waive in an individual case the state's immunity for suit; and authority conferred upon him by statute to appear and defend actions against the state or its officials will not be deemed to have conferred such power. Ford Motor Co. v. Department of Treasury, 323 US 459, 89 L ed 389, 65 S Ct 347.

The legislature having provided a procedure by which an unsatisfied default judgment for damages inflicted by a motor vehicle may be paid from a state fund, which procedure requires a thirty-day notice prior to the entry of the judgment to be given to the state highway commissioner and the attorney general, it has been held not to be within the province of the commissioner or the attorney general, or both, to waive such notice after the entry of judgment so as to transform a private liability into a state liability. Bonniwell v Flanders (ND) 62 NW2d 25, 40 ALR2d 1121.

p. 241, notes 14, 15. Generally, as to waiver of state's immunity from suit, see 49 Am Jur 313 et seq., STATES, §§ 96 et seq.

§ 12. — Matters of Practice.

Am Jur cited in Van Riper v. Jenkins, 137 NJ Eq 603, 45 A2d 844, 163 ALR 1343.

p. 241, n. 16. Bonniwell v Flanders (ND) 62 NW2d 25, 40 ALR2d 1121.

See Darling Apartment Co. v. Springer, 25 Del Ch 420, 22 A2d 397, 137 ALR 803.

Page 241. *Add, following note 16:* The question whether the attorney general was authorized to begin and prosecute an action can be raised only by answer or plea in abatement where the facts do not appear in the petition.[16.5] But where it appears from the petition that the attorney general as plaintiff is acting in his official capacity for and on behalf of the state, and there are no allegations to the contrary, it will be presumed that he was acting with due authority in bringing the action, notwithstanding that he did not allege that he was acting pursuant to a request of the governor.[16.6]

[16.5, 16.6] Martin v. Smith, 239 Wis 314. 1 NW(2d) 163, 140 ALR 1063.

Page 243. *Add new paragraph at end of section:* The question whether an action by an attorney general in his own name for the state regarding a matter of state concern, but not involving a money judgment in favor of the state was properly entitled will not be considered on appeal where it was not raised below his allegation that he brought the action as attorney general on behalf of the state being to the same effect as if he had begun an action in the name of the state on the relation of the attorney general.[7.5] And the question whether jurisdiction was properly invoked in an action by the attorney general, involving the point as to whether he had been properly authorized to bring the action, will not be considered on appeal where the matter was not pressed in the trial court, and for that reason was not considered by that court.[7.6]

[7.5, 7.6] Martin v. Smith, 239 Wis 314. 1 NW (2d) 163, 140 ALR 1063.

§ 14. Advisory Opinion; Weight and Effect of Opinion.

Am Jur cited in Crown Concrete Co. v Conkling, — Iowa —, 75 NW2d 351; Nevada v Slemmons, 244 Iowa 1068. 59 NW2d 793. 43 ALR2d 693.

R. C. L. cited in State v. Conley, 118 W. Va. 508. 190 S. E. 908.

p. 243, n. 13.

Kerby v. Collin County (Tex Civ App) 212 SW2d 494, 3 ALR2d 804.

The attorney general of the state may be called upon to advise those who administer the government of the state, and in the absence of judicial decision his opinions become the guide of such executives. Van Riper v. Jenkins. 137 NJ Eq 603, 45 A2d 844. 163 ALR 1343.

p. 244, n. 19

The attorney general's construction of a statute, acted upon for many years, has been held entitled to considerable weight. Otter Tail Power Co. v. Elbow Lake, 234 Minn 419. 49 NW2d 197, 27 ALR2d 906.

p. 244, n. 1. Badger v Hoidale (CCA8th) 88 F2d 208, 109 ALR 798 (same effect given to the opinion by the Federal court).

Nevada v Slemmons, 244 Iowa 1068. 59 NW2d 793. 43 ALR2d 693.

Huntworth v. Tanner. 87 Wash 670. 152 P 523, Ann Cas 1917D 676.

§ 15. Generally.

Page 244. *Add, following note* 2: The statute may provide for reasonable additional compensation for part time members of the attorney general's staff who perform unusual and extraordinary services outside of their ordinary and expected duties.[2.5]

[2.5] Application of Young (Del) 104 A2d 263.

§ 16. Actions to Restrain Public Nuisances.

Am Jur quoted in State ex rel. Williams v. Karston, 208 Ark 703. 187 SW2d 327.

§ 17. Probate Proceedings and Actions Concerning Charitable Trusts.

Am Jur quoted in Re Owens' Estate. 244 Iowa 143, 57 NW2d 193.

Com. ex rel. Marshall v Beeman, 299 Ky 26 184 SW2d 117.

Am Jur cited in Re Quinn's Estate, 156 Cal App2d 684, 320 P2d 219.

Re Pruner's Estate, 390 Pa 529, 136 A2d 107,

p. 246, n. 15. It has been held that inasmuch as the proper management of charitable trusts is a matter of public concern, the state is interested therein within the meaning of the statutory provision that the attorney general shall appear for and represent the state before the courts in all cases in which the state "is interested." State v Taylor, 58 Wash 2d 252, 362 P2d 247, 86 ALR2d 1365.

p. 246, notes 15 et seq. For later material see 10 Am Jur. CHARITIES. § 115.5 (Supp.)

p. 247, n. 4. State v Taylor, 58 Wash 2d 252, 362 P2d 247, 86 ALR2d 1365.

Page 247. *Add new paragraph at end of section:* The fact that a will provides for a charitable trust does not authorize intervention by the attorney general in a proceeding to contest the will.[6.5] But there is dictum indicating a view that the attorney general either has the right or, in the trial court's discretion, may be permitted to intervene in such a will contest, depending upon whether he is a necessary party, a point not decided, or a proper party, which the court deemed him to be.[6.51]

[6.5] Commonwealth ex rel. Ferguson v Gardner (Ky) 327 SW2d 947, 74 ALR2d 1059.

Anno: 74 ALR2d 1066.

[6.51] Murphey v Dalton (Mo) 314 SW2d 726, 67 ALR2d 1278.

Anno: 74 ALR2d 1067.

§ 18. Actions against Public Officers.

p. 248, notes 8–12.

See 44 Am Jur 136. QUO WARRANTO, § 67.

§ 19. Actions Concerning Corporations.

Am Jur cited in State ex rel. Watson v. Dade County Roofing Co. 156 Fla 260. 22 So2d 793.

p. 249, n. 3.

That a federal statute prohibits national banks from purchasing the stock of any other corporation has been held not to prevent the state attorney general from enforcing a state law which does not permit any corporation to own bank stock, except in enumerated circumstances. Peoples Sav. Bank v Stoddard, 359 Mich 297, 102 NW2d 777, 83 ALR2d 344.

§ 20. — Injunction and Mandamus against Corporations.

p. 251, n. 19.

It has been held that, in an action in which a state bank is granted injunctive and other equitable relief against a national bank and others associated with it who are properly found to have participated in an illegal conspiracy to surreptitiously acquire enough stock of the state bank to dissolve it and leave a branch of the national bank the only institution in the community conducting a general banking business, similar relief in terms of injunction, receivership, and divestiture of the acquired stock may be entered against all the defendants in a quo warranto action instituted by the attorney general and consolidated for trial with the action by the state bank. Peoples Sav. Bank v Stoddard, 359 Mich 297, 102 NW2d 777, 83 ALR2d 344.

§ 21. Criminal Prosecutions.

R. C. L. cited in Com. v. Margiotti, 325 Pa 17, 188 A. 524.

p. 253, n. 17.

The state attorney general's power to investigate any violation of law within the executive branch may supplant or be merged with an investigation by a grand jury to ascertain whether crime has been committed, and co-ordinated in one investigation under his supervision in conjunction with or superseding the district attorney. Dauphin County Grand Jury Investigation. 332 Pa 289. 2 A(2d) 783. 120 ALR 414.

The state's attorney general may, through the quarter sessions and the district attorney's office, see to it that the proper administration of the government is not impeded in the course of a grand jury investigation of alleged official misconduct within the executive branch of the government by the wholesale removal of books, plans, specifications, and other documents absolutely essential to its functioning. Dauphin County Grand Jury Investigation, 332 Pa 289, 2 A(2d) 783, 120 ALR 414.

ATTORNEYS AT LAW

New sections added in this Supplement:

§ 2.1. — *Integrated Bars.*
§ 16.1. — *Effect of Removal from State.*
§ 240.5. *Share or Interest in Decedent's Estate, or in Trust.*
§ 261.5. — *Heir-hunting.*
§ 283.1. — *Effect of Suspension of Sentence.*
§ 285.1. *Misconduct of Law Partner.*

§ 1. Scope.

p. 262, n. 1. As to authority of receivers and trustees in bankruptcy, see BANKRUPTCY, Vol. 6, § 100.1 (Supplement).

See PUBLIC OFFICERS.

§ 2. Regulation of Practice of Law.

Am Jur cited in Martin v Davis, 187 Kan 473, 357 P2d 782.

Clark v Reardon, 231 Mo App 666, 104 SW2d 407 (n. 9).

Re Baker, 8 NJ 321, 85 A2d 505.

Grievance Committee v. Dean (Tex Civ App) 190 SW2d 126.

p. 262, n. 8.

The reason why laymen are forbidden to engage in the law business is that it is detrimental to the public interest for them to represent themselves to the public as being qualified to do that business when they are not, thereby ensnaring the public and spreading error. Liberty Mut. Ins. Co. v. Jones, 344 Mo 932, 130 SW(2d) 945, 125 ALR 1149.

p. 262, n. 9. People ex rel. Chicago Bar Asso. v. Goodman, 366 Ill. 346, 8 N. E. (2d) 941, 111 A.L.R. 1.

Nelson v. Smith, 107 Utah 382, 154 P2d 634, 157 ALR 512.

It is a prerogative of the judicial department to regulate and define the practice of law, and the power of the legislature is in aid of, and does not supersede or detract from, the power of the courts. People ex rel. Chicago Bar Asso. v. Goodman, 366 Ill. 346, 8 N. E. (2d) 941, 111 A.L.R. 1.

The supreme court of the state has the inherent power to regulate the conduct and qualifications of attorneys as officers of the court. Re Nebraska State Bar Asso. 133 Neb. 283, 275 NW 265, 114 ALR 151; State ex rel. Ralston v. Turner, 141 Neb 556, 4 NW(2d) 302, 144 ALR 138.

A statute forbidding the doing by laymen, as constituting the practice of law or the doing of law business, of things permitted by a decision of the state supreme court and held not to constitute law practice or law business, would be unconstitutional, as against § 1 of the Fourteenth Amendment to the Federal Constitution and §§ 4 and 30, art. 2, of the Constitution of Missouri. Liberty Mut. Ins. Co. v. Jones, 344 Mo 932, 130 SW(2d) 945, 125 ALR 1149.

The state has both a right and a duty to control and regulate the practice of law in order to protect the public welfare. And the state has power to declare acts of unauthorized practice of law to be illegal and to punish violations thereof by fine and imprisonment. Nelson v. Smith, 107 Utah 382, 154 P2d 634, 157 ALR 512.

Page 262. *Add, following note* 9: In the absence of an express grant of the power to regulate the practice of law to any one of the three departments of the government, it must, when the occasion demands, be exercised by the judicial department to which it naturally belongs.[9.1]

The Canons of Professional Ethics of the American Bar Association, adopted as rules of court by various courts, are to be viewed not as a bill of rights for the bar, but as a codification of the more important limitations on legal practice broadly deemed necessary for the protection of clients.[9.11]

[9.1] Re Nebraska State Bar Asso. 133 Neb 283, 275 NW 265, 114 ALR 151.

The practice of law is so intimately connected and bound up with the exercise of judicial power in the administration of justice that the right to define and regulate its practice naturally and logically belongs to the judicial department of the state government. Re Nebraska State Bar Asso. 133 Neb. 283, 275 N. W. 265, 114 A.L.R. 151

[9.11] Consolidated Theatres, Inc. v Warner Bros. Circuit Management Corp. (CA2d NY) 216 F2d 920, 52 ALR2d 1231.

§ 2.1. (New text) — Integrated Bars.

Forms: 2 Am Jur Pl & Pr Forms 2:1324-2:1326.

Within the past few years many states have adopted a method to organize the activities of the bar, known as "bar integration." That term has been defined as essentially, "the process by which every member of the bar is given an opportunity to do his share in carrying out the public service of the bar, and obliged to bear his portion of the responsibility."[9.21] While the statutes or court rules under which they have been organized differ to some extent, integrated bars have the common characteristics of being organized by the state or under the direction of the state, and of being under its direct control.[9.23] In the strictly integrated bar, all practicing attorneys are required to be members, as distinguished from membership in voluntary bar associations, and they are subject to the rules of the bar including such provisions as the requirement of the payment of an annual fee for the administration of the purposes of the bar and of adherence to a code of ethics, the alleged breach of which shall be reason for investigation by the state bar and, upon proper cause appearing, a recommendation for discipline or disbarment of the offending member.[9.25] In some states statutes expressly make provision for a state bar. But apart from such express provisions, it has been held that the court has inherent power to promulgate rules providing for an integrated bar.[9.27] Generally, statutes providing for integrated bars have been upheld over the objection that they violated constitutional provisions against the creation of private corporations by special act.[9.3] The requirement of compulsory membership in a state bar, with payment of an annual membership fee, or license fee, in order that an attorney may be entitled to practice his profession, has been held not to be unconstitutional,[9.31] although in one case such a statute was held invalid because it imposed involuntary incorporation upon the individual lawyer in order that he could practice his profession.[9.33] Probably the greatest amount of controversy in connection with the operation of an integrated bar centers around proceedings in regard to disbarment or other discipline of members of the bar.[9.331] Integrated bar acts have been held not to confer judicial power on governing board to conduct disbarment and disciplinary proceedings, where the actual effect of the provisions is to grant the power to investigate and take evidence and to make recommendations to the supreme court of the state.[9.35] Although in some cases provisions which empower the governing board to suspend or disbar an attorney have been held invalid, generally other portions of the acts have been held not to have been invalidated thereby.[9.37] In either case, the effect of the decisions has been to deny validity to encroachments upon judicial powers, and to limit proceedings by integrated bar boards to the status of recommendations to the supreme court, in which final authority is vested.[9.4] In many of the states in which integrated bars have been established, the determination of the state bar or its committee as to disbarment or other discipline is merely recommendatory in character, the final authority resting with the supreme court, and while the courts usually give weight to the recommendations made by the state bar, they are not required to follow them.[9.41] The giving to such boards of power to institute disbarment or disciplinary proceedings, to make findings, and to report to the supreme court is clearly not a conferring of judicial power.[9.42] A state bar act has been held not to be retroactive so as to divest the court of authority to hear reinstatement proceedings pending at the time the act was passed, giving the board of governors the power to pass upon petitions for reinstatement.[9.43]

[9.21] Annotation: 114 A.L.R. 161.

[9.23] Annotation: 114 A.L.R. 161.

Typical of the integrated bars is that of Kentucky, created under rules of the court of appeals in compliance with statutory authority, "organizing and governing a bar association of the attorneys at law of this State to act as an administrative agency of the Court of Appeals of Kentucky for the purpose of enforcing such rules and regulations as are prescribed, adopted, and promulgated by the court of appeals under this act, providing for the government of the State Bar as a part of the judicial department of the state government, and for such divisions thereof as the court of appeals shall determine, and requiring all persons practicing law in this State to be members thereof in good standing, and fixing the form of its organization and operation," and fixing a schedule of annual fees for the purpose of administering the act and rules and regulations to be prescribed. Annotation: 114 A.L.R. 162.

The legislature may, in the discharge of its constitutional duty to promote the general welfare, seek to maintain high standards of conduct in the legal profession and to aid in the efficient administration of justice by providing for the integration of the bar by the formation of a state bar association continued membership in which shall be a condition precedent to the right to practice in the state courts. Integration of Bar Case, 244 Wis 8, 11 NW(2d) 604, 12 NW(2d) 699, 151 ALR 586.

[9.25] Annotation: 114 A.L.R. 161.

Among the advantages of bar integration claimed for it by its proponents are that it is fair and equitable in that it provides that all of the lawyers, instead of only the members of a voluntary bar association, comprising but a fraction of the lawyers of the state, shall meet the expense of carrying on the activities of the bar, and that it provides the only efficient method of handling questions of legal ethics and enforcing discipline. Annotation: 114 A.L.R. 161.

[9.27] Re Nebraska State Bar Asso. 133 Neb. 283, 275 N. W. 265, 114 A.L.R. 151.

Anno: 114 ALR 163; 151 ALR 617.

See Integration of Bar Case, 244 Wis 8, 11 NW(2d) 604, 12 NW(2d) 699, 151 ALR 586.

Power to provide for the integration of the state bar by the organization and government of a state bar association may be conferred upon the supreme court, although, under the state Constitution, such court has only appellate jurisdiction. Integration of Bar Case, 244 Wis 8, 11 NW(2d) 604, 12 NW(2d) 699, 151 ALR 586.

[9.3] **Anno:** 114 ALR 164.

[9.31] Integration of Bar Case, 244 Wis 8, 11 NW(2d) 604, 12 NW(2d) 699, 151 ALR 586.

Anno: 114 ALR 165; 151 ALR 619.

Integration of the bar being essentially a judicial function, a statute directing the supreme court to provide for the organization and government of a state bar association, of which practicing lawyers shall be required to be members, is not unconstitutional as delegating legislative power to the court. Integration of Bar Case, 244 Wis 8, 11 NW(2d) 604, 12 NW(2d) 699, 151 ALR 586.

A statute providing for the formation of a state bar association membership in which shall be a condition of the right to practice law is not invalid as denying to members of the bar the benefit of Federal statutes in relation to the practice of law in the Federal courts, since the state has no power of authority to modify or change the rules of the Federal courts respecting the admission of lawyers to practice before them. Integration of Bar Case, 244 Wis 8, 11 NW(2d) 604, 12 NW(2d) 699, 151 ALR 586.

While the legislature has no constitutional power to compel the court to act, or if it acts, to act in a particular way in the discharge of the judicial function it may, with propriety and in the exercise of its power and the discharge of its duty, declare itself upon questions relating to the general welfare, which includes the integration of the bar, and the court will respect such declarations and adopt them so far as they do not embarrass the court or impair its constitutional functions. Integration of Bar Case, 244 Wis 8, 11 NW(2d) 604, 12 NW(2d) 699, 151 ALR 586

An act of the legislature providing that there shall be an association composed of persons licensed to practice law and that the Supreme Court by appropriate orders shall provide for the organization and government of the association and define the rights, obligations, and conditions of membership, therein, is to be regarded, not as a mere memorial invoking the power of the court in a matter within its jurisdiction, but as a direction to be deferred to. Integration of Bar Case, 244 Wis 8, 11 NW(2d) 604, 12 NW(2d) 699, 151 ALR 586.

The organization of an integrated bar by the formation of a state bar association and formulation by the supreme court of rules for its governance, and defining the rights, obligations, and conditions of membership therein, may properly be postponed where a large number of members of the bar are in the military and naval service of the United States, and many others are giving a large part of their time and energy to matters directly connected with the war effort, and existing provisions as to the admission of candidates to the bar, disbarment proceedings, disciplinary action, and the unauthorized practice of the law, are operating satisfactorily. Integration of Bar Case, 244 Wis 8, 11 NW(2d) 604, 12 NW(2d) 699 151 ALR 586.

[9.33] **Anno:** 114 ALR 164.

[9.331] **Anno:** 151 ALR 622.

[9.35] **Anno:** 114 ALR 168.

[9.37] **Anno:** 114 ALR 168 et seq; 151 ALR 622.

[9.4] **Anno: 114 ALR 169, 170.**

The integrated bar, acting through its grievance committees, conducts hearings, summarily dismisses charges found to be without merit, and certifies up to the board of governors the record in those cases in which it deems the evidence justifies further action, and the board of governors then conducts further proceedings before such matter is brought before the supreme court for final hearing and determination, that court becoming the ultimate trier of the issues of fact as well as of law. Re Lewkowitz, 70 Ariz 325, 220 P2d 229.

[9.41] Re Heirich, 10 Ill 2d 357, 140 NE2d 825, 67 ALR2d 827, cert den 355 US 805, 2 L ed 2d 49, 78 S Ct 22.

Anno: 151 ALR 624; 54 ALR2d 1281.

[9.42] **Anno:** 114 ALR 169, 172.

[9.43] **Anno:** 114 ALR 173.

§ 3. What Constitutes Law Practice.

Am Jur quoted in Bump v. District Ct. 232 Iowa 623, 5 NW(2d) 914.

Hobson v. Kentucky Trust Co. 303 Ky App 493, 197 SW2d 454.

Am Jur cited in Clark v. Reardon, 231 Mo App 666, 104 SW(2d) 407 (n. 11).

Hagen v Gallerano, 66 NJ Super 319, 169 A2d 186.

Virgin Islands Bar Asso. v Dench (DC Virgin Islands) 124 F Supp 257.

RCL cited in People v. Ring, 26 Cal App Supp(2d) 768, 70 P(2d) 281.

Page 262. *Insert, at the beginning of the section:* It is not practical to frame any comprehensive and satisfactory definition of what constitutes the practice of law. Each case must depend largely upon its own particular facts.[9.2] The tendency is to restrict the field in which lay agencies may operate.[9.21] The character of the act done, and not the place where it is performed, is the decisive factor in determining whether a person is engaged in the practice of law.[9.22]

[9.2] People ex rel. Chicago Bar Asso. v. Goodman, 366 Ill. 346, 8 N. E. (2d) 941, 111 A.L.R. 1.

Anno: 111 ALR 21; 125 ALR 1173.

A definition of the words "practicing law" approved as substantially correct is as follows: "Practicing as an attorney or counselor at law, according to the laws and customs of our courts, is the giving of advice or rendition of any sort of service by any person, firm, or corporation when the giving of such advice or rendition of such service requires the use of any degree of legal knowledge or skill." Annotation: 111 A.L.R. 23.

The words "practice of law" may have an entirely different meaning in a statute designed to prevent the practice of law by one who is not qualified to do so from that which the same expression should have in determining qualification to hold judicial office. Gazan v. Heery, 183 Ga. 30, 187 S. E. 371, 106 A.L.R. 498.

The meaning of the term "practice law," as used in a statute making it unlawful for any person not a member of the state bar to "practice law," has been held to be sufficiently certain where prior to the enactment of the statute the state supreme court had defined the meaning of such term, and the legislature in enacting the statute had apparently adopted such definition. **Anno:** 83 L ed 912.

As to whether services in connection with patent matters constitute the practice of law, see annotation: 111 ALR 43.

As to special statutes in regard to the practice of law, see **Anno: 111 ALR 50; 125 ALR 1185.**

As to what amounts to a practice of law within contemplation of a constitutional or statutory provision which makes such practice a condition of eligibility to a judicial office or forbids it by one holding a judicial position, see JUDGES.

[9.21] Annotation: 111 A.L.R. 24.

[9.22] People ex rel. Chicago Bar Asso. v. Goodman, 366 Ill. 346, 8 N. E. (2d) 941, 111 A.L.R. 1.

Anno: 111 ALR 32; 125 ALR 1175; 157 ALR 282 et seq. (corporation): 157 ALR 522 et seq. (collection agencies); 69 ALR2d 409–420 (trust company).

A statute prohibiting the unlicensed practice of law has no application to a person acting for himself in legal matters. And a statute prohibiting the unlicensed practice of law does not conflict with the constitutional provision that no person shall be barred from prosecuting or defending before any tribunal in the state, by himself or counsel, any civil cause to which he is a party. Nelson v. Smith, 107 Utah 382, 154 P2d 634, 157 ALR 512.

The fact that litigants may in some jurisdictions appear in justice courts by agents does not mean that a collection agency may engage in the practice of regularly representing clients in justice courts. **Anno:** 157 ALR 528.

p. 262, n. 10. State Bar Asso. v Connecticut Bank & Trust Co. 145 Conn 222, 140 A2d 863, 69 ALR2d 394.

Gazan v Heery, 183 Ga 30, 187 SE 371, 106 ALR 498.

Re Matthews, 57 Idaho 75, 62 P2d 578, 111 ALR 13.

People ex rel. Chicago Bar Asso. v Goodman, 366 Ill 346, 8 NE2d 941, 111 ALR 1.

Anno: 111 ALR 21, 22; 125 ALR 1173; 151 ALR 781; 69 ALR2d 409–415 (trust company).

In Liberty Mut. Ins. Co. v. Jones, 344 Mo 932, 130 SW(2d) 945, 125 ALR 1149, it was said: "It must be admitted that many definitions of the 'practice of law' include acts done both in and out of court, including services where no litigation is in prospect. Nevertheless, there are fundamental differences between the practice of law—in the sense of court work—and law business. While a layman may represent himself in court, he cannot even on a single occasion represent another, whether for a consideration or not. And a corporation cannot represent itself in court at any time but must appear by attorney. On the other hand the doing of any single act out of court in a representative capacity that a lawyer might do will not necessarily convict a layman of engaging in the law business. The very term itself implies that he must have engaged in the business or held himself out, as some cases say. . . . The holding out may be evidenced by repeated acts indicating a course of conduct, or by the exaction of a consideration."

When one appears before a court of record for the purpose of transacting business with the court in connection with any pending litigation, or when any person seeks to invoke the processes of the court in any matter pending before it, that person is engaging in the practice of law. Arkansas Bar Asso. v Union Nat. Bank, 224 Ark 48, 273 SW2d 408.

p. 263, n. 11. State Bar Asso. v Connecticut Bank & Trust Co. 145 Conn 222, 140 A2d 863, 69 ALR2d 394.

Gazan v Heery, 183 Ga 30, 187 SE 371, 106 ALR 498.

Re Matthews, 57 Idaho 75, 62 P2d 578, 111 ALR 13.

Anno: 111 ALR 23, 26, 27; 125 ALR 1175 et seq.; 69 ALR2d 409–415 (trust company).

It may be said that in general, the practice of directing and managing the enforcement of legal claims and the establishment of the legal rights of others where it is necessary to form and to act upon opinions as to what those rights are and as to the legal methods which must be adopted to enforce them, the practice of giving or furnishing legal advice as to such rights and methods, and the practice, as an occupation, of drafting documents by which such rights are created, modified, surrendered, or secured are all aspects of the practice of law. **Anno:** 111 ALR 23.

One who confers with clients, advises them as to their legal rights, and then takes the business to an attorney and arranges with him to look after the matter in court, is engaged in the practice of law. Annotation: 111 A.L.R. 24.

Laymen entering into a contract with others to furnish the services of a lawyer in specified matters engage in the unauthorized practice of the law. Annotation: 111 A.L.R. 24.

One who represents that he is learned in the law and particularly in matters connected with

conveyancing and who has prepared deeds of conveyance for which a charge was made is engaged in the practice of law. Re Matthews. 57 Idaho, 75, 62 P. (2d) 578, 111 A.L.R. 13.

The preparation and filing of pleadings in workmen's compensation cases, since they are uniformly simple and liberal amendment is permitted, have been held not to constitute the practice of law. Annotation: 111 A.L.R. 30.

p. 263, n. 12. Anno: 105 ALR 1375; 157 ALR 299.

Page 263. *Add, following note* 12: the activities of title guaranty and abstract companies;[12.5] title examination activities by a lending institution or insurance company;[12.51]

12.5 Anno: 157 ALR 303; 85 ALR2d 184 (detailed discussion of cases considering title examination activities).

While a title insurance company may examine for its own benefit the abstract of title to property which it proposes to insure, to determine whether or not it will insure the title, and while it may specify the corrections necessary to meet its demands, it may not furnish a title opinion to a prospective purchaser to be used by him in determining whether or not he will buy the property, and it may not hold itself out as being authorized to do so. Hexter Title & Abstract Co. v. Grievance Committee, F. C. D. 142 Tex 506. 179 SW2d 946. 157 ALR 268

12.51 Anno: 85 ALR2d 184 (detailed discussion of cases considering title examination activities).

It has been held that a building and loan association which employs an attorney at a fixed annual salary, whose principal duty is the making of title examinations in connection with all real-estate loans financed by the association, and who makes a service charge on the loan which includes an unspecified variable amount for the title examination, is guilty of illegally practicing law on the ground that since a clear title is one condition for the granting of a loan, the title examination service is being made primarily for the borrower's and not the association's benefit. Kentucky State Bar Asso. v First Federal Sav. & Loan Asso. (Ky) 342 SW2d 397, 85 ALR2d 178.

p. 263, n. 13. Annotation: 105 ALR 1375: 157 ALR 299.

p. 263, n. 14. Annotation: 105 A.L.R. 1375: 111 ALR 50: 157 ALR 299.

p. 263. n. 15. Anno: 111 ALR 38: 151 ALR 794.

The preparation and filing of a petition for the reorganization of a corporation, pursuant to § 77B of the Bankruptcy Act, and taking part in all the proceedings leading to a plan for reorganization, by a corporation organized to represent bondholders in corporate reorganizations, has been held not to amount to the practice of law **Anno:** 125 ALR 1180: 157 ALR 299, 157 ALR 529 (collection agency).

With respect to bankruptcy proceedings and insolvency cases, the opinion has been expressed that any respectable agency, such as an association of credit men, which can assist in the administration of the law should be permitted to do so, even through activities which may savor of practicing law in a minor way, if so simple and obvious as to be within the capacity of any intelligent layman. **Anno:** 157 ALR 299.

p. 263, n. 16. Annotation: 105 ALR 1375: 157 ALR 299.

p. 263, n. 17. Annotation: 105 A.L.R. 1376: 111 ALR 42; 125 ALR 1181.

However, it has been held that trust companies may appear through their employees in probate or other court matters pertaining to the execution or administration of a trust, probate a will in which they have been designated executor, etc., without engaging in the practice of law **Anno:** 157 ALR 300

p. 263, n. 18. State Bar Asso. v Connecticut Bank & Trust Co. 145 Conn 222, 140 A2d 863, 69 ALR2d 394.

Anno: 53 ALR2d 790 et seq.; 69 ALR2d 409-415 (trust company).

It has been held that a notary public who undertakes to provide for the disposition of an estate by drafting and supervising the execution of a will, but who, not being a licensed attorney, is not qualified to undertake the transaction, is engaged in the unauthorized practice of law Biakanja v Irving, 49 Cal 2d 647, 320 P2d 16, 65 ALR2d 1358.

It has been said by the Michigan court: "So far as the mere mechanical drafting of such instruments or the diction used therein is concerned, we know of no reason justified in law in consequence of which it should be held that a lawyer in his office may employ a law clerk or a stenographer who, having the ability, is intrusted with the drafting of papers of this character; and on the other hand holding that a trust company empowered by statute to act as a fiduciary is barred from so using such employees. But when such papers are filed in or presented to the probate court or other court of record by a corporate fiduciary, they must be under the name and by the authority of one licensed to practice law. Thereupon the attorney becomes responsible for such papers in the same manner as if he had drafted them in person. He makes the draftsmanship his own." **Anno:** 125 ALR 1176.

p. 263, n. 19. Re Matthews, 57 Idaho, 75, 62 P. (2d) 578, 111 A.L.R. 13.

Hexter Title & Abstract Co. v. Grievance Committee, F. C. D. 142 Tex 506. 179 SW2d 946. 157 ALR 268.

Nelson v. Smith. 107 Utah 382. 154 P2d 634, 157 ALR 512.

Anno: 105 ALR 1376; 111 ALR 24 et seq; 125 ALR 1175 et seq: 151 ALR 783: 157 ALR 287; 157 ALR 527 (by collection agency); 53 ALR2d 807-811.

It seems that the practice of drawing for others (for compensation, where that is regarded as an essential) written instruments which require more than the most elementary knowledge of the law or more than that which the ordinary or average layman may be deemed to possess may well be deemed to constitute the practice of law. Annotation: 111 A.L.R. 24.

The preparation, for a money consideration, of legal instruments to be shaped from a mass of facts and conditions involving the application of intricate principles of law which can only be applied by a mind trained in existing laws in order to insure a specific result and to guard against other undesirable results comes within the term "practice of law." Annotation: 111 A.L.R. 25.

The habitual drafting of legal instruments for hire constitutes the practice of law, even though the individual so engaged makes no attempt to appear in court or to give the impression that he is entitled to do so. Annotation: 111 A.L.R. 26.

The rule prohibiting a layman from drafting legal papers does not preclude his drawing papers connected with his own business. Annotation: 111 A.L.R. 26, 27.

With regard to the preparation by trust companies of various types of legal instruments used in connection with the administration of the trust, there appears to be some difference of opinion as to just what may be done without violating the rule that a corporation cannot practice law. See the cases set out in detail in annotation in 157 ALR 287 et seq.

A company incorporated for making abstracts of title, which also acts as agent for a title insurance company, is practicing law in violation of the statute which declares that drawing, for a consideration or pecuniary benefit, documents or instruments affecting or relating to secular rights, or the giving, for consideration, direct or indirect, of an opinion as to the validity of the title to real property, is the practice of law, where, through employees who are licensed attorneys acting under direction of its executives and not of its customers, and in respect of property in which it has no interest of its own, it prepares deeds, notes, mortgages, deeds of trust, mechanics' liens, releases, and such other additional instruments as seem necessary in connection with perfecting the title upon which it is issuing or plans to issue title policies, such papers being prepared in some instances merely in connection with the preparation of an abstract of title without title insurance, notwithstanding that no separate charge is made for such service, which, however, is advertised as an inducement for contracts for abstracts of title, for which a direct charge is made; since under such circumstances there is a consideration, reward, or pecuniary benefit flowing to the company within the meaning of the statute. Hexter Title & Abstract Co. v. Grievance Committee, F. C. D. 142 Tex 506, 179 SW2d 946, 157 ALR 268.

Page 263. *Add, following note* **19:** The offense of unlawfully practicing law is not mitigated by the fact that the legal documents drawn were not original in outline, but followed a prepared form available to the public generally; as for example, deeds, writs, summons, etc. Authorship of a legal document is no less real because the instrument followed approved legal outline. It is the act of deciding the applicability of a specific form to a particular situation, and the exercise of discretion and judgment in determining the answers to the matters suggested upon a prepared form, that invades the province of a lawyer. The character of the form used will not vary this broad rule.[19.1]

While there are cases which seem to hold unequivocally either that the drafting, or filling in blanks in printed forms, of instruments relating to land by laymen constitutes the practice of law,[19.11] or that it does not constitute such practice,[19.12] in the majority of instances there are other factors affecting the situation,[19.13] such as, for example, the particular statutes involved,[19.14] whether the work was a mere incident to the business of the one preparing the instrument,[19.15] whether compensation was paid for the work,[19.16] or whether the work consisted of the mere filling in of blanks of a printed form or the compiling of the whole instrument.[19.17] And frequently the views of the courts are not in accord, notwithstanding the similarity of circumstances involved.[19.18]

19.1 Anno: 125 ALR 1177; 53 ALR2d 807-811.

The Missouri court has said: "Anyone who wants to pay the price may purchase a set of form books and read and copy them. He may use them in his own business if he so desires. But when he advises others for a consideration, that this or that is the law, or that this form or that is the proper form to be used in a certain transaction, then he is doing all that a lawyer does when a client seeks his advice. The mere copying of the form is usually done in a lawyer's office by a stenographer; but the stenographer must be told by the lawyer what to copy, and the client relies upon the advice of the attorney as to whether the form will accomplish the desired result in his particular case." **Anno:** 125 ALR 1177.

19.11 Re Eastern Idaho Loan & T. Co. 49 Idaho 280, 288 P 157, 73 ALR 1323.

Hexter Title & Abstract Co. v Grievance Committee, 142 Tex 506, 179 SW2d 946, 157 ALR 268.

Ferris v Snively, 172 Wash 167, 19 P2d 942, 90 ALR 278 (law clerk).

Anno: 53 ALR2d 790-794.

19.12 Re Eastern Idaho Loan & T. Co. 49 Idaho 280, 288 P 157, 73 ALR 1323 (preparing a simple instrument not involving the legal effect of special facts and conditions).

Ingham County Bar Asso. v Walter Neller Co. 342 Mich 214, 69 NW2d 713, 53 ALR2d 777 (incident of business).

Anno: 53 ALR2d 794-796.

It has been held that the drawing of instruments relating to real estate on isolated occasions does not constitute the practice of law. **Anno:** 53 ALR2d 795.

It has been held that where the defendant was one of ten who had inherited property, he did not offend the criminal law in performing services in and about preparing and procuring signatures to the conveyance of the property, since he was attending to his own interests as well as the interests of his co-owners in performing such activities. **Anno:** 53 ALR2d 795.

19.13 Anno: 53 ALR2d 791-811.

19.14 Anno: 53 ALR2d 791 et seq.

It has been held that the statute providing for the licensing and regulating of real-estate brokers, by requiring a satisfactory understanding of the laws and principles of real-estate conveyancing, deeds, mortgages, land contracts, and leases, indicates that it was not the legislative intent to include as illegal practice of law the acts of real-estate brokers in filling in forms for such instruments without extra compensation as an incident to their regular business. Ingham County Bar Asso. v Walter Neller Co. 343 Mich 214, 69 NW2d 713, 53 ALR2d 777.

19.15 Anno: 53 ALR2d 796-804.

Real-estate corporations and their employees have been held not to be illegally engaged in the practice of law in filling out, as an incident to their handling and consummation of real-estate transactions in which they are acting as brokers and for which they receive no extra compensation, printed forms of offers to purchase real estate, warranty deeds, quitclaim deeds, land contracts, land contract assignments, leases, and notices to terminate tenancies. Ingham County Bar Asso. v Walter Neller Co. 343 Mich 214, 69 NW2d 713, 53 ALR2d 777.

It has been held that conveyancing in itself does not constitute the practice of law and when conducted as an incident to a lawful business, is not unlawful practice. Ingham County Bar Asso. v Walter Neller Co. 343 Mich 214, 69 NW2d 713, 53 ALR2d 777.

The fact that the matter of drafting, or filling in of blanks in printed forms, of instruments relating to land is merely incidental to the business of the broker or other person or corporation preparing such instruments has not always prevented such acts from being regarded as constituting the practice of law. Some courts have taken the view that the instrument which is to bind the parties to the transaction is of such legal significance as to necessitate the services of one learned in the law, and that it is for the protection of the lay parties to the transaction that the preparation of the instruments by the broker or similar person, rather than by a lawyer, is held to constitute an unauthorized practice of the law. **Anno:** 53 ALR2d 801.

19.16 Re Eastern Idaho Loan & T. Co. 49 Idaho 280, 288 P 157, 73 ALR 1323.

Ingham County Bar Asso. v Walter Neller Co. 343 Mich 214, 69 NW2d 713, 53 ALR2d 777.

Hexter Title & Abstract Co. v Grievance Committee, 142 Tex 506, 179 SW2d 946, 157 ALR 268.

Ferris v Snively, 172 Wash 167, 19 P2d 942, 90 ALR 278.

Anno: 53 ALR2d 804-807.

19.17 Anno: 53 ALR2d 807.

19.18 Anno: 53 ALR2d 790-811.

p. 263, n. 1. Ingham County Bar Asso. v Walter Neller Co. 343 Mich 214, 69 NW2d 713, 53 ALR2d 777.

Anno: 105 ALR 1370; 151 ALR 783; 53 ALR 2d 810; 69 ALR2d 411 (trust company).

The apparent holding of the Idaho case cited in the text is explained in Re Matthews, 57 Idaho, 75, 62 P. (2d) 578, 111 A.L.R. 13, as being part of the contention of counsel, and not, as the opinion indicates through an erroneous punctuation, a statement of the court.

There is authority, however, to support a distinction between the drawing of simple instruments and those which are more complex. Annotation: 111 A.L.R. 29.

One who is not a member of the bar may lawfully prepare instruments such as simple deeds, mortgages, promissory notes, and bills of sale when these instruments are incident to transactions in which such person is interested, provided no charge is made therefor. Practice of law includes drawing for others complicated legal instruments, such as wills and trust agreements, which require more legal knowledge than is possessed by the average layman, even though such instruments may, to some extent, be incident to a business such as that usually conducted by trust companies. Annotation: 111 A.L.R. 29.

The occasional drafting of simple deeds and other legal instruments, when not conducted as an occupation or yielding substantial income, may fall outside the practice of the law. **Anno:** 111 ALR 29; 125 ALR 1174.

It should be noted that the drawing of any kind of instrument may constitute the practice of law where its preparation is accompanied by advice or counsel as to its legal effect and validity. Annotation: 111 ALR 26, 27, 30.

When a lay adjuster for an insurance company "in effecting settlement of a claim arising under a policy of casualty insurance issued by such company, fills in, on a printed form prepared by counsel for the company, the Workmen's Compensation Commission, or other public authority, the release to be executed by such claimant, such act of such lay adjuster does not constitute the practice of law or the doing of law business." Liberty Mut. Ins. Co. v. Jones, 344 Mo 932, 130 SW(2d) 945, 125 ALR 1149.

An employee of an insurance company who exercises his own judgment as to which of several forms of release prepared by counsel for the company he would use in settlement of a claim arising under a policy of casualty insurance issued by the company is not engaged in the practice of law. Liberty Mut. Ins. Co. v. Jones, 344 Mo 932, 130 SW(2d) 945, 125 ALR 1149.

Page 263. *Add, following note* 1: Any distinction which may exist between simple and complex legal instruments in regard to whether their preparation for another constitutes the practice of law is regarded by some courts as illusory and unsatisfactory.[1.1] Where the application of legal knowledge and technique is required in participating on behalf of another in hearings and proceedings before a board or commission, the activity constitutes the practice of law; [1.2] but there are decisions which hold on their particular facts that an appearance before an administrative body on behalf of another does not involve the rendition of legal services.[1.21] Decisions on this question have involved appearances before the Land Department,[1.3] the Board of Standards and Appeals, [1.31] the Interstate Commerce Commission,[1.32] Public Service Commissions,[1.33] and workmen's compensation boards.[1.34] Giving advice in the making of tax returns or on how to reduce a party's taxes,[1.4] assisting in settling a claim by the state to recover back taxes and securing a reduction of the claim,[1.41] and the performance of such services as the examination and appraisal of property, analysis of assessed valuation, the preparation and filing of suggestions with the tax commissioners, and an application for the reduction of assessments have been held not to involve the practice of law.[1.42] However, other services in regard to securing the reduction of tax assessments have been held to constitute the practice of law.[1.5] A claim adjuster or an "ambulance chaser" may be held to be practicing law on account of the particular methods employed by him in soliciting and adjusting personal injury cases.[1.6] But the rule has been stated that when a lay investigator employed by an insurance company "investigates for his employer the facts and circumstances relating to a casualty or claim arising under a policy of casualty insurance issued by his employer, and reports to his employer the facts ascertained in such investigation, these acts of such lay investigator do not constitute the practice of law or the doing of law business." And in accordance therewith it has been held that an adjuster employed by an insurance company may, during the negotiation and settlement of a claim arising under a policy issued by such company, inform the claimant what the company's attorney has advised it regarding its liability under the policy; but the adjuster may not state, or act upon, his own opinion as to the legal rights of the company, insured or the claimant; that such an adjuster may determine for his employer the monetary extent of the latter's liability and the pecuniary limit which it will be willing to offer or pay in settlement of any claim arising under a policy of casualty insurance issued by such employer, "provided he does not determine the legal liability of his employer or its assured, but arrives at his conclusion either regardless of legal liability or upon the advice of counsel;" that he may state in his report the opinion rendered by the company's counsel upon any question of liability upon the claim, without thereby engaging in the practice of law.[1.7]

[1.1] Annotation: 111 A.L.R. 29.

[1.2] People ex rel. Chicago Bar Asso. v. Goodman, 366 Ill. 346, 8 N. E. (2d) 941, 111 A.L.R. 1.

Anno: 111 ALR 32; 125 ALR 1179; 151 ALR 789.

One who makes a business of prosecuting workmen's compensation claims before the state Industrial Commission may be regarded as engaging in the unauthorized practice of law where such business involves a determination of whether the remedy must be sought under the Workmen's Compensation Law the Federal Employers' Liability Act, or at common law. People ex rel. Chicago Bar Asso. v. Goodman, 366 Ill. 346, 8 N. E. (2d) 941, 111 A.L.R. 1.

As to whether an appearance before the legislature or a board to secure a pardon or release of one convicted of a crime constitutes the practice of law, see annotation: 111 ALR 35.

A lay representative of an insurance company who appears before a commissioner in hearings under the Workmen's Compensation Act, in the course of which he files pleadings, states his case, examines and cross-examines witnesses, and presents arguments, is engaged in the practice of law, although such activities constitute only a minor portion of the duties of his employment and he receives no specific remuneration for such services. **Anno:** 125 ALR 1179.

Acts by a layman which, if performed before the full commission in workmen's compensation hearings, would concededly constitute the unauthorized practice of law, are not rendered less condemnatory when performed before a single commissioner in such hearings, pursuant to a rule of the commission that while only licensed attorneys may appear before the full commission, lay representation is permissible in hearings before single commissioners. **Anno:** 125 ALR 1179.

[1.21] **Anno:** 111 ALR 32; 125 ALR 1179; 151 ALR 786.

[1.3] **Anno:** 111 ALR 32.

[1.31] **Anno:** 111 ALR 32.

[1.32] **Anno:** 111 ALR 32; 151 ALR 787.

[1.33] **Anno:** 111 ALR 34.

[1.34] People ex rel. Chicago Bar Asso. v. Goodman, 366 Ill. 346, 8 N. E. (2d) 941, 111 A.L.R. 1.

Anno: 111 ALR 33, 34; 125 ALR 1179.

"The Workmen's Compensation Board, its functions and mode of operation," it is said in one case, "are not to be confused with those of other so-called administrative bodies and agencies. There is an ever growing number of such boards and departments of government which are legislative or executive in character, rather than judicial. Familiar examples are the Interstate Commerce Commission, the office of the Commissioner of Patents, the United States Treasury Department, the United States Board of Tax Appeals, Public Service Commissions, the Federal Trade Commission, the Securities and Exchange Commission, minimum wage boards, and the like." Annotation: 111 A.L.R. 33.

The rule is stated in Liberty Mut. Ins. Co. v. Jones, 344 Mo 932, 130 SW(2d) 945, 125 ALR 1149, that when an agent of an insurance company "participates in an informal conference with or before the workmen's compensation commission, such conference being held by and at the instance of such commission or its representative for the purpose of endeavoring to bring about an amicable agreement between the insured and the injured employee as to payment of compensation, such act of such lay investigator or adjuster does not constitute the practice of law or the doing of law business."

1.4 Anno: 111 ALR 36: 125 ALR 1180: 151 ALR 790.

1.41 Anno: 111 ALR 36; 125 ALR 1180.

1.42 Anno: 111 ALR 37: 125 ALR 1180: 157 ALR 301.

1.5 Anno: 111 ALR 37; 125 ALR 1180: 151 ALR 793: 157 ALR 301.

1.6 Anno: 111 ALR 44: 125 ALR 1182; 151 ALR 796; 157 ALR 307.

In Liberty Mut. Ins. Co. v. Jones, 344 Mo 932, 130 SW(2d) 945, 125 ALR 1149, the court drew a distinction between adjusters employed by casualty companies and those engaged in the private practice of adjusting claims, observing that it would seem clear that an adjuster who represents himself to the public as able to compromise, adjust, or settle claims generally, is engaged in the practice of law, at least where he advises or suggests a settlement, or analyzes the facts, or makes any representation as to the merits of his client's cause, while an adjuster in the regular employ of an insurance or casualty company is obviously in a different category, and stated: "The reason why laymen are forbidden to engage in the law business is that it is detrimental to the public interest for them to represent themselves to the public as being qualified to do that business when they are not, thereby ensnaring the public and spreading error broadcast. The cases show that in most instances such adjusters advertise extensively—which is permissible if what they do is not law business. On the other hand, appellant's lay claim adjusters work only for their several employers, who hire and retain them with their eyes open. When they deal with claimants it is on an adversary basis, not a representative basis implying a fiduciary relation."

A statute defining the practice of law as including anyone who "settles, adjusts, or compromises, defaulted, controverted, or disputed accounts, claims or demands" includes the adjustment of insurance losses, so far as there is a default, dispute, or controversy involved, but where there is no such default, dispute, or controversy, the statute leaves open a field of business for the independent lay insurance adjuster. Wilkey v. State, 244 Ala 568, 14 So (2d) 536, 151 ALR 765, writ of certiorari denied in 320 US 787, 88 L ed 473, 64 S Ct 195

The activities of independent lay insurance adjusters constitute the unlawful practice of law, within a statute including, in its definition of practice of law, the adjustment of claims which are "defaulted, controverted, or disputed," in so far as such activities consist of (1) giving advice as to rights of subrogation and contribution, (2) expressing an opinion as to a claimant's rights under the Workmen's Compensation Act, (3) recommending that the insurer increase its offer of settlement, (4) advising a claimant that he could not legally sue the insurer, and (5) appearing in court to have settlements with minors approved; but not so far as such activities consist of (1) mere investigation of claims, (2) adjustment of a loss where liability is not controverted, (3) settlement of small claims, (4) settlement of claims where, although the claimant had rejected the insurer's original offer, there was no dispute as to liability and negotiations were still open, (5) holding themselves out, and listing themselves in insurance journals, as engaged in the business of independent insurance adjusters, (6) having claimants execute releases on forms furnished by the insurer, and (7) conveying to the claimant the opinion of insurer's counsel as to his rights. Wilkey v. State, 244 Ala 568, 14 So 536, 151 ALR 765, writ of certiorari denied in 320 US 787, 88 L ed 473, 64 S Ct 195

The judicial construction of a statute defining the practice of law, which brings within such definition the business of independent insurance adjusters, but excludes therefrom salaried adjusters employed by insurance companies, does not constitute a denial, to the formal class, of the equal protection of the laws. Wilkey v. State, 244 Ala 568, 14 So (2d) 536, 151 ALR 765, writ of certiorari denied in 320 US 787, 88 L ed 473, 64 S Ct 195

1.7 Liberty Mut. Ins. Co. v. Jones, 344 Mo 932, 130 SW(2d) 945, 125 ALR 1149.

Anno: 125 ALR 1182: 151 ALR 797: 157 ALR 307.

A statute regulating the practice of law which includes in its definition of practice of law the adjustment of disputed claims is not to be construed as completely preventing the adjustment of insurance losses by independent law adjusters, where there are other statutes regulating the business of insurance agents and adjusters. Wilkey v. State, 244 Ala 568, 14 So 536, 151 ALR 765, writ of certiorari denied in 320 US 787, 88 L ed 473, 64 S Ct 195.

p. 263, n. 2. Anno: 111 ALR 39; 125 ALR 1180; 157 ALR 522.

A layman who is the agent of a creditor has a right to present a claim or note to the debtor for payment and to receive payment in behalf of the creditor. And where a corporate collection agency was involved, it was held that the agency had the right to collect debts for others, provided it did not employ an attorney or promise to employ one, or threaten the debtor with suit in case he failed to pay; that if collection could not be made without the services of an attorney, the agency should return the claim to the creditor, who should select and employ his own attorney; and that the agency should not engage, directly or indirectly, in the business of employing an attorney for others to collect claims or to prosecute suits therefor or have any interest in the fee earned by the attorney for his work. Annotation: 111 A.L.R. 40.

p. 263, n. 3. Anno: 111 ALR 39; 125 ALR 1180; 151 ALR 794; 157 ALR 522 et seq.

But it has been held that the publication, advertising, distribution, and sale of a pamphlet entitled "A Practical Aid for Executors and Administrators of Decedent Estates," by one who had acquired special knowledge and expert skill in estate matters during sixteen years' experience in the office of the registrar of wills of a county, eight years of which he was deputy and eight years registrar of wills and clerk of the orphans' court, coupled with a holding out as ready and willing to hold consultation with the purchasers and readers of the pamphlet, on the drawing of wills and other proceedings pertaining to decedents' estates, amounted to the practice of law and was unauthorized, because the defendant was a layman. The objectionable features pointed out were the giving of advice in the form of questions and answers contained in the pamphlet, involving knowledge which only legal training and skill could give, and the intimation and solicitation respecting readiness to serve anyone having such problems. **Anno:** 151 ALR 795.

The maintenance of a legal department by a collection agency through which it collects its principals' claims in the courts, or the hiring of an attorney for the same purpose and the control of such attorney by the agency rather than by the principal, is a circumstance pointing to the practice of law by such agency **Anno:** 157 ALR 523.

A collection agency which undertakes to bring lawsuits on claims placed in its hands and perform the necessary legal services incident thereto thereby engages in the practice of law, even though it takes assignments of such claims to itself and though it functions through licensed attorneys. Nelson v. Smith 107 Utah 382, 154 P2d 634, 157 ALR 512.

The taking of colorable assignments by a collection agency will not relieve conduct otherwise objectionable as amounting to the practice of law from the taint of illegality because of a constitutional or statutory provision permitting persons to prosecute their suits in person. **Anno:** 157 ALR 524.

The casual assignee of a claim for procedural convenience does not, by prosecuting it in court in his own person, engage in the unlicensed practice of law. Nelson v. Smith, 107 Utah 382, 154 P2d 634, 157 ALR 512

A statute which provides that the furnishing of advice or services for or on behalf of a debtor in connection with any debt-pooling plan, whereby such debtor deposits any funds for the purpose of making pro rata payments or other distributions to his creditors, shall be deemed to be the practice of law, is not unconstitutional. Home Budget Service, Inc. v Boston Bar Asso. 335 Mass 228, 139 NE2d 387.

Page 263. *Add, following note* 3: The rendering of opinions as to the validity or invalidity of title to real or personal property has been deemed to constitute the practice of law.[3.1] A different rule, however, seems to apply to the mere searching of titles and furnishing of a certificate respecting the same.[3.11]

[3.1] **Anno:** 111 ALR 31; 125 ALR 1174, 1179; 151 ALR 786; 85 ALR2d 189.

It has been held that a title examination (which includes an analysis of recorded interests in land coupled with an opinion as to its legal status) is a service which lawfully can be performed for others only by a licensed attorney. Kentucky State Bar Asso. v First Federal Sav. & Loan Asso. (Ky) 342 SW2d 397, 85 ALR2d 178.

[3.11] **Anno:** 111 ALR 31; 125 ALR 1179; 85 ALR2d 189.

p. 263, n. 4. Anno: 105 ALR 1371; 151 ALR 800.

p. 263, n. 5. Anno: 105 ALR 1371; 111 ALR 42; 125 ALR 1181; 157 ALR 292.

An automobile association which in consideration of an annual fee undertakes, in addition to supplying certain stipulated services and information, to pay within specified limits for the services of lawyers employed by subscribers to advise and defend them in suits for property damage or against charges of violating automobile laws and regulations, no part of whose fees are received by the association, does not thereby engage in the practice of law. Re Thibodeau, 295 Mass 374, 3 NE 2d 749, 106 ALR 542. **Anno:** 106 ALR 548.

Re Maclub of America, 295 Mass 45, 3 NE (2d) 272, 105 ALR 1360.

A motor club agreeing with its members (a) to attempt amicably to adjust without court action claims for property damage to automobile for or against a member where the amount in controversy does not exceed $100, (b) to attempt to settle such claims by arbitration, (c) to obtain the name and address of the owner of any vehicle, (d) to arrange to deposit the necessary collateral for a member who has received a ticket for a violation of a minor traffic regulation, and (e) to furnish an attorney to represent a member in case of unjust prosecution where the interest of the membership as a whole appears to be involved; maintained a department of claims and adjustment in charge of a layman to furnish these services, with whom members of the organization consulted from time to time concerning the claims for damages sustained by their automobiles in accident, and who, upon request of a member, endeavored to collect the claim by writing to the other person involved in the accident; and who, in the event of amicable settlement, filled out a release form for signature of the proper party; and in the event no amicable settlement was reached, so informed the member and advised him to get his own attorney or to proceed in the small claims court unlawfully engages in the practice of law. **Anno:** 157 ALR 292.

Page 263. *Add, following note* 5: The solicitation of shippers by a layman for the purpose of obtaining their authorization to prosecute claims for refunds from railroads for excessive charges, and who thereafter instituted litigation in that connection, employing such legal or other skilled aid as he deemed necessary.[5.1]

[5.1] **Anno:** 125 ALR 1184.

p. 263, n. 6. Annotation: 105 A.L.R. 1371; 111 ALR 39; 157 ALR 522.

Corporations which solicit liquidated commercial accounts for collection and which use the courts, or a threat of court action for the collection thereof ordinarily have been held to be unlawfully practicing law. But a mere solicitation of liquidated commercial accounts from wholesale concerns and manufacturers, for collection on a commission basis, and collecting the same by making personal calls on the debtors or by writing them letters, does not amount to an unlawful practice of law by a corporation organized to do a general collection and adjustment business. **Anno:** 157 ALR 293.

Corporations regularly undertaking to collect distributive shares in estates of decedents have been held engaged in the practice of law. **Anno:** 157 ALR 298; 157 ALR 529.

p. 263, n. 7. Annotation: 105 A.L.R. 1375.

Page 263. *Add, following note* 8: The broadcasting of programs consisting of statements of legal questions submitted by members of the public and answers thereto given by persons occupying or having occupied judicial positions constitutes the practice of law within the meaning of a statute forbidding corporations to practice law.[8.1]

[8.1] Rosenthal v. Shepard Broadcasting Service, 299 Mass 286, 12 NE(2d) 819, 114 ALR 1502.

Annotation: 114 A.L.R. 1506.

p. 264, n. 9. Anno: 111 ALR 43, s. 125 ALR 1181, 151 ALR 794; 69 ALR2d 408, 415.

A trust company may, as a duly appointed fiduciary, execute a specific trust placed in its hands, and to that end, may, through its employee-attorneys, draft all papers incident to the administration of the trust, and appear in the courts in all matters pertaining thereto, without engaging in the unlawful practice of law. **Anno:** 125 ALR 1181.

A trust company authorized by law to act as administrator, executor, trustee, guardian, or in other fiduciary capacity, has been held not engaged in the practice of law by virtue of the fact that its salaried attorneys prepare and file papers in court in estates where it has been named as executor, or where it has been appointed administrator. **Anno:** 125 ALR 1181.

A corporation or an individual organized for, or engaged in, the business of collecting and cashing inheritances and legacies owing to foreign beneficiaries by means of powers of attorney obtained through foreign correspondents has been held engaged in the practice of law **Anno:** 125 ALR 1181.

Page 264. *Add following note* 9: It has been held, with varying degrees of emphasis, that the fact that a trust company is acting as a fiduciary, or, in so acting, is engaged in the administration of functions authorized by statutes defining the functions of trust companies, does not give special sanction for its engaging in activities otherwise deemed to constitute the practice of law, even though the acts complained of are performed by licensed attorneys, where such attorneys are employees of the bank.[9.05] The basic problem is what acts are commonly understood to be the practice of law and the courts have varied in the degree of strictness or liberality followed, with reference to particular acts.[9.051]

[9.05] State Bar Asso. v Connecticut Bank & Trust Co. 145 Conn 222, 140 A2d 863, 69 ALR 2d 394.

Re Otterness, 181 Minn 254, 232 NW 318, 73 ALR 1319 (trust company acting as representative of an estate is not a "party" within meaning of statute permitting party to appear in court on his own behalf).

Anno: 69 ALR2d 407.

9.051 **Anno:** 69 ALR2d 409–420.

It has been held that a trust company is not engaged in the practice of law by acting primarily for itself in obtaining or holding trust department customers by disseminating general information concerning the application, scope, and effect of various laws and in reviewing wills and trust agreements, but is engaged in the practice of law in so far as it performs acts which are not primarily for itself but for the administration and settlement of the affairs of estates. State Bar Asso. v Connecticut Bank & Trust Co. 145 Conn 222, 140 A2d 863, 69 ALR2d 394.

It has been held that the facts of a particular case may justify the conclusion that a bank is not engaged in the unlawful practice of law in acting through its trust department employees, whether lawyers or laymen, in preparing tax returns and dealing with and appearing before state and federal tax authorities in connection with taxes claimed to be due from estates administered by it, but such acts do constitute the unlawful practice of law where the preparation of tax returns or the matters dealt with involve tax law problems of such type that their solution would be commonly understood to be the practice of law. State Bar Asso. v Connecticut Bank & Trust Co. 145 Conn 222, 140 A2d 863, 69 ALR2d 394.

Page 264. *Add new paragraph at end of section:* It appears that the sale of legal blanks does not constitute the practice of law. And it has been held on a number of occasions that advertisements by notary publics offering the preparation of "legal documents," "correct legal conveyances," and the like does not constitute the practice of law in the absence of a showing of acts by such notaries, in connection therewith, constituting the rendition of "legal services."[9.1]

It has been held that the maintenance of a service agency by a motion picture company for the purpose of investigating infringements of its copyrights, and the institution of suit, through its attorneys, where such violation is found, does not constitute the unlawful practice of law.[9.2] And the issuance of an insurance policy protecting against liability, and the act of the company issuing such policy, "in interceding by an attorney at law and maintaining a defense in behalf of the insured when a claim is made or a suit is brought against the insured, has been held not to constitute the practice of law or the doing of law business, though the amount sued for exceeds the amount of insurance coverage."[9.3]

The activities of so-called "probate research" organizations which make a business of investigating probate or surrogate court records and notifying heirs of their interest in the particular estate, representing to such heirs that the organization has expended considerable time and money in making such investigation, and that the heirs would never have heard of their good fortune otherwise, in return for which such heirs are advised to give the organization power of attorney to assume control of legal proceedings including employment of attorneys, necessary to establish the heirs' interest in the estate, and are expected to assign to the organization a certain percentage of the proceeds paid over to them by the administrator of the estate, in the event that their claims are successfully established, have been held to constitute the illegal practice of law.[9.5]

While courts usually permit laymen rendering predominantly nonlegal services in tax connections to dispose of incidental questions of law, by the weight of authority a nonlawyer may not undertake, as an independent or distinctly separable service, to render opinions regarding tax liability based on examination of authorities, to construe a tax statute, or, with tax saving in view, to counsel a course of business.[9.6] However, there is a line of cases holding that supplying information and advice in tax matters, even though not incidental to another service, does not amount to practice of law.[9.61]

While a degree of familiarity with tax law is a requisite for making out self-assessing tax returns, these are generally regarded as primarily informative in character and not of the nature of strict legal instruments, which establish, limit, or terminate rights and liabilities. Consequently, the courts hold that their preparation, especially those of the simpler sort, is open to the laity.[9.62]

Owners of property, especially small holders, aggrieved over imposition of unlawful or excessive taxes, are not infrequently confronted with the alternative of suffering in silence or of seeking adjustment, cost of which in trouble and money is out of proportion to any benefit to be gained. To meet this dilemma, two devices have sprung into being. One is the taxpayers' association, incorporated or not, and often a nonprofit undertaking, which pools a large number of small contributions from individual property owners into a war fund which finances sallies against obstinate taxing authorities. The other is an enterpriser, individual or corporate, who, for a fee, commonly a percentage of the reduction or refund effected, makes a specialty of handling taxpayers' grievances. Sometimes the latter, after examining the tax records for overassessments or irregularities, seeks out and actively solicits engagements from property owners, acting as a sort of opposite number to the tax ferret.

Both of these activities have come under attack as amounting to unauthorized practice of law; and due partly to divergent views taken by judges and partly to the considerable number of determining factors which are in individual cases present or absent in varying combinations, it is difficult or impossible to find a pattern for the decisions. However, subject always to qualification, it can be said that the more important considerations are whether or not service to the taxpayer includes handling and control of litigation, if necessary; whether an intermediary will be interposed between the real party in interest and a lawyer; and whether the special knowledge required for the undertaking is legal or economic. Generally, a layman can make property appraisals and comparison of assessments to determine if the property owner has received fair treatment at the hands of the taxing officials, and frequently he may represent the property owner before the assessor or even a nonjudicial board of equalization.[9.63] But if the arrangement contemplates seeking redress in court, even through a qualified attorney, the courts uniformly condemn it as constituting unauthorized practice.[9.64]

Since the practice of law consists of services rendered another, in tax matters—as elsewhere—a layman is free to act as his own advocate and to take his own counsel; and the test is whether he has a genuine personal interest in the transaction. So, filing a petition with the state inheritance tax department for appraisement and waiver of taxes in the estate of a deceased co-owner of land, which the petitioner, a layman, contemplated taking as security for a loan, has been held not to constitute practice of law, but was merely giving attention to the petitioner's own personal interest, as a lender of money, in making certain that the property was unencumbered; and could not be taken as a representation that the petitioner was authorized to practice law.[9.65]

[9.1] **Anno:** 125 ALR 1183.

[9.2] **Anno:** 125 ALR 1185.

For a number of cases discussing the meaning of the actual practice of law under reciprocal provisions for admission of attorney admitted to practice in another jurisdiction, see the annotation in 51 ALR2d 1207.

[9.3] Liberty Mut. Ins. Co. v. Jones, 344 Mo 932, 130 SW(2d) 945, 125 ALR 1149.

Anno: 125 ALR 1185

[9.5] Re Butler, 29 Cal2d 644, 177 P2d 16, 171 ALR 343 (holding that the activities of a nonlawyer engaged in the business of contacting beneficiaries of decedents' estates, soliciting and securing powers of attorney to represent them in proceedings involving the estates and to appoint attorneys for them, and entering into agreements whereby he is given complete control of such litigation and is to pay all expenses, including attorneys' fees and court costs, in consideration of the assignment to him of a portion of their interests in the estates, constitute an unlawful practice of law, and assignments and powers of attorney executed pursuant to such arrangements are illegal and void).

Anno: 171 ALR 355.

A transaction by which a nonlawyer, in accordance with his general business practice, contracts and solicits beneficiaries of decedents' estates, secures their authorization to appear for them, and enters into agreements with them whereby he receives a power of attorney and is authorized to employ attorneys to represent them and he agrees to pav all expenses, including attorneys' fees and court costs, and thus assumes complete control of litigation instituted on behalf of the beneficiaries through attorneys hired by him in consideration of their assignment to him of a part of their interests in the estate, amounts to commercial exploitation of the legal profession and is contrary to public policy. Re Butler. 29 Cal2d 644. 177 P2d 16. 171 ALR 343

A statute authorizing the probate court, before making distribution to any assignee of an heir, devisee, or legatee, or to any person other than an heir, devisee, or legatee pursuant to any agreement, to inquire into the consideration for the assignment or agreement and into the circumstances surrounding the same, while enlarging the power of the court and giving it some control over agreements providing compensation for services of so-called "heir-hunters," does not recognize the propriety of, or establish a public policy favorable to, an agreement whereby a nonlawyer takes an assignment of a portion of an heir's interest in a decedent's estate, agrees to pay all expenses, including attorneys' fees and court costs, and assumes complete control of litigation on behalf of the heir, and employs counsel to represent him Re Butler. 29 Cal2d 644. 177 P2d 16. 171 ALR 343.

[9.6] Re New York County Lawyers Asso. 273 App Div 524, 78 NYS2d 209, 9 ALR2d 787, revg 188 Misc 406, 69 NYS2d 730, and affd without op 299 NY 728, 87 NE2d 451 (in which an accountant, who rendered no other service to the taxpayer, was held guilty of unauthorized law practice for giving an opinion, based on an examination of reported decisions, as to the year in which city retail sales taxes and compensating use taxes were deductible in making a Federal income tax return).

Anno: 9 ALR2d 798.

[9.61] **Anno:** 9 ALR2d 800.

[9.62] **Anno:** 9 ALR2d 801.

[9.63] **Anno:** 9 ALR2d 803.

[9.64] **Anno:** 9 ALR2d 803.

A contract by former record owners of land to employ the other party as agent to institute litigation to restore title as against the holder of the property under a tax deed, under which contract the agent agreed to pay expenses for attorneys, court costs, and redemption, in consideration of an oil and gas lease and a conveyance of minerals in the property, has been held not invalid as authorizing or requiring a layman to practice law, in view of the implication in the contract that the agent was to employ attorneys to bring and prosecute the litigation, and of the evidence that the agent did not attempt to appear or act as an attorney in the litigation which was actually conducted by attorneys. Cox v. Freeman, 204 Okla 138. 227 P2d 670, 28 ALR2d 1230.

[9.65] **Anno:** 9 ALR2d 805.

§ 4. — Work Done by Law Clerk.

p. 264, n. 10. Anno: 111 ALR 45; 125 ALR 1183; 151 ALR 802; 53 ALR2d 794.

§ 5. Attorneys and Counsel Defined and Distinguished.

See article, "The Legal Profession during the Middle Ages," by Professor A-H Chroust, in 32 Notre Dame Law pp 85 et seq.

§ 6. Nature of Office of Attorney.

Am Jur quoted in Woodruff & Son v Rhoton, 251 Iowa 550, 101 NW2d 720.

Am Jur cited in State ex rel. Florida Bar v Calhoon (Fla) 102 So 2d 604.

Harrison v State, 231 Ind 147, 106 NE2d 912.

Re Ryan, 229 Iowa 339, 294 NW 566.

Hoppe v. Klapperich, 224 Minn 224, 28 NW 2d 780, 173 ALR 819.

State ex rel. Gentry v. Becker, 351 Mo 769 174 SW(2d) 181.

R. C. L. quoted in Herfurth v. Horine, 266 Ky. 19, 98 S. W. (2d) 21.

R. C. L. cited in People ex rel. Committee on Grievances v. Denver Clearing House Banks. 99 Colo. 50, 59 P. (2d) 468.

p. 265, n. 3. Cole v. Myers, 128 Conn 223. 21 A(2d) 396. 136 ALR 226.

Harrison v. State. 231 Ind 147, 106 NE2d 912, 32 ALR2d 875.

Fischer v Howard, 201 Or 426, 271 P2d 1059, 49 ALR2d 1301.

A court may, in the exercise of its authority over an attorney as an officer of the court, compel him to answer questions under oath, under threat of commitment for contempt. Gottwals v. Rencher, 60 Nev 35, 98 P(2d) 481, 126 ALR 1262

However, an attorney is not a court "officer" within the meaning of 18 NSC § 401(2), empowering a court of the United States to punish as contempt "misbehavior of any of its officers in their official transactions;" see Cammer v United States, 350 US 399, 100 L ed 474, 76 S Ct 456, 12 Am Jur, Contempt § 41 (Supp).

§ 7. Duties of Office.

Am Jur quoted in Bluestein v Thompson, 102 Ohio App 157, 2 Ohio Ops2d 143, 139 NE2d 668.

R. C. L. quoted in Herfurth v. Horine, 266 Ky. 19, 98 S. W. (2d) 21.

R. C. L. cited in People ex rel. Committee on Grievances v. Denver Clearing House Banks. 99 Colo. 50, 59 P. (2d) 468.

p. 266, n. 11. Fisher v. Pace, 366 US 155, 93 L ed 569, 69 S Ct 425, reh den 336 US 928 93 L ed 1089, 69 S Ct 653.

p. 266, n. 13. State Bar Asso. v Connecticut Bank & Trust Co. 145 Conn 222, 140 A2d 863, 69 ALR2d 394 (bound by canons of ethics enforced by the courts).

It has been held that the Canons of Professional Ethics of the American Bar Association undertake to codify the traditions and practice recognized over the centuries as part of the common law with respect to the lawyer's obligations, and are as obligatory on him when adopted by rule of court as if cast in statutory form. Re Rothman, 12 NJ 528, 97 A2d 621, 39 ALR2d 1032.

§ 8. — Precedence of Public, over Private, Duties.

Am Jur cited in Leuch v. Egelhoff, 255 Wis 29, 38 NW2d 1.

p. 266, n. 14. State Bar Asso. v Connecticut Bank & Trust Co. 145 Conn 222, 140 A2d 863, 69 ALR2d 394.

p. 266, n. 16. It has been held that nothing should be done by any member of the legal fraternity which might tend to lessen in any degree the confidence of the public in the fidelity, honesty, and integrity of the profession. Lyons v Hall (La App) 90 So2d 519, 60 ALR2d 1003.

p. 266, n. 17. Fisher v. Pace, 336 US 155, 93 L ed 569, 69 S Ct 425 reh den 336 US 928, 93 L ed 1089, 69 S Ct 653.

p. 266, n. 19.

"An attorney owes his first duty to the court. He assumed his obligations toward it before he ever had a client. His oath requires him to be absolutely honest even though his client's interests may seem to require a contrary course. The lawyers cannot serve two masters; and the one they have undertaken to serve primarily is the court." Re Nebraska State Bar Asso. 133 Neb. 283, 275 N. W. 265, 114 ALR 151.

§ 10. Necessity of Representation by Attorney

See article, "The Legal Profession during the Middle Ages," by Professor A-H Chroust, in 32 Notre Dame Law pp 85 et seq.

Am Jur cited in White v State, — Ga App —, 125 SE2d 239 (dissent op).

p. 267, n. 7. A litigant has a right to act as his own attorney but in so doing, he should be restricted to the same rules of evidence and procedure as is required of those qualified to practice law before the courts. Lombardi v Citizens Nat. Trust & Sav. Bank, 137 Cal App2d 206 289 P2d 823.

It has been held that a statute providing that in all courts of the United States the parties may plead and conduct their own cases personally or by counsel, and that such representation by counsel shall be in accordance with the rules of the courts, is not so indefinite and vague as to be invalid. Brasier v Jeary (CA8 Neb) 256 F2d 474, 67 ALR2d 1096, cert den 358 US 867, 3 L ed 2d 99, 79 S Ct 97, reh den 358 US 923, 3 L ed 2d 242, 79 S Ct 286.

The rule of court requiring a nonresident attorney trying a case to have a resident attorney associated with him in the trial has been held not applicable to a case conducted by a nonresident party personally. Brasier v Jeary (CA8 Neb) 256 F2d 474, 67 ALR2d 1096, cert den 358 US 867, 3 L ed 2d 99, 79 S Ct 97, reh den 358 US 923, 3 L ed 2d 242, 79 S Ct 286.

p. 267, n. 8. Liberty Mut. Ins. Co. v. Jones, 344 Mo 932, 130 SW(2d) 945 125 ALR 1149

p. 267, n. 9. Anno: 67 ALR2d 1104–1108.

A party to a civil action appearing pro se has been held not to be entitled, as a matter of right, to be represented by counsel at the same time. Brasier v Jeary (CA8 Neb) 256 F2d 474, 67 ALR2d 1096, cert den 358 US 867, 3 L ed 2d 99, 79 S Ct 97, reh den 358 US 923, 3 L ed 2d 242, 79 S Ct 286.

A statutory provision denying a party conducting his own case personally the right to aid of associate counsel has been held not violative of due process of law secured by the Fifth Amendment to the Federal Constitution. Brasier v Jeary (CA8 Neb) 256 F2d 474, 67 ALR2d 1096, cert den 358 US 867, 3 L ed 2d 99, 79 S Ct 97, reh den 358 US 923, 3 L ed 2d 242, 79 S Ct 286.

It has been held that the discretionary power of a trial judge to control and regulate the orderly procedure of the trial justifies denial of a motion of counsel for the plaintiff that the plaintiff be permitted to assist counsel in argument and to aid counsel in making statements to the court. Brasier v Jeary (CA8 Neb) 256 F2d 474, 67 ALR2d 1096, cert den 358 US 867, 3 L ed 2d 99, 79 S Ct 97, reh den 358 US 923, 3 L ed 2d 242, 79 S Ct 286.

p. 267, n. 11. Anno: 67 ALR2d 1109.

Page 267. *Add following note* 11: Other courts have denied or sustained a denial of permission for a litigant-attorney to help his counsel conduct a trial, on the ground that he stood no differently from any other litigant represented by counsel.[11.5]

[11.5] **Anno:** 67 ALR2d 1109.

p. 267, n. 12. State v Thomlinson, — SD —, 100 NW2d 121, 77 ALR2d 1229.

Anno: 77 ALR2d 1235.

p. 267, n. 13. State v Thomlinson, — SD —, 100 NW2d 121, 77 ALR2d 1229.

p. 268, n. 15. State v Thomlinson, — SD —, 100 NW2d 121, 77 ALR2d 1229.

Anno: 77 ALR2d 1241.

§ 11. Privileges and Exemptions of Office.

p. 268, n. 1. Anno: 74 ALR2d 599.

§ 13. — By Municipal Corporation.

Am Jur cited in Davis v. Ogden City, 117 Utah 315, 215 P2d 616, 223 P2d 412, 16 ALR2d 1208.

p. 269, n 15. Davis v. Ogden City, 117 Utah 315, 215 P2d 616, 223 P2d 412, 16 ALR2d 1208.

Anno: 16 ALR2d 1229.

An attorney engaged in the practice of law within a municipality is subject to a municipal ordinance levying an annual occupational tax on various occupations and professions, including that of attorney, as against the attorney's contention that he is exempt from such tax in that he is an officer of the court and an agency in the judicial machinery for the administration and enforcement of justice. **Anno:** 123 ALR 1384.

It is generally agreed that a municipality may not impose a tax upon the right to engage in the practice of law as a regulatory measure under the police power, as distinguished from a tax for revenue purposes. **Anno:** 16 ALR2d 1230; see Davis v Ogden City, 117 Utah 315, 215 P2d 616, 223 P2d 412, 16 ALR2d 1208

The contention that attorneys are exempt from municipal, privilege, or occupational taxes for revenue by reason of the fact that they are, in a certain limited sense, officers of the court and a part of the judicial branch of the state government has been consistently denied. **Anno:** 16 ALR2d 1230; see Davis v. Ogden City, 117 Utah 315, 215 P2d 616, 223 P2d 412, 16 ALR2d 1208.

The fact that a municipality is without authority to regulate the practice of law does not preclude it from levying a revenue license tax on attorneys. Davis v. Ogden City, 117 Utah 315, 215 P2d 616, 223 P2d 412, 16 ALR2d 1208.

Page 269. *Add, following note* 15: The right to impose the tax is sometimes conferred directly by constitutional provision, or by provision therefor in a freeholders' or home-rule charter.[15.5] In the absence of such constitutional authorization, the power to impose the tax must be conferred by statute or the municipal charter, either expressly or by necessary or reasonable implication.[15.51]

The authority of a municipality to impose license fees on particular classes of attorneys, such as nonresidents, depends, of course, upon the proper construction of the applicable charter or statutory provisions in the light of the facts and circumstances of the particular case.[15.6]

[15.5] **Anno:** 16 ALR2d 1231.

[15.51] Davis v. Ogden City, 117 Utah 315, 215 P2d 616, 223 P2d 412, 16 ALR2d 1208.

Anno: 16 ALR2d 1231.

A statute which expressly enumerates businesses which cities may license, regulate, and tax inferentially limits municipal power to the businesses so listed; and the practice of law, not being included in the enumeration, is not within the scope of the power granted thereby Davis v Ogden City, 117 Utah 315, 215 P2d 616 223 P2d 412, 16 ALR2d 1208.

15.6 Anno: 16 ALR2d 1237.

p. 269, n. 16. Anno: 16 ALR2d 1238.

p. 269, n. 17. Anno: 16 ALR2d 1237.

Under a statute authorizing municipalities to levy a license tax on attorneys "residing" therein, such tax may not be imposed on an attorney who does not reside in the municipality, although he may maintain an office or engage in practice therein. **Anno:** 16 ALR2d 1237.

p. 269, n. 18. Anno: 16 ALR2d 1231.

Page 269. *Add, following note* 18: And it is generally agreed that a state license to practice law does not render an attorney immune from a municipal revenue license tax, in the absence of any statutory provision to that effect.[18.5]

18.5 Davis v. Ogden City, 117 Utah 315, 215 P2d 616, 223 P2d 412, 16 ALR2d 1208.

Petersburg v. Cocke, 94 Va 244, 26 SE 576, 36 LRA 432; Ould v. Richmond (Va) 23 Gratt 464, 14 Am Rep 139.

Anno: 16 ALR2d 1235.

p. 270, n. 19. Anno: 16 ALR2d 1235.

Page 270. *Add, following note* 19: The right of a municipality to impose a revenue license tax on attorneys has frequently been held to exist under statutory or charter authority to "license," "regulate," or "tax" businesses, employments, or occupations generally,[19.5] although a contrary conclusion has been reached in a few cases, due in some instances to other statutory provisions relating to the subject.[19.51]

The exemption from a municipal licensing ordinance of attorneys who occupy the status merely of employees of other persons, firms, or corporations and who do not operate their own business does not render the ordinance unlawfully discriminatory.[19.6] Nor does the exemption, from an ordinance imposing a license tax on attorneys practicing their profession in the municipality, of attorneys temporarily in the city on specific professional business, unless they advertise their professional services, or, in addition to the specific business, solicit additional business, constitute an unlawful discrimination against resident attorneys.[19.61] And it has been held that an ordinance imposing a license tax of a specified amount on attorneys and other persons is not rendered invalid by the exemption from such tax of "persons, firms, individuals or corporations who pay a tax to the city or state on gross incomes," pursuant to the provisions of the enabling statute.[19.62]

Ordinances basing the amount of a license or occupation tax on attorneys on the gross income or receipts from their practice have in some instances been sustained as against objections that the tax constituted an income tax, not within the power of the municipality to levy; [19.7] that it was unreasonable, discriminatory, and unjust;[19.71] and that it was violative of the constitutional requirements as to uniformity of taxation.[19.72] But an ordinance imposing a license tax on attorneys of a specified amount and an additional amount based on gross income in excess of a specified minimum has been declared invalid as violative of a constitutional provision prohibiting the levying of an income tax upon residents or citizens by the state or under its authority.[19.73]

It has been held that the imposition of the same amount of tax on every attorney subject thereto, without reference to the amount of his income from his practice, is not violative of a constitutional requirement as to uniformity of taxation.[19.74]

19.5 Abraham v. Roseburg, 55 Or 359, 105 P 401, Ann Cas 1912A 597 ("to license and regulate all such callings, trades and employments as the public good may require to be licensed and regulated and as are not prohibited by law").

Davis v. Ogden City, 117 Utah 315, 215 P2d 616, 223 P2d 412, 16 ALR2d 1208 "to raise revenue by levying and collecting a license fee or tax on any such business within the limits of the city, and regulate the same by ordinance").

Anno: 16 ALR2d 1231.

19.51 Anno: 16 ALR2d 1234.

19.6 Davis v. Ogden City, 117 Utah 315, 215 P2d 616, 223 P2d 412, 16 ALR2d 1208.

Anno: 16 ALR2d 1238.

19.61, 19.62 Anno: 16 ALR2d 1238.

19.7 Davis v. Ogden City, 117 Utah 315, 215 P2d 616, 223 P2d 412, 16 ALR2d 1208.

Anno: 16 ALR2d 1239.

19.71–19.74 Anno: 16 ALR2d 1239.

§ 14. Right and License to Practice.

Am Jur cited in Moity v Louisiana State Bar Asso. 239 La 1081, 121 So 2d 87; Louisiana State Bar Asso. v Theard, 225 La 98, 72 So 2d 310.

Re Monaghan, 122 Vt 199, 167 A2d 81.

West Virginia State Bar v Earley, 144 W Va 504, 109 SE2d 420.

See article, "The importance and value of attorney general's opinion," by Chief Justice R. L. Larson, in 41 Iowa Law Review pp. 351 et seq.

p. 270, n. 20. State Bar Asso. v Connecticut Bank & Trust Co. 145 Conn 222, 140 A2d 863, 69 ALR2d 394.

Ruckenbrod v Mullins, 102 Utah 548, 133 P 2d 325, 144 ALR 839.

The Fourteenth Amendment to the Constitution of the United States does not grant the right to practice law; nor is the right to practice law in the courts a privilege or immunity, within the meaning of the Fourteenth Amendment. State ex rel. Ralston v. Turner, 141 Neb 556, 4 NW(2d) 302, 144 ALR 138.

Only a decision which violates a Federal right authorizes interference by the Supreme Court of the United States with a state's choice as to the personnel of its bar. Re Summers, 325 US 561, 89 L ed 1795, 65 S Ct 1307.

No violation of the principles of religious freedom, which the Fourteenth Amendment secures against state action, is involved in a denial by a state court of an application for admission to the bar, on the ground that the applicant, because of a conscientious belief in nonviolence, cannot take in good faith the required oath to support the state constitution, where such support is construed to include willingness to serve in the state militia when required. Re Summers, 325 US 561, 89 L ed 1795, 65 S Ct 1307.

p. 270, n. 1. People ex rel. Chicago Bar Asso. v. Goodman, 366 Ill. 346, 8 N. E. (2d) 941, 111 A.L.R. 1.

p. 270, n. 2. People ex rel. Chicago Bar Asso. v. Goodman, 366 Ill. 346, 8 N E. (2d) 941, 111 A.L.R. 1.

Page 270. *Add following note* 2: But irrespective of whether the practice of law is a "right" or "privilege," a person cannot be prevented from practicing law except for valid reasons, such practice not being a matter of the state's grace.[2.5]

2.5 Schware v Board of Bar Examiners of New Mexico, 353 US 232, 1 L ed 2d 796, 77 S Ct 752.

While it is important to leave states free to select their own bars, it is equally important that the state should not exercise this power in an arbitrary or discriminatory manner nor in such way as to impinge on the freedom of political expression or association. Konigsberg v State Bar of California, 353 US 252, 1 L ed 810, 77 S Ct 722.

p. 270, n. 3. Trovatten v. Minea, 213 Minn 544, 7 NW2d 390, 144 ALR 1263.

Page 271. *Add new paragraph following note* 10: A state may constitutionally require a lawyer to be a member of an integrated bar.[10.5]

[10.5] See infra, § 19 (Supp).

Page 271. *Add, following note* 13: When the legislature sets up an administrative body, such as an industrial commission, and empowers it to promulgate rules governing procedure before it, such body cannot, by a rule permitting a party to appear before it by "agent," bestow upon one not a duly authorized attorney at law the privilege of performing services for a claimant falling within the category of the practice of law.[13.1]

[13.1] People ex rel. Chicago Bar Asso. v. Goodman, 366 Ill 346, 8 NE2d 941, 111 ALR 1, writ of certiorari denied in 302 US 728, 82 L ed 562, 58 S Ct 49.

§ 15. Jurisdiction to Admit.

Am Jur cited in Heiberger v Clark, 148 Conn 177, 169 A2d 652.

Moity v Louisiana State Bar Asso. 239 La 1081, 121 So 2d 87.

RCL cited in Re Florida State Bar Asso. 134 Fla 851, 186 So 280.

p. 271, n. 18. Anno: 144 ALR 150.

And see infra, § 19 (Supp.).

p. 271, n. 19. Re Keenan, 310 Mass 166, 37 NE(2d) 516, 137 ALR 766.

p. 271, n. 20. State ex rel. Foster v. Washington State Bar Asso. 23 Wash2d 800, 162 P2d 261, 160 ALR 1366.

It has been held that no statute can control the judicial department in the performance of its duty to decide who shall enjoy the privilege of practicing law. State Bar Asso. v Connecticut Bank & Trust Co. 145 Conn 222, 140 A2d 863, 69 ALR2d 394.

p. 271, n. 1. People ex rel. Chicago Bar Asso. v. Goodman, 366 Ill. 346, 8 N. E. (2d) 941, 111 A.L.R. 1 (holding that this power extends to regulating the study of law).

Nelson v. Smith, 107 Utah 382, 154 P2d 634, 157 ALR 512; Ruckenbrod v. Mullins, 102 Utah 548, 133 P2d 325, 144 ALR 839.

p. 271, n. 2. Anno: 144 ALR 150.

And see infra, § 19 (Supp.).

The filing of a petition for admission to the bar, though provided for by statute, is nevertheless subject to the action of the courts. Re Keenan, 310 Mass 166, 37 NE(2d) 516, 137 ALR 766.

A statutory provision that a citizen "may . . . file a petition" for admission to the bar is not, in view of the superior power of the judiciary over membership in the bar, to be taken as meaning that every citizen filing a petition shall be admitted to the bar. Re Keenan, 310 Mass 166, 37 NE(2d) 516, 137 ALR 766.

One who has been disbarred is entitled to file in a certain court a petition for admission to the bar where the statute provides that a petition may be filed in such court by a "citizen" to be examined for "admission" as an attorney at law, and if found qualified, to be "admitted" as such. Re Keenan, 310 Mass 166, 37 NE(2d) 516, 137 ALR 766.

The fact that admission to the bar is regulated by a statute which fails to distinguish between ordinary applications and applications by persons previously disbarred does not prevent the judicial department of the state from imposing procedural and substantive conditions upon the admission as an attorney of a person previously disbarred different from those imposed upon a person applying for original admission. Re Keenan, 310 Mass 166, 37 NE2d 516, 137 ALR 766.

A statutory provision for examination for admission to the bar, even though confined to an examination into the acquirements and qualifications of the applicant other than his moral character, is as applicable to a petition by one previously disbarred as to a petition by an original applicant. Re Keenan, 310 Mass 166, 37 NE(2d) 516, 137 ALR 766.

The fact that a statute relating to the admission of attorneys to the bar provides for the referring of a petition for admission to a board of bar examiners does not establish the inapplicability of the statute to a petition for admission by one previously disbarred, where, under the statute providing for reference of the petition "unless the court otherwise orders," the court, if it is of the opinion that a report of the bar examiners would not be helpful in the case of an admission of a previously disbarred attorney, may dispense with any reference of the petition in such a case. Re Keenan, 310 Mass 166, 37 NE(2d) 516, 137 ALR 766

It has been held that the statute authorizing the Superior Court to admit as attorneys such persons as are qualified therefor, agreeably to the rules established by the judges of said court, is to be construed only as a legislative recognition of the inherent right of the Superior Court, a constitutionally established tribunal, to promulgate rules for the admission of attorneys. State Bar Asso. v Connecticut Bank & Trust Co. 145 Conn 222, 140 A2d 863, 69 ALR2d 394.

p. 272, n. 3.

It is not inappropriate for the legislature to intrust to a lower court jurisdiction, concurrent with that of the highest court of the state, over petitions for admission to the bar, where the lower court is organized particularly for the hearing and trial of proceedings at common law involving the determination of issues of fact, such as might be involved upon a petition for admission to the bar. Re Keenan, 310 Mass 166, 37 NE2d 516, 137 ALR 766.

The legislature has the power to confer upon a lower court created by statute jurisdiction, concurrent with that of the highest court of the state, over petitions for admission to the bar, at least where the highest court has not, by a valid rule, excluded the lower court from such jurisdiction. Re Keenan, 310 Mass 166, 37 NE(2d) 516, 137 ALR 766.

In the absence of a determination by the highest court of a state that its power over admissions to the bar is to be exercised exclusively by it, a statute conferring on a lower court concurrent jurisdiction in such cases is not an unconstitutional interference with the power of the highest court. Re Keenan, 310 Mass 166, 37 NE(2d) 516, 137 ALR 766.

A statutory provision for the filing in certain courts of petitions for admission to the bar is to be interpreted as a provision in aid of the judicial department in reaching a proper selection of those qualified for admission to practice in the courts, and not as interfering with that department in the performance of its duty. Re Keenan, 310 Mass 166, 37 NE (2d) 516, 137 ALR 766.

The Rules of the Supreme Judicial Court of Massachusetts in Relation to Attorneys held not to exclude the exercise by the Superior Court of its statutory jurisdiction, concurrent with that of the Supreme Judicial Court, over petitions for admission to the bar. Re Keenan, 310 Mass 166, 37 NE(2d) 516, 137 ALR 766.

p. 272, n. 4. State ex rel. Ralston v. Turner 141 Neb 556, 4 NW2d 302, 144 ALR 138.

§ 16. Nonresident Practitioners.

Am Jur quoted in Johnson v Di Giovanni, 347 Mich 118, 78 NW2d 560.

Am Jur cited in Thomas v Cassidy (CA4 Va) 249 F2d 91, cert den 355 US 958, 2 L ed 2d 533, 78 S Ct 544.

Page 272. *Add new paragraph at end of section:* The validity of a statutory requirement that a nonresident attorney appoint a resident attorney upon whom service might be had in matters connected with the action has been upheld.[7.5] Court rules requiring a nonresident attorney to employ or associate with himself local counsel have been held invalid.[7.51] A statute requiring association with local counsel has been held inapplicable to a nonresident attorney who was prosecuting an action in his own behalf as party plaintiff.[7.52] Where a particular statute or court rule required that a nonresident attorney employ, or associate with himself, local counsel, some courts have been strict in enforcing such requirement;[7.53] but other courts have interpreted statutory provisions or court rules as not to require a nonresident attorney to employ, or associate with himself, local counsel.[7.54] The United States Supreme Court has held that a Kansas statute and rules of court permitting an out-of-state lawyer to practice before Kansas tribunals only if he associates a member of the Kansas bar with him, as attorney of record, does not violate the Fourteenth Amendment either on its face or as applied to a lawyer maintaining law offices and a practice of law both out of state and in Kansas.[7.55]

[7.5] **Anno:** 45 ALR2d 1065.

[7.51] **Anno:** 45 ALR2d 1066.

The rule of a county chancery court precluding the prosecution of a suit therein by a nonresident attorney, who has been admitted to practice in courts of equal jurisdiction of another state, without the employment of a resident of the county as co-counsel, has been held invalid as unreasonable and as not conforming to reciprocity statute. Letaw v Smith, 223 Ark 638, 268 SW2d 3, 45 ALR2d 1053.

[7.52] **Anno:** 45 ALR2d 1066.

[7.53] **Anno:** 45 ALR2d 1067.

[7.54] **Anno:** 45 ALR2d 1069

[7.55] Martin v Walton, 368 US 25, 7 L ed 2d 5, 82 S Ct 1, reh den 368 US 945, 7 L ed 2d 341, 82 S Ct 376.

§ 16.1. (New text) — Effect of Removal from State.

The effect of the removal of an attorney from the state and of the establishment of a residence in another state is to suspend his right to practice law in the former state.[1] This is true even though the removal is to a contiguous state.[2] However, as the right to practice law created by admission to the bar is a continuous right for life, unless it is revoked, mere absence from the state does not of itself necessarily cause the forfeiture or abandonment of the right to practice originally granted.[3] The suspension of the right to practice law in the state, caused by the removal of the attorney from the state and his establishment of a residence in another state, does not cause the forfeiture or termination of the right of an attorney to be a member of the bar of the court of his original residence. The latter right will be revived upon the return of the attorney to the state of his original residence and the re-establishment of his residence there, and with that right will necessarily be revived his right to practice law in the state.[4] And if membership in the bar association of the state has, during his nonresidence, been made a condition of practicing law in the state, he is entitled, as a matter of right and without having to go through the formalities or conditions necessary for the admission of new members, to the privilege of membership in such association, even though under the statute creating the bar association only those entitled to practice law in the state at the time of its enactment and those subsequently qualifying as new members are entitled to the privilege of membership and to the right to practice.[5] Upon the question whether, upon his application for readmission to the bar of the state, his unprofessional conduct as a practicing attorney of the state to which he had moved, or his disbarment for such conduct in the other state, will ipso facto preclude his readmission or warrant his disbarment also at the forum, there is some conflict of opinion. One view is that as such foreign disbarment has no extraterritorial effect, it does not ipso facto operate to deny to such attorney seeking readmission the right thereto, or necessarily require his disbarment also from the bar of the forum, although such disbarment and the probative facts (which will be treated as conclusively established in the foreign disbarment proceedings) may, in subsequent disciplinary proceedings against him at the form, be the subject of an inquiry, and if such facts are sufficient to disbar an attorney from the bar of the forum, the court of the forum may order a disbarment.[6] Another view is that his professional misconduct in the other state and disbarment therefor will ipso facto operate as the basis of a denial to him of the right to readmission to which he would otherwise be entitled as a matter of right.[7]

The few cases dealing with the question of the effect of change of residence by an attorney after the commencement of an action in the state, upon his right to continue as attorney in such action, are conflicting. Thus, the view has been taken that if the prerequisite of residence was present at the commencement of the action, the right to continue as attorney in the prosecution of the action and enforcement of the judgment rendered is not lost by the supervening nonresidence.[8] The opposite conclusion has also been reached.[9]

[1] State ex rel. Foster v. Washington State Bar Asso. 23 Wash2d 800, 162 P2d 261, 160 ALR 1366.

Anno: 160 ALR 1373.

[2, 3] **Anno:** 160 ALR 1373.

[4] State ex rel. Foster v. Washington State Bar Asso. 23 Wash2d 800, 162 P2d 261, 160 ALR 1366.

Anno: 160 ALR 1374.

[5] State ex rel. Foster v. Washington State Bar Asso. 23 Wash2d 800, 162 P2d 261, 160 ALR 1366.

Anno: 160 ALR 1374.

One who, having been admitted to the bar of the State of Washington and having practiced there for a number of years, removed to Alaska and after having practiced his profession there for over thirty years, and while in good standing as a member of the Alaska Bar, returned to Washington and, having established his residence there, sought admission to membership in the State Bar Association upon payment of the required dues and tender of any amount necessary to investigate his professional conduct while a member of the Alaska bar, together with proof showing his good standing as a member of the Alaska bar, has been held entitled to admission to such membership in the State Bar Association, although during his absence from Washington the State Bar Act was enacted which confined the first membership of the State Bar Association to those who at the time of the enactment thereof were entitled to practice law in the State of Washington, and although during such nonresidence he had no right to practice law in Washington—the ground of the decision being that, although during his nonresidence his right to practice law in Washington was suspended, he still remained a member of the state bar, and he did not lose his membership in that bar by reason of his nonresidence at the time of the enactment of that statute, and that upon his return to Washington he regained his status as a member of the Washington bar, which entitled him to membership in the State Bar Association. State ex rel. Foster v. Washington State Bar Asso. 23 Wash2d 800, 162 P2d 261. 160 ALR 1366.

One who, being a member of the Arizona bar, removed to California and practiced law there, and who upon the adoption of the Arizona State Bar Act automatically became a member of the Arizona bar, under the terms of that act providing that its first members should include all persons who were at the time of its enactment entitled to practice law in Arizona, may, as a matter of right, pay the accrued membership fees provided for by the act and thereby prevent his suspension for delinquency in such payment where the act provides for a two months' notice of such delinquency before a suspension, and it is not shown that such notice was ever given to him or that he was actually suspended before tender of such arrearages of dues. **Anno:** 160 ALR 1375.

[6] **Anno:** 160 ALR 1375.

[7] State ex rel. Foster v. Washington State Bar Asso. 23 Wash2d 800. 162 P2d 261. 160 ALR 1366.

Anno: 160 ALR 1375.

Conduct while residing in another state and professional behavior as a member of the bar of that state, of an attorney who seeks to resume practice in Washington, having formerly been admitted to the bar of that state, is a proper subject of investigation before admitting the attorney to membership in the State Bar Association. State ex rel. Foster v. Washington State Bar Asso. 23 Wash2d 800, 162 P2d 261, 160 ALR 1366.

[8] **Anno:** 60 ALR 1373.

§ 17. Liability for Unauthorized Practice of Law.

Forms: 2 Am Jur Pl & Pr Forms 2:1341–2:1345; 6 Am Jur Pl & Pr Forms 6:341–6:344; 16 Am Jur Pl & Pr Forms 16:1028.

Am Jur quoted in Hobson v. Kentucky Trust Co. 303 Ky 493. 197 SW2d 454.

Am Jur cited in Bump v. District Ct. 232 Iowa 623. 5 NW(2d) 914.

Re Baker. 8 NJ 321. 85 A2d 505

West Virginia State Bar v Earley, 144 W Va 504, 109 SE2d 420.

p. 272, n. 9. Dulles v Johnson (CA2 NY) 273 F2d 362, 80 ALR2d 1338, cert den 364 US 834, 5 L ed 2d 60, 81 S Ct 54.

Page 272. *Add, following note 9*: A statute may render the unauthorized practice of law by one not an attorney a contempt of court;[9.1] and it has been held that such unauthorized practice, whether the illegal acts are performed in or out of court, is in contempt of the state supreme court in which inherent power to regulate the admission of attorneys to practice is vested.[9.11]

[9.1] Re Matthews, 57 Idaho. 75. 62 P. (2d) 578, 111 A.L.R. 13.

[9.11] People ex rel. Chicago Bar Asso. v. Goodman, 366 Ill. 346. 8 N. E. (2d) 941, 111 A.L.R. 1.

As to matters in regard to procedure and punishment for contempt, see CONTEMPT.

p. 272, n. 11. Nelson v. Smith. 107 Utah 382. 154 P2d 634, 157 ALR 512.

Injunction is a proper remedy to prevent the violations of the law by a corporation engaged in the practice of law. Hexter Title & Abstract Co. v. Grievance Committee, F. C. D. 142 Tex 506. 179 SW2d 946. 157 ALR 268. **Anno:** 157 ALR 310.

A suit to enjoin unlawful practice of law by one not a member of the state bar may be brought in the name of the grievance committee of that body, that committee having been created by the supreme court, in the exercise of power granted by statute, and authorized to maintain suit to prohibit unlawful practice of law. Hexter Title & Abstract Co. v. Grievance Committee. F. C. D. 142 Tex 506. 179 SW2d 946. 157 ALR 268.

Page 272. *Add, following note 11*: The prosecution of suits by an attorney may be enjoined where he has secured such litigation through "chasers" paid by him.[11.1]

However, the success of a proceeding to restrain one not admitted to practice law from performing legal work does not depend upon proof of his violation of any statute.[11.5]

[11.1] See § 274, infra (Supp).

[11.5] **A statute prohibiting one not admitted to practice law from doing legal work for compensation** does not preclude a court of equity from enjoining a licensed real estate broker from performing work of a legal nature notwithstanding that he does not receive compensation therefor over and above his ordinary real estate commission. Washington State Bar Asso. v. Washington Asso. of Realtors, 41 Wash2d 697, 251 P2d 619, overruling Paul v. Stanley, 168 Wash 371, 12 P2d 401.

p. 272, n. 12. Anno: 105 ALR 1376; 157 ALR 310.

§ 18. Who May Challenge Right.

Forms: 2 Am Jur Pl & Pr Forms 2:1341–2:1343, 2:1345; 6 Am Jur Pl & Pr Forms 6:341–6:344.

Am Jur quoted in Conway-Bogue Realty Invest. Co. v Denver Bar Asso. 135 Colo 398, 312 P2d 998.

Hobson v Kentucky Trust Co. 303 Ky 493, 197 SW2d 454.

Am Jur cited in Re Dodd, 131 Conn 702, 42 A2d 36.

Bump v. District Ct. 232 Iowa 623, 5 NW2d 914.

Re Baker. 8 NJ 321. 85 A2d 505

West Virginia State Bar v Earley, 144 W Va 504, 109 SE2d 420.

p. 273, n. 14.

Upon a report of a jurisdictional question by a trial judge in whose court a petition has been filed by a disbarred attorney for readmission to the bar, the appellate court is not concerned with any question of the right of a bar association which, although an order of notice of the petition was issued to it and it objected to the jurisdiction of the court below, is not technically a party to the proceeding. Re Keenan, 310 Mass 166, 37 NE(2d) 516, 137 ALR 766.

A state bar, which by statute is constituted an administrative agency of the judicial department of the state, all persons not members thereof being prohibited from practicing law in the state, has no interest not common to the public in general, regarding the right to practice law, and may maintain a suit to enjoin one not a member from practicing law. Hexter Title & Abstract Co. v. Grievance Committee, F. C. D. 142 Tex 506. 179 SW2d 946. 157 ALR 268.

Page 273. *Add paragraph at end of section:* An action by two railroads to enjoin the solicitation and prosecution of claims against them by an attorney who through a family partnership and employees of the railroad, operating as "chasers," had secured such litigation, which regardless of the place where the injury to an employee of the railroad occurred, was to be prosecuted in his jurisdiction, has been upheld and the injunction granted.[16.5]

[16.5] See § 274, infra (Supp).

§ 19. Generally.

Am Jur cited in Re Florida State Bar Asso. 134 Fla 851, 186 So 280 (n. 18).

RCL cited in State ex rel. Watson v. Dade County Roofing Co. 156 Fla 260. 22 So2d 793.

p. 273, n. 17.

For hundreds of years prior to the American Revolution the English courts actually exercised control over admittance to the bar. **Anno:** 144 ALR 156.

p. 273, n. 18.

Interference by the legislature with the power of the courts to control membership in the bar of the state is invalid under a constitutional provision that "the legislative department shall never exercise the executive and judicial powers, or either of them." Re Keenan, 310 Mass 166, 37 NE(2d) 516, 137 ALR 766.

A few cases support the doctrine that the legislature has full power in the matter of admissions to the bar. And some cases more or less distinctly affirm that control of the matter of admissions to the bar is in the courts. **Anno:** 144 ALR 152, 153.

The general conclusion to be drawn from the cases (allowing for contrary doctrines laid down in a few jurisdictions, and in some instances still adhered to) is that, notwithstanding the fundamental division of the powers of government contemplated by American constitutions, and despite the vital interest of the courts in the character, learning, and ability of practicing attorneys, a state legislature may, with effect, enact reasonable statutes regulating the matter of admitting attorneys to practice, including the prescribing of procedure to be followed by applicants, committees, boards, and, usually, by the courts, the learning and character to be possessed by persons admitted, and generally, the conditions to be complied with. **Anno:** 144 ALR 150, 159.

Admission to practice law is a judicial function, one of the inherent powers of the court, and is not within the powers of the legislature. Re Levy, 23 Wash2d 607, 161 P2d 651, 162 ALR 805.

p. 273, n. 20. Barr v. Watts (Fla) 70 So2d 347, holding that the legislature has power to prescribe qualifications for admission to the practice of law concurrent with that of the Supreme Court; Gould v. State, 99 Fla 662, 127 So 309, 69 ALR 699.

Re Keenan, 310 Mass 166, 37 NE2d 516, 137 ALR 766; Opinion of Justices, 279 Mass 607, 180 NE 725, 81 ALR 1059.

Anno: 144 ALR 154.

It is sometimes said that a legislature may enact laws to "aid" the courts in the exercise of their inherent judicial power in the matter of admissions to the bar; and in certain other cases expressions of similar import are used. In other cases it is simply stated, in substance, that the legislature may enact reasonable laws regulating admission to the bar. **Anno:** 144 ALR 152

The act of admitting attorneys to practice is in most jurisdictions regarded as exclusively for the courts, as is the final determination in regard to the fitness and qualifications of particular persons, and the courts, acting therein, may exercise judicial power to reject an applicant for unfitness, notwithstanding he may have met the terms of existing statutes and under the provisions thereof appears fully entitled to admittance. **Anno:** 144 ALR 151, 176, 179.

While the legislature may fix minimum standards of qualifications for attorneys at law, the court will determine for itself whether the qualifications so fixed invade the judicial field or embarrass the court in the discharge of its functions; and it is no more within the power of the legislature to prescribe qualifications for attorneys which are too rigorous than it is to prescribe with finality those which are too law. Integration of Bar Case, 244 Wis 8, 11 NW(2d) 604, 12 NW(2d) 699, 151 ALR 586.

Statutes regulating admissions to the bar are effective in so far as, under the police power, they establish minimum requirements; but they cannot deprive the court of the power to require additional qualifications. Re Levy, 23 Wash2d 607, 161 P2d 651, 162 ALR 805.

The court will recognize no exceptions to its rules prescribing qualifications for admission to the bar. Re Levy, 23 Wash2d 607, 161 P2d 651, 162 ALR 805.

p. 273, n. 1. Anno: 114 ALR 173; 144 ALR 155, 163.

Under most constitutions, the sounder and better supported doctrine seems to be that, in the exercise of its police power, in the interest and for the protection of the general public, a legislature may, with entire validity, reasonably regulate admissions to the bar, but that any statutory provision which, as put into effect, involves interference with, or frustration of, the courts in the performance of their duties and functions cannot be regarded as valid. **Anno:** 144 ALR 150.

No statute can control the judicial department in the performance of its duty to decide who is fit to practice law. Opinion of Justices, 279 Mass 607, 180 NE 725, 81 ALR 1059; State ex rel. Ralston v. Turner, 141 Neb 556, 4 NW(2d) 302, 144 ALR 138.

Where a legislative bill constitutes an endeavor on the part of the legislature to go beyond the concept of minimum requirements of an applicant to take examination for admission to the bar and denies the judicial department the power to place higher qualifications than those specified in the act, and, in fact, usurps the power of the judiciary in such respect; held, such legislative act is unconstitutional. State ex rel. Ralston v. Turner, 141 Neb 556, 4 NW(2d) 302, 144 ALR 138

A statute relating to the admission of war veterans to practice law, using the words "may be admitted" should be construed as merely permitting, and not requiring, admission by the courts of persons having the qualifications therein stated, and such statute, especially in view of the presumed knowledge of the legislators that the word "may" in a statute relating to the practice of law, had been previously construed by the courts as not mandatory, does not indicate a purpose on the part of the legislature to usurp the powers of the judiciary with regard to the control of the admission of applicants to the practice of law (expressed in this instance by a court rule promulgated prior to the passage of the statute and covering the admission of veterans and requiring certain qualifications in addition to those required by the statute). Re Levy, 23 Wash2d 607, 161 P2d 651, 162 ALR 805

p. 273, n. 2.

A statute relating to admission to the bar is not, even when interpreted as conferring on a lower court jurisdiction over a petition for admission by one previously disbarred by a higher court, unconstitutional as an interference by the legislature with the judiciary, especially where, under the law of the state, a petition for readmission is an entirely new and independent proceeding distinct from the proceeding for disbarment. Re Keenan, 310 Mass 166, 37 NE(2d) 516, 137 ALR 766

p. 273, n. 4.

Some of the cases gives support to the proposition that a legislature has power validity to prescribe minimum prerequisites for admission to the bar, subject merely to the power of the courts to prescribe additional requirements **Anno:** 144 ALR 166; see State ex rel. Ralston v. Turner, 141 Neb 556, 4 NW(2d) 302, 144 ALR 138.

Page 273. *Add, following note* 4: In most jurisdictions it is clear that statutes prescribing reasonable educational prerequisites for admission to the bar will be given effect by the courts, although not to the extent of depriving the courts of authority to prescribe additionally.[4.51] And the principle that no statute prescribing prerequisites for admittance to the bar can dispense with qualifications deemed essential by the courts undoubtedly applies in most jurisdictions to matters of education,[4.52] and to the matter of the personal character of applicants.[4.53]

[4.51] **Anno:** 144 ALR 168.

In a few cases the rule is laid down that the legislature has full power in the matter of prescribing educational prerequisites for admission to the bar **Anno:** 144 ALR 169

[4.52] Re Day, 181 Ill 73, 54 NE 646, 50 LRA 519; Hanson v. Grattan, 84 Kan 843, 115 P 646, 34 LRA(NS) 240; Re Keenan, 310 Mass 166, 37 NE(2d) 516, 137 ALR 766; Opinion of the Justices, 279 Mass 607, 180 NE 725, 81 ALR 1059.

State ex rel. Ralston v. Turner, 141 Neb 556 4 NW(2d) 302, 144 ALR 138.

Anno: 144 ALR 169

[4.53] **Anno:** 144 ALR 172

p. 273, n. 5. Anno: 144 ALR 163.

Page 273. *Add, following note* 6: The purpose in imposing upon candidates for admission to the bar the requirements of learning and good moral character is not to create a monopoly in the legal profession or to protect the profession; such requirements are designed for the better security of the people against incompetency and dishonesty.[6.1]

A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the due process or equal protection clauses of the Fourteenth Amendment.[6.5] Thus, while a state can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, any qualification must have a rational connection with the applicant's fitness or capacity to practice law; an applicant cannot be excluded merely because he is a Republican, or a Negro, or a member of a particular church.[6.51] And even in applying permissible standards, officers of a state cannot exclude a person from the practice of law when there is no basis for their finding that he fails to meet the standards, or when their action is invidiously discriminatory.[6.52]

The Supreme Court has held that due process is not denied to a bar applicant by a state's denial of his application for the reason that he has refused to answer questions relevant to his qualifications, as long as he has been warned in advance of the consequences of his refusal to answer.[6.53]

A state may constitutionally require a lawyer to be a member of an integrated bar.[6.6]

[6.1] People ex rel. Chicago Bar Asso. v. Goodman, 366 Ill. 346, 8 N. E. (2d) 941, 111 A.L.R. 1.

[6.5] Schware v Board of Bar Examiners of New Mexico, 353 US 232, 1 L ed 2d 796, 77 S Ct 792.
Anno: 6 L ed 2d 1328.

[6.51] Schware v Board of Bar Examiners of New Mexico, 353 US 232, 1 L ed 2d 796, 77 S Ct 792.
Anno: 6 L ed 2d 1329.

[6.52] Schware v Board of Bar Examiners of New Mexico, 353 US 232, 1 L ed 2d 796, 77 S Ct 752.

See Konigsberg v State Bar of California, 353 US 252, 1 L ed 2d 810, 77 S Ct 722.

[6.53] **Anno:** 6 L ed 2d 1330.

In Konigsberg v State Bar of California, 366 US 36, 6 L ed 2d 105, 81 S Ct 997, the United States Supreme Court upheld California's rejection of an application to the state bar where the applicant refused to answer questions concerning present and past membership in the Communist Party. The Court said that California's placing on a bar applicant the burden of proving "good moral character" was valid, and that under such a rule, the state could rebut the applicant's showing of good moral character by evidence resulting from an independent investigation, from the applicant's response to questions on his application form, or from interrogation of the applicant himself. It concluded that with regard to rebutting evidence of good moral character by interrogation of the applicant, a state can deny admission to a bar applicant so long as he refuses to provide unprivileged answers to questions having a substantial relevance to his qualifications, such as questions regarding good moral character, if it gives the applicant due warning of the consequences of continued refusal to respond to such questions. The Court regarded as irrelevant the fact that the rule was court-made rather than enacted by the legislature, and as immaterial the question whether the rule required the rejection of all applicants refusing to answer material questions, or only those applicants whom the examining committee deemed to have materially obstructed its investigation.

In Re Anastaplo, 366 US 82, 6 L ed 135, 81 S Ct 978, upholding Illinois' rejection of a bar applicant for refusal to answer questions regarding Communist Party membership, the Court stated that (1) it is not constitutionally impermissible for a state legislatively, or through court-made regulation, to adopt a rule that a bar applicant will not be admitted if and so long as, by refusing to answer material questions, he obstructs a bar examination committee in interrogating him upon his qualifications, even though it has before it substantial character evidence altogether favorable to the applicant, (2) it is of no constitutional significance whether the interrogation of an applicant on matters relevant to his qualifications is prompted by information which the committee already has about him from other sources or arises from a good-faith belief in the need for exploratory or testing questions of the applicant, and (3) a bar applicant has, in such circumstances, a "constitutional right to be warned in advance of the consequences of his refusal to answer."

[6.6] Lathrop v Donohue, 367 US 820, 6 L ed 2d 1191, 81 S Ct 1826.

§ 20. Eligibility to Admission or Practice Generally.

Page 274. *Add new paragraph following note 9:* While ordinarily applicants for admission to the bar are required to take and pass a prescribed examination before being admitted,[9.5] it has been held that a court rule that honorably discharged war veterans graduating from an approved law school without opportunity to take a bar examination before entering service, or satisfactorily completing three years of study at certain law schools before entering active service and subsequently graduating therefrom, and satisfactorily completing a six months' refresher course at either school, may be admitted to practice law without examination does not unlawfully discriminate against law students who, by reason of physical infirmity, were unable to enter war service.[9.51]

[9.5] See infra, § 27.

[9.51] Re Levy, 23 Wash2d 607, 161 P2d 651, 162 ALR 805.
Anno: 162 ALR 818.

p. 274, n. 10.
The United States Supreme Court (as well as the federal courts in general) does not conduct independent examinations for admission to its bar. Re Isserman, 345 US 286, 97 L ed 1013, 73 S Ct 676

§ 21. Residence and Citizenship; Race.

Am Jur cited in Benson v Schneider (ND) 68 NW2d 665.

p. 274, n. 11. Anno: 160 ALR 1372; 51 ALR 2d 1219 (under reciprocity provisions).

p. 274, n. 12. Anno: 51 ALR2d 1207.

Page 274. *Add following note* 14: In some jurisdictions, the rules for admission of attorneys to practice contain a provision to the effect that an attorney from another country which has a jurisprudence based on the principles of the English common law might be admitted to practice without examination. Applicants who came from countries not having such system as the basis for its jurisprudence have been denied admission.[14.5]

[14.5] **Anno:** 51 ALR2d 1206.

p. 274, n. 15. As to civil rights generally, see 10 Am Jur 893, Civil Rights.

§ 22. Sex.

p. 275, n. 19. Anno: 51 ALR2d 1202.

§ 23. Moral Character.

p. 275, n. 1. Re Stephenson, 243 Ala 342, 10 So(2d) 1, 143 ALR 166.

State Bar Asso. v Connecticut Bank & Trust Co. 145 Conn 222, 140 A2d 863, 69 ALR2d 394.

Anno: 51 ALR2d 1217 (under reciprocity provisions); 64 ALR2d 304.

A court may and should examine into the moral character of an applicant for admission to the bar, even where, under a statutory provision for the filing of a petition to be examined for admission, examination into acquirements and qualifications, rather than moral character, is the subject of the petition. Re Keenan, 310 Mass 166, 37 NE(2d) 516, 137 ALR 766.

p. 275, n. 2. Anno: 51 ALR2d 1202, 1217.

Page 275. *Add new paragraph following note 3:* While a state can require high standards of qualification, such as good moral character, before it admits an applicant to the bar,[3.5] the due process clause of the Fourteenth Amendment is violated by a state's denying an applicant the opportunity to qualify for the practice of law on the ground that he has not shown good moral character, where such a finding cannot reasonably be made on the record.[3.51]

[3.5] Schware v Board of Bar Examiners of New Mexico, 353 US 232, 1 L ed 2d 796, 77 S Ct 792.

[3.51] Schware v Board of Bar Examiners of New Mexico, 353 US 232, 1 L ed 2d 796, 77 S Ct 752; Konigsberg v State Bar of California, 353 US 252, 1 L ed 2d 810, 77 S Ct 722.

Anno: 64 ALR2d 309, 310.

Government censorship can no more be reconciled with the national constitutional standard of freedom of speech and press when done in the guise of determining "moral character" (for instance, for the purpose of admission to the bar), than if it should be attempted directly. Konigsberg v State Bar of California, 353 US 252, 1 L ed 2d 810, 77 S Ct 722.

Mere unorthodoxy in the field of political and social ideas does not, as a matter of fair and logical inference, negative good moral character. Schware v Board of Bar Examiners of New Mexico, 353 US 232, 1 L ed 2d 796, 77 S Ct 752.

A state's denial of a person's right to practice law on the ground that he failed to prove his good moral character and his loyalty to the United States is both arbitrary and discriminatory, and hence a denial of due process and equal protection of the laws, where there is no evidence in the record which rationally supports a finding of doubt about his character or loyalty. Konigsberg v State Bar of California, 353 US 252, 1 L ed 2d 810, 77 S Ct 722.

A state court's finding that an applicant excluded from taking the state bar examination has not shown good moral character is not reasonably supported by the record, where the undisputed evidence shows him to be a man of high ideals with a deep sense of social justice; nothing in the record suggests that he has engaged in any conduct during the past fifteen years which reflects adversely on his character; his use of aliases prior to that period of time was for the purpose of forestalling anti-Semitism in securing employment, and, at the occasion of a mass arrest during a labor dispute, for the purpose of avoiding his being discharged as a striker; his arrests, also more than fifteen years ago, resulted in only one instance in a formal charge, and this charge concerned an offense not involving moral turpitude and was dropped before the case came to trial; and his admitted membership in the Communist Party from 1932 to 1940 was not shown to have been anything more than faith in a political party lawful at that time; nor can the applicant's exclusion be justified on a combination of all these factors. Schware v Board of Bar Examiners of New Mexico, 353 US 232, 1 L ed 2d 796, 77 S Ct 752.

A state court's finding that in the 1930's when an applicant excluded from taking a state bar examination was a member of the Communist Party, it was dominated by a foreign power and was dedicated to the violent overthrow of the government and that every member was aware of this, is not supported by evidence where nothing in the record shows that the applicant participated in any illegal activity or did anything morally reprehensible as a member of that party. Schware v Board of Bar Examiners of New Mexico, 353 US 232, 1 L ed 2d 796, 77 S Ct 752.

A denial without opinion by the California Supreme Court of a petition for review of the refusal of the Committee of Bar Examiners to certify the petitioner to practice law does not rest upon an adequate state ground, that is, the petitioner's alleged failure to elaborate in the brief accompanying the petition for review his claims of violation of various federal constitutional rights, where he repeatedly asserted these rights throughout the hearings before the committee, relied upon them in his petition for review, nothing indicates that the California Supreme Court requires that contentions raised in the petition for review must also be set out in the briefs accompanying it, and three of the seven justices of that court dissented from the denial of the petition. Konigsberg v State Bar of California, 353 US 252, 1 L ed 2d 810, 77 S Ct 722.

A finding, made by a committee of bar examiners in denying an applicant the right to practice law, that he failed to prove his good moral character is not rationally supported by the evidence where numerous individuals in every walk of life attested to his excellent character, not a single person testified to the contrary, his background furnished strong proof that his life had always been honest, and the only doubts alleged about his character arose (1) from an alleged membership, not reliably proven, in the Communist Party in 1941, there being, however, no evidence of any unlawful activities on his part and the party being a recognized political party at that time, (2) from his criticism of public officials and their policies, which, however, was not unusually extreme and expressed only his view that certain officials were performing their duties in a manner injurious to the public, and (3) from his refusal to answer questions by the committee as to his present and past membership in the Communist Party, such refusal, however, being made in good faith and based on his claim, not frivolous under the circumstances, that under the First and Fourteenth Amendments to the United States Constitution a state could not inquire into a person's political opinions or associations. Konigsberg v State Bar of California, 353 US 252, 1 L ed 2d 810, 77 S Ct 722.

No unfavorable inferences as to the truthfulness, candor, or moral character in general, of an applicant for admission to the bar can be drawn from his refusal to answer questions, put to him by the committee of bar examiners, as to his past and present membership in the Communist Party, where his refusal to answer was based on a good faith belief that the United States Constitution prohibited the type of inquiries which the committee was making. Konigsberg v State Bar of California, 353 US 252, 1 L ed 2d 810, 77 S Ct 722.

A finding, made by a committee of bar examiners in denying an applicant the right to practice law, that he failed to prove that he did not advocate the overthrow of the federal and state governments by force and violence is not rationally supported by the evidence, where the applicant repeatedly testified under oath before the committee that he did not believe in nor advocate the overthrow of any government in this country by any unconstitutional means, no witness testified to the contrary, many witnesses gave testimony utterly inconsistent with the premise that he was disloyal, and he told the committee that he was ready to take an oath to uphold the federal and state constitutions; the mere fact that he was a member of the Communist Party in 1941 does not provide a reasonable basis for a belief that he presently advocates overthrowing the government by force. Konigsberg v State Bar of California, 353 US 252, 1 L ed 2d 810, 77 S Ct 722.

p. 276, n. 4. Anno: 64 ALR2d 318.

Page 276. *Add at end of section:* The courts considering questions with respect to the applicant's moral qualifications have been concerned with whether various specific acts of misconduct or charges of crime alleged, or brought to the attention of the court or examining body, warranted rejection of the application,[4.5] such as presenting a forged certificate of good character,[4.51] attempting to gain admission to the bar by impersonating another person or by other devious method,[4.52] generally turbulent, intemperate, or irresponsible conduct,[4.53] solicitation of cases (ambulance chasing) in a state where the applicant formerly practiced,[4.54] disbarment, or failure to disclose to the examiners disbarment or pending disbarment proceedings in another state,[4.55] membership in the Communist Party,[4.56] unauthorized holding self out as an attorney,[4.57] conviction of crime, charge of crime not followed by conviction or a pending indictment,[4.58] unethical or questionable business practices,[4.59] and other improprieties or alleged misconduct.[4.6]

Courts in some instances have been inclined to look askance at claims of reformation on the part of applicants for admission to the bar.[4.61]

[4.5] **Anno:** 64 ALR2d 317-328.
[4.51] **Anno:** 64 ALR2d 319.
[4.52] **Anno:** 64 ALR2d 320.
[4.53] **Anno:** 64 ALR2d 320.
[4.54] **Anno:** 64 ALR2d 321.
[4.55] **Anno:** 64 ALR2d 321.
[4.56] Konigsberg v State Bar of California, 366 US 36, 6 L ed 2d 105, 81 S Ct 997; Konigsberg v State Bar of California, 353 US 252, 1 L ed 2d 810, 77 S Ct 722, reh den 354 US 927, 1 L ed 2d 1441, 77 S Ct 1374.
Anno: 64 ALR2d 321; 6 L ed 2d 1329.

Where admitted membership in the Communist Party from 1932 to 1940 was not shown to have been anything more than faith in a political party lawful at that time, it has been held that such membership at that time did not justify an inference that such person was of bad moral character in 1953 when he applied for admission to the bar of New Mexico. Schware v Board of Bar Examiners, 353 US 232, 1 L ed 2d 796, 77 S Ct 752, 64 ALR2d 288.

A Canadian case has held absolutely and without equivocation that membership in the Communist Party was ground for refusing admission to the British Columbia bar. **Anno:** 64 ALR2d 322.

[4.57] **Anno:** 64 ALR2d 324.
[4.58] Spears v State Bar, 211 Cal 183, 294 P 697, 72 ALR 923.
Rosencranz v Tidrington, 193 Ind 472, 141 NE 58, 28 ALR 1136.
Anno: 64 ALR2d 325.

It has been said that the mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct, and whatever probative force the arrest may have is normally dissipated when formal charges are not filed against the arrested person and he is released without trial. Schware v Board of Bar Examiners, 353 US 232, 1 L ed 2d 796, 77 S Ct 752, 64 ALR2d 288.

[4.59] **Anno:** 64 ALR2d 326.
[4.6] **Anno:** 64 ALR2d 327.
[4.61] **Anno:** 64 ALR2d 329.

§ 24. Education.

p. 276, n. 5. State Bar Asso. v Connecticut Bank & Trust Co. 145 Conn 222, 140 A2d 863, 69 ALR2d 394.
Anno: 51 ALR2d 1218.

It has been held that an applicant who held a certificate of admission from another state, and who produced satisfactory evidence that he had practiced in the highest courts of such state for a period of 3 years, must also present satisfactory evidence that he possessed the requisite general education required by other provisions of the statute, in addition to evidence of good moral character. **Anno:** 51 ALR 2d 1218.

p. 276, n. 8. See State ex rel. Ralston v. Turner, 141 Neb 556, 4 NW(2d) 302, 144 ALR 138.

§ 25. Right of Corporation to Practice Law.

Am Jur cited in Re Florida Bar (Fla) 133 So 2d 554.

Kendall v Belling, 295 Ky 782, 175 SW2d 489.

Judd v. City Trust & Sav. Bank, 133 Ohio St 81, 12 NE(2d) 288 (notes 12, 13).

RCL cited in Wayne v. Murphey-Favre & Co. 56 Idaho, 788, 59 P(2d) 721.

State ex rel. Freebourn v. Merchants' Credit Service, 104 Mont 76, 66 P(2d) 337.

Bar Asso. v. Hexter Title & Abstract Co. (Tex Civ App) 175 SW2d 108; Stewart Abstract Co. v. Judicial Commission (Tex Civ App) 131 SW(2d) 686; Montgomery v. Utilities Ins. Co. (Tex Civ App) 117 SW(2d) 486.

p. 276, n. 12. State Bar Asso. v Connecticut Bank & Trust Co. 145 Conn 222, 140 A2d 863, 69 ALR2d 394.

Kentucky State Bar Asso. v First Federal Sav. & Loan Asso. (Ky) 342 SW2d 397, 85 ALR 2d 178.

Rosenthal v Shepard Broadcasting Co. 299 Mass 286, 12 NE2d 819, 114 ALR 1502; Re Maclub of America, 295 Mass 45, 3 NE2d 272, 105 ALR 1360.

Liberty Mut. Ins. Co. v. Jones, 344 Mo 932, 130 SW(2d) 945, 125 ALR 1149.

Anno: 105 ALR 1365; 157 ALR 283.

p. 276, n. 13. State Bar Asso. v Connecticut Bank & Trust Co. 145 Conn 222, 140 A2d 863, 69 ALR2d 394.

Anno: 105 ALR 1366; 157 ALR 284.

The broadcasting of programs known as "Court of Common Troubles" and "Goodwill Court" wherein legal questions submitted by members of the public were answered by persons occupying or having occupied judicial positions constituted a violation by the broadcasting company of the statute forbidding corporations to practice law. Rosenthal v. Shepard Broadcasting Co. 299 Mass 286, 12 NE (2d) 819, 114 A.L.R. 1502. Annotation: 114 A.L.R. 1506

It has been held that a corporation may employ its own attorney to render legal services for it, but if it renders a legal service to members of the public, and particularly if it makes a charge for such service, it is engaged in the unauthorized practice of law. Kentucky State Bar Asso. v First Federal Sav. & Loan Asso. (Ky) 342 SW2d 397, 85 ALR2d 178.

The fact that a corporation combines a legal service to the public with commercial services, which it properly may render, has been held not to constitute an excuse for the unauthorized practice of law. Kentucky State Bar Asso. v First Federal Sav. & Loan Asso. (Ky) 342 SW2d 397, 85 ALR2d 178.

§ 26. Generally.

Forms: 1 Am Jur Legal Forms 1:1796–1:1800.

p. 277, n. 14.

A petition, with a pamphlet attached thereto as an exhibit, falsely and maliciously attacking the courts of the state and the judges thereof, may be considered as evidence upon the question of the attorney's moral and mental fitness to practice law. State Bar Commission ex rel. Williams v. Sullivan, 35 Okla 745, 131 P 703, LRA1915D 1218

p. 277, n. 15. Anno: 64 ALR2d 317.

p. 277, n. 16. Anno: 64 ALR2d 311.

For cases discussing the weight to be given to testimonials of character and reputation, see **Anno:** 64 ALR2d 330.

p. 277, n. 17. Anno: 64 ALR2d 308.

§ 27. Examination of Applicants.

Am Jur cited in Re Hughey, 62 Nev 498, 156 P2d 733.

Page 278. *Add, following note* 20: Records of the board of bar examiners are records of the court.[20.5]

[20.5] Re Levy, 23 Wash2d 607, 161 P2d 651, 162 ALR 805.

p. 278, n. 5. Anno: 51 ALR2d 1201-1221.

It has been held that one seeking admission to the practice of law in New York without examination on the ground of his practice in the highest court of another state for at least 5 years must have resided continuously, or substantially so, in that other state for the 5 years, and the Appellate Division acts within its discretionary powers in ruling that compliance with such residence requirement is not shown by a petitioner who was admitted to practice in Georgia, but who spent at least half of the time in each of the 5 years living and working in states other than Georgia as a claims attorney for a liability insurance company. Re Application of Harvey, 309 NY 46. 127 NE2d 801, 51 ALR2d 1196.

Work for the federal government, even though legal in nature, has been held not to take the applicant out of the requirement that he show practice in the other jurisdiction for a certain length of time. **Anno:** 51 ALR2d 1209.

Applications for admission have been denied on the ground that the applicant had not come within the requirement of actual practice in the other jurisdiction for the necessary length of time. **Anno:** 51 ALR2d 1208.

It has been held that an application for admission to the bar would be denied where it appeared that the applicant had left his home state, in which he did not meet, the requirements for admission and had gone to another state, in which he was admitted and practiced, after which he applied for admission in his home state under the reciprocity provision. **Anno:** 51 ALR2d 1202.

Some cases have recognized the propriety of "tacking" the time of practice in one jurisdiction to the time of practice in another under the proper circumstances, but have reached the conclusion under the facts confronting them, that the application should nevertheless be denied, since the applicant had not shown actual practice for the required period of time. **Anno:** 51 ALR2d 1213.

Page 278. *Add at end of section:* A fairly common requirement in reciprocity statutes or rules is that the applicant must have been admitted to practice before the "highest court" in the jurisdiction where he had formerly practiced.[5.5] The reciprocity provisions in some jurisdictions require that an applicant for admission who applies as a member of the bar of another jurisdiction must have his qualifications and compliance with the reciprocity provisions examined by a board of law examiners or similar body, and that such body must then make a recommendation for or against admission of the applicant.[5.51]

[5.5] Re Application of Harvey, 309 NY 46, 127 NE2d 801, 51 ALR2d 1196.
Anno: 51 ALR2d 1204–1206.

[5.51] **Anno:** 51 ALR2d 1219.

§ 28. Administration of Oath.

Anno: 18 ALR2d 335; 97 L ed 227.

In Re Summers, 325 US 561, 89 L ed 1795, 65 S Ct 1307. where the court sustained Illinois' denial of admission to practice as an attorney to one who was willing to take the required oath to support the state constitution but, because he was unwilling to bear arms, was considered by the Illinois court to be unable to take such oath conscientiously, a dissenting opinion by Justice Black, with whom three justices concurred, referred to the requirement as a test oath and took the view that it was unconstitutional as applied to this petitioner, whose refusal to bear arms was based upon his religious beliefs.

p. 278, n. 7. Anno: 18 ALR2d 283-291.

§ 29. Necessity of Retainer or Contract of Employment.

Forms: 1 Am Jur Legal Forms 1:1801–1:1844; 2 Am Jur Pl & Pr Forms 2:1203, 2:1205.

Am Jur cited in Holt v Swenson, 252 Minn 510, 90 NW2d 724.

RCL quoted in Wylie v. Grand Rapids, 297 Mich 365. 297 NW 526.

p. 278, n. 8. The personal representative of a deceased lawyer has been held to be without right to assign pending cases to counsel of his choice, since this is a matter for the client to decide. Re Heirich, 10 Ill 2d 357, 140 NE2d 825, 67 ALR2d 827. cert den 355 US 805, 2 L ed 2d 49. 78 S Ct 22.

§ 30. Who May Employ Attorney.

Forms: 2 Am Jur Pl & Pr Forms 2:1205.

Am Jur cited in Swartfager v Wells, 53 Cal App(2d) 422 128 P(2d) 128

Dostal v Magee, 272 Wis 509. 76 NW2d 349. (dissent op).

§ 31. Sufficiency of Retainer.

Forms: 2 Am Jur Pl & Pr Forms 2:1299.

Am Jur cited in Lawrence v. Tschirgi, 244 Iowa 386, 57 NW2d 46.

Bresette v Knapp, 121 Vt 376, 159 A2d 329.

Nicholson v. Shockey, 192 Va 270, 64 SE2d 813.

RCL quoted in Wylie v. Grand Rapids, 297 Mich 365. 297 NW 526.

Page 279. *Add, following note* 20: It has been held that the employment of one member of a law firm is the employment of the firm, so as to permit a recovery in the firm name against an executor for services rendered to the decedent in his lifetime.[20.5]

[20.5] Garden v. Riley, 116 W Va 723. 183 SE 46, 143 ALR 662.

§ 33. Assignment of Counsel by the Court.

Am Jur quoted in State v Delaney, 221 Or 620, 332 P2d 71, 351 P2d 85.

p. 280, n. 4. Knox County Council v. State, 217 Ind 493, 29 NE(2d) 405. 130 ALR 1427.

p. 280, n. 7.

A court in which a criminal prosecution is commenced against a pauper defendant has inherent power, independently of legislative authority and not subject in any way to the regulation and control of the legislature, to appoint counsel for the defendant in accordance with his constitutional right thereto. Knox County Council v. State, 217 Ind 493, 29 NE(2d) 405. 130 ALR 1427.

§ 34. By Act of Client.

Forms: 1 Am Jur Legal Forms 1:1845–1:1847; 2 Am Jur Pl & Pr Forms 2:1185, 2:1186, 2:1188, 2:1189. 2:1191, 2:1193-2:1195, 2:1200–2:1202.

Am Jur quoted in Re Lachmund, 179 Or 420. 170 P2d 748. 166 ALR 479.

Am Jur cited in Echlin v. Superior Ct. 13 Cal (2d) 368, 90 P(2d) 63, 124 ALR 719 (n. 15).

Carey v. Gulfport, 140 Fla 40. 191 So 45; Bump v. District Ct. 232 Iowa 623. 5 NW2d 914.

Com. use of Clay County v. Sizemore. 269 Ky 722, 108 SW(2d) 733 (n. 15).

Marchand v. Gulf Ref. Co. 187 La 1002, 175 So 647 (n. 17).

State ex rel. Seifert, Johnson & Hand v Smith, 260 Minn 405, 110 NW2d 159; Colstad v Levine, 243 Minn 279, 67 NW2d 648.

Morse v. Eighth Judicial District Ct 65 Nev 275. 195 P2d 199. 3 ALR2d 136.

Bolton v. Marshall, 153 Ohio St 250. 91 NE2d 508.

RCL quoted in Goodkind v. Wolkowsky, 132 Fla 63. 180 So 538.

RCL cited in Gravity Drainage Dist. v. Edwards, 207 La 1, 20 So2d 405; United Gas Pub. Serv. Co. v. Christian, 186 La 689, 173 So 174; Re Winston, 40 NM 348. 59 P2d 904.

p. 281, n. 15. Re Montgomery, 272 N. Y. 323. 6 N. E. (2d) 40. 109 A.L.R. 669.

Re Lachmund, 179 Or 420, 170 P2d 748. 166 ALR 479.

A client has the right to discharge his attorney and to substitute another at any time, with or without cause, and in spite of any contract. Cole v. Myers, 128 Conn 223. 21 A (2d) 396. 136 ALR 226.

p. 281, n. 16. Anno: 43 ALR2d 680, 683.

Page 281. *Add following note* 17: Where the employment under a general or periodic retainer fee or salary contract is for a definite period, the attorney may be discharged at any time for justifiable cause;[17.5] but the wrongful discharge of the attorney prior to the expiration of the specified period constitutes a breach of the contract, and has been held to entitle the attorney to compensation or damages.[17.51] An attorney's delay in filing an action does not constitute cause for his discharge, where the action is filed well within the period of limitation.[17.52]

[17.5] **Anno:** 43 ALR2d 680.
[17.51] **Anno:** 43 ALR2d 680.
See infra. § 172 (Supp).
[17.52] Peresipka v Elgin, J. & E. R. Co. (CA7 Ind) 231 F2d 268, 59 ALR2d 554.

§ 35. — Necessity of Notice of Discharge.

Forms: 2 Am Jur Pl & Pr Forms 2:1188, 2:1191, 2:1200–2:1202.

Page 281. *Add at end of section:* The right of an attorney to notice and hearing before termination of a general or periodic retainer fee or salary contract may depend upon or be affected by express provisions of the contract in this regard.[2.5]

[2.5] **Anno:** 43 ALR2d 681.

§ 36. — When Attorney's Power Is Coupled with an Interest.

Am. Jur. cited in Marchand v. Gulf Ref. Co. 187 La 1002, 175 So 647 (notes 3, 4).

p. 281, n. 4. Anno: 28 ALR2d 1283.

An attorney at law employed to defend against claims by which persons were asserting mineral rights in a tract of land and who, for services rendered and other good and valuable consideration receipt of which was acknowledged, was sold and conveyed with full guaranty of title an undivided 20 per cent of the oil, gas, and other minerals in or under the property, has been held to have a power coupled with an interest which was not revocable at the will of the principal without just cause. Anno: 28 ALR2d 1283.

p. 282, n. 7. Anno: 28 ALR2d 1261, 1268.

It is only where an attorney has a power coupled with an interest that he must be retained and is not subject to discharge; and an interest in and to the fruits or proceeds to be derived from the action is not such a power. Echlin v. Superior Ct. 13 Cal (2d) 368, 90 P (2d) 63, 124 ALR 719.

California cases dealing with the authority of attorneys at law in the prosecution of actions for their clients have construed transfers of title to the subject matter of the agency as not vesting such an interest as will prevent revocation of the agency where the transfer is made as compensation for the attorney's services and to reimburse him for expenditures. **Anno:** 28 ALR2d 1268.

§ 37. By Death of Client.

Am Jur cited in Bergum v. Palmborg, 239 Minn 569, 58 NW2d 722.

RCL quoted in Darrow v. Van Buskirk, 1 Ariz 57, 110 P(2d) 216.

§ 38. By Dissolution of Corporation or Partnership, or Receivership.

Am Jur cited in Fessler v. Weiss, 348 Ill App 21, 107 NE2d 795.

§ 39. By Act of Attorney.

Am Jur quoted in Boyle v. Beltzhoover, 119 W Va 626, 196 SE 503 (n. 15).

Am Jur cited in State ex rel. Groves v. First Judicial Dist. Ct. 61 Nev 269, 125 P(2d) 723.

Bostock v. Brown, 198 Wash 288, 88 P(2d) 445 (notes 17–18).

Page 283. *Add following note* 18: With respect to the duration of the employment of an attorney under a general or periodic retainer fee or salary contract, the demand and receipt of compensation for services which the attorney is obligated to render under the contract, for the fee or salary specified therein, has been held, in effect, to operate as a rescission of the contract.[18.5] But the fact that an attorney employed under an annual retainer for a specified period may in some instances, or in respect of some matters, have subordinated the client's interests to his own, does not operate as a rescission of the contract where the client has full knowledge of the facts and continues to avail himself of the attorney's services.[18.51]

[18.5] **Anno:** 43 ALR2d 680, 681.
[18.51] **Anno:** 43 ALR2d 680.

p. 283, n. 1. It has been held that an attorney should not be permitted to withdraw from a case where an injustice would result to the client because of his inability to secure new counsel who could familiarize himself with the complicated case within the short period before the day set for trial. Finch v Wallberg Dredging Co. 76 Idaho 246, 281 P2d 136, 48 ALR2d 1150.

§ 41. By Death of Attorney or Acceptance of Incompatible Office.

Am Jur cited in Atwood v Atwood, 253 Minn 185, 91 NW2d 728.

p. 283, n. 9. Re Heirich, 10 Ill 2d 357, 140 NE2d 825, 67 ALR2d 827, cert den 355 US 805, 2 L ed 2d 49, 78 S Ct 22.

§ 43. By Accomplishment of Purpose.

p. 284, n. 13.

It has been held that an attorney-client relation in the course of which the attorney receives certain jewelry on behalf of the client continues until return of the jewelry or the making of a proper excuse for nondelivery. Glenn v. Haynes, 192 Va 574, 66 SE2d 509, 26 ALR2d 1334.

Page 284. *Add at end of section:* With respect to the term or duration of the employment of an attorney under a general or periodic retainer fee or salary contract, it has been held or stated generally that such employment at a specified compensation per year, month, or other definite period is an employment for such period rather than at will;[15.5] and that where an attorney who has been employed under a contract providing for a specified yearly compensation continues in such employment after the expiration of the year, it will be presumed that he does so under a renewal or extension of the original contract.[15.51]

[15.5] **Anno:** 43 ALR2d 679.
[15.51] **Anno:** 43 ALR2d 680.

§ 44. Generally.

Forms: 2 Am Jur Pl & Pr Forms 2:1176–2:1202.

Am Jur quoted in State v. Moore, 34 Wash 2d 351, 208 P2d 1207.

Am Jur cited in D'Agostino v Peoples Water & Gas Co. (Fla) 78 So2d 739.

Stone v Baldwin, 331 Ill App 421, 73 NE2d 635.

RCL cited in Vosges Syndicate v. Everglades Club Co. 122 Fla 267, 164 So 881; Diem v. Diem, 136 Fla 824, 187 So 569.

p. 284, n. 16. Change cross-reference to read. § 36.

p. 284, n. 17.

The right to change attorneys with or without cause is universal. Echlin v. Superior Ct. 13 Cal (2d) 368, 90 P(2d) 63, 124 ALR 719.

p. 285, n. 18. See Evans v. Ockershausen, 69 App DC 285, 100 F(2d) 695, 128 ALR 177, writ of certiorari denied in 306 US 633, 83 L ed 1034, 59 S Ct 462.

p. 285, notes 20, 1.

Thus, the rule has been laid down that in the absence of such misconduct, neglect, or the like as to make it inequitable for the discharged attorney to claim any remuneration for his services, the court granting the order of substitution must or ordinarily will prescribe as a condition thereto some specific provision, either by way of a present payment or by adequate security from the proceeds of recovery, as compensation for the services of the attorney already rendered. **Anno:** 124 ALR 725.

In a number of cases the courts have said that the court granting a substitution has the power to impose such a condition, or may do so in its discretion; and it would seem, under this view of the matter, that the courts are disposed in the great majority of cases to exercise their discretion by imposing a condition which actually protects the discharged attorney, where no misconduct, neglect, or the like on his part is shown. **Anno:** 124 ALR 728.

p. 285, n. 1. See annotation in 124 ALR 730, for a number of cases illustrative of circumstances indicating such misconduct, want of good faith, etc., on the part of the attorney, as to justify the grant of orders of substitution without imposition of conditions requiring payment to or security for the attorney of record.

It is proper for a court, in removing an attorney and ordering the substitution of another attorney, to make provision in its order for the protection of the rights of the discharged attorney with respect to any possible compensation he may be entitled to under a contingent fee contract entered into by him with his client. Evans v. Ockershausen, 69 App DC 285, 100 F(2d) 695, 128 ALR 177, writ of certiorari denied in 306 US 633, 83 L ed 1034, 59 S Ct 462.

An order made in a pending action for substitution of attorney for the plaintiff upon payment to the original attorney of a specified sum has been held erroneous in so far as it includes compensation for services rendered in other actions, where plaintiff's request for consideration of such other actions, made upon his motion for substitution, was opposed by the original attorney, and where the record shows that the issue actually tried concerned only compensation for the former action, notwithstanding the attorney's claim, unsupported by the record, that the issues were broadened on the hearing. Froedtert Grain & Malting Co. v Peter P. Woboril, Inc. 265 Wis 456, 61 NW2d 855, 43 ALR2d 671.

Page 285. *Add, following note* 1: In a number of cases orders of substitution have been conditioned upon paying the discharged attorney his disbursements or actual expenses.[1.1] And in some cases it seems that the preservation of the attorney's lien has been considered sufficient protection to the attorney for payment for his services already rendered, upon a substitution of attorneys.[1.2]

[1.1] **Anno:** 124 ALR 732.

[1.2] **Anno:** 124 ALR 735.

Page 285. *Add, following note* 3: In some states there are statutes requiring an order of the court for the substitution of an attorney,[3.1] which in some instances condition such an order upon payment of the fees of the discharged attorney by the party asking that the change in attorneys be made.[3.2]

[3.1] Echlin v. Superior Ct. 13 Cal (2d) 368, 90 P(2d) 63, 124 ALR 719.
Anno: 124 ALR 743.

In Echlin v. Superior Ct. 13 Cal (2d) 368, 90 P(2d) 63, 124 ALR 719, it is indicated that in the jurisdiction the right to an order of substitution of attorneys would exist even without a statue to that effect, such as did exist in the jurisdiction.

[3.2] Echlin v. Superior Ct. 13 Cal (2d) 368, 90 P(2d) 63, 124 ALR 719.
Anno: 124 ALR 743.

Where a statute providing for substitution of an attorney upon the order of the court, upon application of either client or attorney, was amended by adding thereto a further provision, "except that in all civil cases in which the fee or compensation of the attorney is contingent upon the recovery of money, in which case the court shall determine the amount and terms of payment of the fee or compensation to be paid by the party," such amendment was held to be special legislation, and therefore unconstitutional in that there is no reasonable distinction in the matter of determining attorneys' fees between cases where the fee is "contingent on the recovery of money" and other cases, but such amendment was also held to be severable from the remainder of the statute. The court also noted that the effect of the amendment was to impose on the appellate courts the burden of determining, in the first instance, disputes between attorneys and clients in cases pending on appeal. Echlin v. Superior Ct. 13 Cal (2d) 368, 90 P(2d) 63, 124 ALR 719. This same amendment had previously been held objectionable by the intermediate appellate court, as infringing the constitutional provision for trial by jury. **Anno:** 124 ALR 743.

§ 45. Nature of Relationship.

Forms: 2 Am Jur Pl & Pr Forms 2:1196-2:1199.

Am Jur quoted in Re Kaemmerer (Mo App) 178 SW(2d) 474; Laughlin v. Boatmen's Nat. Bank (Mo) 163 SW(2d) 761.

Am Jur cited in Woodruff & Son v Rhoton, 251 Iowa 550, 101 NW2d 720.

Searcy v Novo (La App) 188 So 490.

Colstad v Levine, 243 Minn 279, 67 NW2d 648.

Holtzman v. Hopwood Realty, 77 Ohio App 516, 65 NE2d 409, rehearing denied in (Ohio App) 68 NE2d 239.

Balwin v Birchby, — Wyo —, 346 P2d 278.

RCL cited in State ex rel. Nebraska State Bar Asso. v. Niklaus, 149 Neb 859, 33 NW2d 145.

p. 285, n. 8. Littleton v. Kincaid (CA4th) 179 F2d 848, 27 ALR2d 572, cert den 340 US 809, 95 L ed 595, 71 S Ct 36, 38.

State Bar Asso. v Connecticut Bank & Trust Co. 145 Conn 222, 140 A2d 863, 69 ALR2d 394.

Lyons v Hall (La App) 90 So2d 519, 60 ALR 2d 1003.

Gardine v. Cottey, 360 Mo 681, 230 SW2d 731, 18 ALR2d 1100.

A fiduciary relationship exists as a matter of law between an attorney and client, which requires all transactions between them growing out of such relationship to be subject to the closest scrutiny. Gaffney v. Harmon, 405 Ill 273, 90 NE2d 785, 20 ALR2d 1273.

An insurer's attorneys have been held to be bound by the same high standards which govern all attorneys, whether or not privately retained. Allstate Ins. Co. v Keller, 17 Ill App 2d 44, 149 NE2d 482, 70 ALR2d 1190.

Page 285. *Add following note* 8: Lawyers must operate in a threefold capacity, as self-employed businessmen, as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes.[8.5]

[8.5] Cohen v Hurley, 366 US 117, 6 L ed 2d 156, 81 S Ct 954.

p. 286, n. 9. Re Lachmund, 179 Or 420, 170 P2d 748, 166 ALR 479.

p. 286, n. 14. Annotation: 111 A.L.R. 1454.

Where the work performed by an attorney is not purely professional and is such that if done by another person would entitle him to the benefit of a lien granted by statute against employers, an attorney, to such an extent, may come within the class contemplated by the statute. Annotation: 111 A.L.R. 1454.

§ 46. Duties Owed to Client by Attorney.

Forms: 2 Am Jur Pl & Pr Forms 2:1293, 2:1294.

Am Jur quoted in Gay v Heller (CA5 Fla) 252 F2d 313.

Laughlin v Boatmen's Nat. Bank (Mo) 163 SW2d 761.

Am Jur cited in McNeal v. Steinberger, 192 Okla 283, 135 P2d 490.

Holland v Columbia Iron Mining Co. 4 Utah2d 303, 293 P2d 700.

p. 286, n. 17.
An attorney's breach of fidelity to a client's interest constitutes constructive fraud. Gardine v. Cottey, 360 Mo 681, 230 SW2d 731, 18 ALR2d 1100

p. 286, n. 18. State Bar Asso. v Connecticut Bank & Trust Co. 145 Conn 222, 140 A2d 863, 69 ALR2d 394.

Page 286. *Add following note* 20: An attorney is required to disclose to his client all facts and circumstances within his knowledge which, in his honest judgment, might be likely to affect the performance of his duty for that client.[20.5] A client may presume from an attorney's failure to disclose matters material to his employment that the attorney has no interest which will interfere with his devotion to the cause confided in him, or betray his judgment.[20.51]

[20.5] Allstate Ins. Co. v Keller, 17 Ill App 2d 44, 149 NE2d 482, 70 ALR2d 1190.

[20.51] Allstate Ins. Co. v Keller, 17 Ill App 2d 44, 149 NE2d 482, 70 ALR2d 1190.

Page 287. *Add, following note* 4: An attorney receiving from his client funds to be applied to a certain purpose may not discharge at such time as suits his convenience his duty so to apply them and may not retain any unexpended balance until such time as he sees fit to return it.[4.5]

[4.5] Copren v. State Bar, 64 Nev 364, 183 P2d 833, 173 ALR 284.

§ 47. — Exercise of Reasonable Care and Skill.

Am Jur cited in Woodruff & Son v Rhoton, 251 Iowa 550, 101 NW2d 720.

Hodges v Carter, 239 NC 517, 80 SE2d 144.

p. 287, n. 5. It has been held that an attorney who contracts to prosecute an action on behalf of his client impliedly represents (1) that he possesses the requisite degree of learning, skill, and ability which is necessary to the practice of his profession and which others similarly situated ordinarily possess; (2) that he will exert his best judgment in the prosecution of the litigation entrusted to him; and (3) that he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his client's cause. Hodges v Carter, 239 NC 517, 80 SE2d 144, 45 ALR2d 1.

§ 48. Generally.

Forms: 2 Am Jur Pl & Pr Forms 2:1284.

Am Jur cited in Dreka v. Whitehair, 150 Fla 517, 8 So(2d) 23.

Hunt v. Picklesimer, 290 Ky 573, 162 SW(2d) 27

Agregaard v Skrmetta (La App) 131 So 2d 363.

Matthews v. Spears (La App) 24 So2d 195, rehearing denied in (La App) 24 So2d 485.

Baker v. Otto, 180 Md 53, 22 A2d 924; Cook v. Hollyday, 185 Md 656, 45 A2d 761

Palmer v Arnett, 352 Mich 22, 88 NW2d 445.

Colstad v Levine, 243 Minn 279, 67 NW2d 648.

Hines v Donovan, 101 NH 239, 139 A2d 884.

Re Honig, 10 NJ 74, 89 A2d 411.

RCL quoted in Searcy v. Novo (La App) 188 So 490

p. 288, n. 15. Littleton v. Kincaid (CA4th) 179 F2d 848, 27 ALR2d 572, cert den 340 US 809, 95 L ed 595, 71 S Ct 36, 38.

Moore v. Rochester Weaver Min. Co. 42 Nev 164, 174 P 1017, 19 ALR 830.

p. 288, n. 19.
While in some jurisdictions the rule of independent advice has been held applicable to transactions between attorney and client, it has, on the contrary, been frequently held that a transaction between attorney and client may be upheld if the attorney himself gives the client the proper advice. **Anno:** 123 ALR 1515, 1518.

§ 49. Transactions Concerning Subject-matter of Retainer.

Forms: 2 Am Jur Pl & Pr Forms 2:1284.

Am Jur cited in Spencer v. Nelson (Cal App) 238 P2d 169, hear gr by sup ct.

Hunt v. Picklesimer, 290 Ky 573, 162 SW2d 27.

Matthews v. Spears (La App) 24 So2d 195, rehearing denied in (La App) 24 So2d 485.

Palmer v Arnett, 352 Mich 22, 88 NW2d 445.

Petraborg v. Zontelli, 217 Minn 536, 15 NW (2d) 174.

Re Honig, 10 NJ 74, 89 A2d 411.

p. 288, n. 1. Cite to footnote beginning: **"A constructive trust." Anno:** 129 ALR 696; 159 ALR 1008.

p. 289, n. 5. Stearns v. Wollenberg, 51 Or 88, 92 P 1079, 14 LRA(NS) 1095.

It has been held that, in a transaction between an attorney and client otherwise characterized by the highest integrity and utmost good faith, bad faith will not be imputed to the attorney merely because he seeks to protect his own interests. Appeal of Burke, 378 Pa 616, 108 A2d 58, 47 ALR2d 1367.

§ 50. Burden of Proof.

Am Jur quoted in Searcy v. Novo (La App) 188 So 490 (notes 6-8).

Boyle v. Beltzhoover, 119 W Va 626, 196 SE 503 (notes 6-10).

Am Jur cited in McCargo v Steele (DC Ark) 160 F Supp 7, affd (CA8) 260 F2d 753.

Johnson v Rolf, 208 Ark 554, 188 SW2d 137.

Toner v Hubbard (Fla App) 105 So2d 180.

Hardin v. Baynes, 198 Ga 683, 32 SE2d 384.

Hunt v. Picklesimer, 290 Ky 573, 162 SW2d 27.

Colstad v Levine, 243 Minn 279, 67 NW2d 648.

Nelson v. Hammett (Mo) 189 SW2d 238.

Frost v. Bachman 259 App Div 745, 18 NYS (2d) 702.

Severns v. Boylan, 75 Ohio App 15, 60 NE2d 521; Holtzman v. Hopwood Realty, 77 Ohio App 516, 65 NE2d 409, rehearing denied in (Ohio App) 68 NE2d 239.

RCL quoted in Re Pate, 232 Mo App 478, 119 SW(2d) 11.

p. 289, n. 6. Moore v. Rochester Weaver Min. Co. 42 Nev 164, 174 P 1017, 19 ALR 830.

p. 289, n. 9. York v. James, 62 Wyo 184 165 P2d 109, 162 ALR 730.

The burden is upon an attorney to show the fairness, adequacy, and equity of a transaction whereby he receives something of benefit contrary to the interests of his client, either by purchase from the client or by acquiring interests adverse to the client. Gaffney v. Harmon 405 Ill 273, 90 NE2d 785, 20 ALR2d 1273.

The general principle that when a transaction between an attorney and his client is attacked, the burden is cast upon the attorney to prove that it was not influenced by the relationship has been invoked or applied in cases involving attacks by clients on purchases of their property by their attorneys at tax or judicial sale **Anno:** 20 ALR2d 1306.

Page 289. *Add, following note* 10: Any such transaction is presumptively invalid on the ground of constructive fraud, and this presumption can be overcome only by the clearest and most satisfactory evidence.[10.1]

[10.1] Moore v. Rochester Weaver Min. Co. 42 Nev 164, 174 P 1017, 19 ALR 830.

§ 51. Gifts or Bequests.

Am Jur quoted in Stormon v Weiss (ND) 65 NW2d 475.

Am Jur cited in Re Brown, 165 Or 575, 108 P(2d) 775.

Nicholson v. Shockey, 192 Va 270, 64 SE2d 813.

Re Barnes Estate, 14 Wis 2d 643, 112 NW2d 142.

p. 290, n. 11. McDonald v. Hewlett, 102 Cal App2d 680, 228 P2d 83, 24 ALR2d 1281 (nontestamentary gift)

Anno: 24 ALR2d 1293 et seq. (nontestamentary gift).

Page 290. *Add, following note* 11: A presumption generally arises, where the relationship of attorney and client is shown, that with respect to gifts from the client to the attorney, the latter has exercised undue influence over the former.[11.5] In the American jurisdictions this inference is rebuttable,[11.51] being at most prima facie, but in some of the English decisions it has been said that there can be no rebuttal if it is shown that the relationship existed when the gift was made.[11.52] On the whole, however, it would seem that in the American jurisdictions, the attorney may, by the introduction of clear and convincing evidence, rebut the presumption of undue influence arising out of the confidential relationship of attorney and client, while in England the rule appears to be that the gift is absolutely void.[11.53]

While the opportunity of rebutting the presumption of undue influence by evidence to the contrary is afforded the attorney under the American rule, it should be noted that evidence that such undue influence was in fact exerted may be introduced by the party seeking to set aside the gift. Thus, it may be seen that the evidence which is introduced may either strengthen the presumption on the one hand, or weaken or dispel it, on the other. In this respect it would be well to note that certain general factors, consisting of evidence on the matter, have been considered by the courts as influencing their determination of the issue.[11.54] One such evidentiary factor, generally alluded to by the courts in cases in which it is to be found, is the effect which mental weakness on the part of the donor has on the issue of undue influence. As a general rule, where such mental weakness is shown, whether arising from old age or infirmity of the mind, and whether such weakness is such as to incapacitate the donor entirely or only partially, the presumption of undue influence is considerably strengthened. The result, of course, from the practical view, is that the donee would have to introduce evidence of a high nature to rebut the greatly strengthened presumption which thus arises.[11.55]

Another factor which often receives discussion is whether the donor has received disinterested and competent legal advice from a source equal to the donee in understanding of the subject matter of the transaction. As some courts have expressed it, the donor must show that the donee has received such advice as a condition precedent to the establishment of the validity of the gift.[11.56] Similarly, as it is contrary to human nature to impoverish oneself under circumstances of need or expected need, the view has been taken that where the gift is shown to be thus improvident its invalidity is substantially evident.[11.57] So too, as it is not consistent with fair dealing that a person conceal, or delay in revealing, an alleged gift, such a delay, extending until after the death of the donor or the removal of witnesses who otherwise might have been able to shed light upon the circumstance, has been held to show on the part of the donee a consciousness of guilt or a belief that the gift would not have been upheld had it been revealed sooner.[11.58]

On the other hand, the courts have refused to hold one donor guilty of laches in failing to promptly assail a gift, particularly where the relationship of attorney and client has continued for the entire or a substantial part of the time elapsing, since the presumption of undue influence is considered to have continued during such time.[11.59]

And it may be noted that in an English case it has been stated by way of dictum that a gift from client to attorney, otherwise invalid, may be rendered valid by a subsequent ratification by the client at a time when the relationship has terminated.[11.6]

[11.5] McDonald v. Hewlett, 102 Cal App2d 680, 228 P2d 83. 24 ALR2d 1281.

Armstrong v. Morrow, 166 Wis 1, 163 NW 179, Ann Cas 1918E 1156.

Anno: 24 ALR2d 1293 (nontestamentary gift).

This presumption, it has been pointed out, arises not from any actual wrongdoing between the parties, but as the result of the solicitude of the courts for the presumably weaker party and their determination that there shall be no overreaching by the stronger party. **Anno:** 24 ALR2d 1291.

[11.51] **Anno:** 24 ALR2d 1291 (nontestamentary gift).

[11.52] **Anno:** 24 ALR2d 1291 (nontestamentary gift).

Some qualifications of this strict English rule have been indicated, as, for example, that ratification of the gift at a later date, when the relationship has ended, may result in its being upheld, and in at least one case it has been stated that where considerations such as kind feelings existing between the client and the attorney are present, the gift may be upheld. **Anno:** 24 ALR2d 1291.

[11.53] **Anno:** 24 ALR2d 1301 (nontestamentary gift).

[11.54] **Anno:** 24 ALR2d 1291 (nontestamentary gift).

[11.55] **Anno:** 24 ALR2d 1291, 1296 (nontestamentary gift).

[11.56] **Anno:** 24 ALR2d 1291, 1298 (nontestamentary gift).

In Lloyd v. Coote & Ball (Eng) [1915] 1 KB 242, Ann Cas 1916E 434—Div Ct, the failure of an attorney to advise a client whom he induced to execute acknowledgments of debts barred by statute, to obtain independent legal advice, was held sufficient to void such acknowledgments.

[11.57] McDonald v. Hewlett, 102 Cal App2d 680, 228 P2d 83, 24 ALR2d 1281 (wherein a nontestamentary gift of over $50,000 by a client to his attorney was set aside as having been made under undue influence, and the court indicated that a factor which served to strengthen its conclusion was the fact that the gift had the effect of pauperizing the client at a time when he was very ill, unable to work, and under hospital care).

Anno: 24 ALR2d 1292, 1300 (nontestamentary gift).

[11.58] McDonald v. Hewlett, 102 Cal App2d 680, 228 P2d 83, 24 ALR2d 1281 (wherein an alleged gift from a hospitalized and apparently helpless client was not revealed by the attorney until after the former's death, the court declared that long delay in disclosing an alleged transfer, or the fact that there was no disclosure until after the death of the donor, were circumstances which rendered the testimony of the claimant subject to suspicion).

Anno: 24 ALR2d 1292, 1301.

[11.59] Armstrong v. Morrow, 166 Wis 1, 163 NW 179, Ann Cas 1918E 1156 (wherein an assignment of a mortgage was obtained by an attorney from an elderly client who was shown to have placed implicit trust and confidence in the attorney, who was an intimate friend and close associate for several years prior to and after the assignment, the contention that since the client had lived four years after the assignment he was guilty of laches in not moving more seasonably to set the assignment aside was held untenable, the court pointing out that so far as appeared from the record, the confidential relation and undue influence existing before the assignment continued thereafter to about the time that the client died, and that under these circumstances there was nothing to arouse him to action, and hence no delay amounting to laches).

Anno: 24 ALR2d 1292, 1301 (nontestamentary gift).
11.6 **Anno:** 24 ALR2d 1301 (nontestamentary gift).

§ 53. Effect of Laches upon Client's Right to Relief.

RCL cited in Wallner v. Fidelity & D. Co. 253 Wis 66, 33 NW2d 215, 10 ALR2d 745.

§ 54. Generally.

RCL cited in Roberts v. Roberts (Tex Civ App) 193 SW2d 707.
p. 291, n. 2. St. Louis-San Francisco R. Co. v. Hurst, 198 Ark 546, 129 SW(2d) 970, 122 ALR 965.
As to effect of stipulation against compromise without attorney's consent in contingent fee contract, see infra, § 163 (Supp.).

§ 55. Lobbying Contracts.

R. C. L. quoted in Hollister v. Ulvi, 199 Minn. 269, 271 N. W. 493.
RCL cited in Johnston v. J. R. Watkins Co. 195 Okla 341, 157 P2d 755.

§ 56. Contracts to Obstruct Justice or to Shield or Promote Crime.

Am Jur cited in Murrel v Bridges, 225 Ark 53, 279 SW2d 30.

§ 57. Contracts to Procure Liberation or Pardon of Convict.

p. 293, n. 4. Anno: 148 ALR 774.

§ 58. Generally.

Am Jur quoted in Chandler v Howard (Mo) 312 SW2d 26; Demmel v Hammett, 360 Mo 737, 230 SW2d 686.
Am Jur cited in Dreka v. Whitehair, 150 Fla 617, 8 So(2d) 23.
p. 293, n. 6. Okfuskee County v. Hazelwood, 79 Okla 185, 192 P 217, 11 ALR 709.
Anno: 20 ALR2d 1280.
p. 294, n. 9. Anno: 20 ALR2d 1309–1319.

§ 59. Purchase of Outstanding Titles or Claims.

Am Jur cited in Demmel v. Hammett, 360 Mo 737, 230 SW2d 686.
Williams v. International Harvester Co. 172 Or 270, 141 P2d 837.

§ 60. Purchase at Tax or Judicial Sale.

p. 294, n. 15. Anno: 20 ALR2d 1285.
A purchase of land at a tax sale by the owner's attorney operates only as a payment of the taxes. Anno: 75 Am St Rep 233.
p. 294, n. 16. Gaffney v. Harmon, 405 Ill 273, 90 NE2d 785, 20 ALR2d 1273.
Bank of Mill Creek v. Elk Horn Coal Corp. 133 W Va 639, 57 SE2d 736 (receivers of corporation held not permitted to sell property to their attorneys).
Anno: 20 ALR2d 1284 et seq.
p. 295, n. 18. Anno: 20 ALR2d 1301–1304, 1307; 27 ALR2d 1312.
The confidential relationship existing between an attorney and client is sufficient to create a constructive trust in property purchased by the attorney under an oral agreement by him to bid in the property at a sheriff's sale for their mutual benefit. Anno: 14 ALR2d 1286.
p. 295, n. 19. Anno: 20 ALR2d 1301–1304.
p. 295, n. 20. Anno: 20 ALR2d 1301–1304.
It has been held that if attorneys for the wife in divorce proceedings brought by her improperly secure a decree dividing property belonging to her, between herself and her husband, and the evidence shows a case of implicit trust and confidence by her in her attorneys, her acquiescence in such decree cannot avail her attorneys to their advantage and to her detriment, where such attorneys subsequently purchased at an execution sale of the interest improvidently awarded to the husband under the decree in the divorce proceedings; as to them she is not estopped from claiming her property. Bucher v. Hohl, 199 Mo 320, 97 SW 922, 116 Am St Rep 492.

Page 295. *Add, following note 20:* Where counsel, however, is merely consulted as to the state of the title to land which is subsequently sold, he is not prohibited from becoming the purchaser thereof, where he has given the correct advice concerning the liens on the property.[20.1] It has also been held that an attorney at law, like others usually disqualified to purchase at judicial sales, may do so if necessary for the protection of his own interests,[20.2] provided that he has first properly obtained an order of court granting permission to purchase.[20.3]

The usual mode of seeking relief from a purchase by an attorney is by motion or suit to set aside the sale. Either, if promptly instituted, is likely to prove successful unless the attorney affirmatively shows that his action was entirely proper and that no advantage was taken of the party complaining. Sometimes the equity may be worked out by merely requiring the attorney to account with his client for the profits of the property purchased and afterwards disposed of.[20.4]

20.1 Kauder v. Lautman, 114 NJ Eq 197, 168 A 660, citing RCL, affirmed in 116 NJ Eq 145, 172 A 565.
Anno: 21 Ann Cas 275 et seq.; 20 ALR2d 1312.
20.2 **Anno:** 136 Am St Rep 816; 20 ALR2d 1299, 1300.
20.3 **Anno:** 21 Ann Cas 275; 20 ALR2d 1299, 1300.
20.4 **Anno:** 136 Am St Rep 816; 20 ALR2d 1307–1309.

So, too, miscellaneous equitable remedies, such as a suit to remove a cloud upon title or to cancel deeds have been successfully employed.[20.41] Probably the remedy or relief most frequently sought is by way of an action or suit to impress a constructive trust upon the property invalidly purchased by the attorney.[20.42]

Where the sale to the attorney of the client's property at judicial or tax sale is invalidated, in so far as the attorney is concerned, he is entitled to reimbursement for the purchase money paid by him, as well as for taxes and other liens discharged by him while in possession of the property, plus amounts expended for useful improvements, such allowances to be diminished by rents and profits received by him while in possession of the property.[20.44]

20.41 Bucher v. Hohl, 199 Mo 320, 97 SW 922 116 Am St Rep 492.
Anno: 20 ALR3d 1306–1309.
20.42 Gaffney v. Harmon, 405 Ill 273, 90 NE 2d 785, 20 ALR2d 1273.
Anno: 20 ALR2d 1306–1308.
20.44 **Anno:** 20 ALR2d 1304–1306.
An attorney who holds title to realty, in which his client formerly held a life estate, by redemption from an execution sale and by assignment of a tax title and which is declared by the court to be held in trust for the client, has been held not thereby deprived of the right to reimbursement for his expenditures and a reasonable compensation for his services upon an accounting. Gaffney v. Harmon, 405 Ill 273, 90 NE2d 785, 20 ALR2d 1273.

§ 61. Effect of Prior Termination of Relation.

p. 295, n. 1. 20 ALR2d 1309 et seq.
There is no objection to the attorney's becoming the purchaser of property at a judicial sale in which his former client is interested, where there is no evidence of undue steps having been taken by him to the prejudice of his former client, or of his having used for his own advantage information acquired in his professional employment. Kauder v. Lautman, 114 NJ Eq 197, 168 A 660, citing RCL, affirmed in 116 NJ Eq 145, 172 A 565.
Anno: 21 Ann Cas 277 et seq.

p. 295, n. 3. Anno: 20 ALR2d 1309 et seq.

p. 295, n. 4. Anno: 20 ALR2d 1310.

It has been held that an attorney who enters into an agreement with his client, under which the client executes a note for sums due the attorney and for additional fees with the understanding that judgment shall be taken thereon by the attorney who as judgment creditor shall redeem realty of the client formerly sold under execution, and convey the property to the client upon reimbursement, may not profit from the redemption by terminating the attorney-client relationship. Gaffney v. Harmon, 405 Ill 273, 90 NE2d 785, 20 ALR2d 1273.

§ 62. Effect of Good Faith.

Am Jur quoted in Demmel v. Hammett, 360 Mo 737, 230 SW2d 686.

p. 295, n. 6. Anno: 20 ALR2d 1296, 1297.

It has been held that an executor or trustee could not, against the dissent of the cestui que trust, make a valid sale of property of the estate to the attorney for the executor, notwithstanding the transaction was conducted in good faith and the purchase price was reasonably adequate. The court observed that the incapacity of the attorney to become a purchaser of the assets of the estate without the full knowledge and consent of all parties in interest rests upon the ground of public policy, and that the inexorable character of the rule "is grounded in sound morals, and is reflected in the supplicating words of the Lord's Prayer, 'Lead us not into temptation.'" **Anno:** 20 ALR2d 1297.

p. 296, n. 7. Anno: 20 ALR2d 1297-1299.

However, receivers were held not permitted to make a sale of corporate property to their attorneys who paid adequate consideration in good faith where the identity of the purchasers was concealed from the stockholders and from the court on the authority of which the receivers acted. Bank of Mill Creek v. Elk Horn Coal Corp. 133 W Va 639, 57 SE2d 736.

p. 296, n. 8. Anno: 20ALR2d 1293-1296.

Dealings between an attorney and his client come within the general principle applied in Virginia to trustees, under which it has been held not enough, where the trustee sells trust property to himself with the consent of the beneficiary, that the beneficiary had full knowledge of the facts and of his legal rights, and that his consent was not improperly induced by the trustee, but it is also essential that the price be fair and reasonable. Littleton v. Kincaid (CA4th) 179 F2d 848, 27 ALR2d 572, cert den 340 US 809, 95 L ed 595, 71 S Ct 36, 38.

§ 63. Effect of Laches upon Right to Relief.

Am Jur cited in Demmel v. Hammett, 360 Mo 737, 230 SW2d 686.

p. 296, n. 9. Anno: 20 ALR2d 1301, 1302.

p. 296, n. 10. Bucher v. Hohl, 199 Mo 320, 97 SW 922, 116 Am St Rep 492.

Anno: 20 ALR2d 1302-1304.

It has been held that a suit by a client to have his former realty, which was acquired by his attorney by redemption from an execution sale and by purchase of a tax title, declared to be held in trust is not barred by laches where, since acquisition of the property by the attorney, the rents have been adequate to reimburse the attorney for his services and money expended, including tax obligations, and no injury to the attorney other than loss of expected profits of the transaction would result. Gaffney v. Harmon, 405 Ill 273, 90 NE2d 785, 20 ALR2d 1273.

§ 64. Generally.

Am Jur quoted in Hoffman v. Hogan, 345 Mo 903, 137 SW(2d) 441.

Zimmer v. Gudmundsen, 142 Neb 260, 5 NW (2d) 707.

W. C. Turnbow Petroleum Corp. v. Fulton (Tex Civ App) 199 SW2d 263.

Am Jur cited in Estate of Rorem, 245 Iowa 1125, 66 NW2d 292, 47 ALR2d 1089.

Wilson v Wahl, 182 Kan 532, 322 P2d 804; State v Leigh, 178 Kan 549, 289 P2d 774.

Olitkowski v St. Casimir's Sav. & L. Asso. 302 Mich 303, 4 NW2d 664.

Sluggett v. Phillips (Mo App) 178 SW2d 458; Moffett Bros. Partnership Estate v. Moffett. 345 Mo 741, 137 SW(2d) 507

W. C. Turnbow Petroleum Corp. v. Fulton (Tex Civ App) 199 SW2d 263.

p. 296. n 11. Re Estate of Rorem, 245 Iowa 1125, 66 NW2d 292, 47 ALR2d 1089.

Sedlak v Duda, 144 Neb 567, 13 NW2d 892, 154 ALR 490.

Gottwals v. Rencher, 60 Nev 35, 98 P2d 481, 126 ALR 1262.

Anno: 126 ALR 1271.

Sound pubic policy requires that an attorney not represent conflicting interests. Gardine v. Cottey, 360 Mo 681, 230 SW2d 731, 18 ALR2d 1100.

Where the owner of an automobile involved in an accident claimed the driver was using it without permission there was a conflict of interest between the insurer of the owner and the driver making the representation of both by the same attorneys improper and justifying a new trial. Hammett v. McIntyre, 114 Cal App2d 148, 249 P2d 885.

p. 296, n. 12. Sedlak v. Duda, 144 Neb 567, 13 NW2d 892, 154 ALR 490.

p. 296, n. 13. Consolidated Theatres, Inc. v Warner Bros. Circuit Management Corp. (CA2d NY) 216 F2d 920, 52 ALR2d 1231.

Hammett v McIntyre, 114 Cal App2d 148, 249 P2d 885.

King Constr. Co. v. Mary Helen Coal Corp. 194 Ky 435, 239 SW 799, citing RCL.

Sedlak v. Duda, 144 Neb 567, 13 NW2d 892, 154 ALR 490

Anno: 52 ALR2d 1254.

p. 297, n. 15. It has been held that where an insurer's attorney has reason to believe that the discharge of his duties to his client, the insured, will conflict with his duties to his employer, the insurer, it becomes incumbent upon him to terminate his relationship with the client. Allstate Ins. Co. v Keller, 17 Ill App 2d 44, 149 NE2d 482, 70 ALR2d 1190.

Page 297. *Add, following note* 16: It has been held that where in the course of the trial of an action against one insured by an automobile liability policy obligating the insurer to defend claims against the insured it becomes apparent that the claim in suit is not within the coverage of the policy, it would be professional misconduct for attorneys employed by the insurer to continue to represent the insured, by reason of the conflict of interest between the insurer and the insured.[16.5]

It is the duty of attorneys, hired by an automobile liability insurer to defend the insured, upon learning of the possible conflict of interests between the insurer and insured, to immediately notify the insured of this fact.[16.51]

[16.5] Helm v. Inter-Insurance Exchange, 354 Mo 935 192 SW2d 417 167 ALR 238

[16.51] Allstate Ins. Co. v Keller, 17 Ill App 2d 44, 149 NE2d 482, 70 ALR2d 1190.

§ 65. Where Interests Are Not Adverse or Both Clients Consent.

Am Jur quoted in Hoffman v. Hogan, 345 Mo 903, 137 SW(2d) 441.

Am Jur cited in McClendon v. Eubanks, 249 Ala 170, 30 So2d 261

Wilson v Wahl, 182 Kan 532, 322 P2d 804.

Rippon v Mercantile Safe Deposit & Trust Co. 213 Md 215, 131 A2d 695.

Moseley v. Deans, 222 NC 731, 24 SE2d 630.

p. 297, n. 17. Shaw v Bill, 95 US 10, 24 L ed 333, Consolidated Theatres, Inc. v Warner Bros. Circuit Management Corp. (CA2d NY) 216 F2d 920, 52 ALR2d 1231.

Sedlak v Duda, 144 Neb 567, 13 NW2d 892, 154 ALR 490

Anno: 47 ALR2d 1104-1107 (propriety of representation of heir or other beneficiary by attorney for executor or administrator in controversy with other heirs or beneficiaries); 52 ALR2d 1262-1268.

Whether an attorney has violated his professional duty by changing sides depends upon the facts of the particular case, one of which is the likelihood that his former client has sustained injury. Gottwals v. Rencher, 60 Nev 35, 98 P(2d) 481, 126 ALR 1262.

Whether an executor may act for one of the heirs in a controversy with other heirs involving property of the estate has been held to depend upon the circumstances of the particular case, including the fact that the other heirs did not consider him their attorney but were at all times represented by other attorneys of their own choice. Re Estate of Rorem, 245 Iowa 1125, 66 NW2d 292, 47 ALR2d 1089. **Anno:** 47 ALR2d 1106.

Under Canon 6 of the Canons of Professional Ethics of the American Bar Association, adopted as rules of court by various courts, imposing the professional obligation not to accept employment in matters affecting any interest of a former client as to which confidence has been reposed, it has been held to be the work done for the client and the attorney's access to the confidential information of the client that is crucial in determining applicability of the canon, and it is immaterial that the attorney acquired such information while a mere clerk in the employ of another, rather than as an associate counsel. Consolidated Theatres, Inc. v Warner Bros. Circuit Management Corp. (CA 2d NY) 216 F2d 920, 52 ALR2d 1231.

Page 297. *Add, following note* 17: The authorities seem in agreement that the privilege of objecting to an attorney's representing a party because he previously represented the party's adversary may be waived by the latter, and that effect will be given to such waiver where all the proper elements of waiver are present.[17.1]

17.1 Consolidated Theatres, Inc. v Warner Bros. Circuit Management Corp. (CA2d NY) 216 F2d 920, 52 ALR2d 1231.

Gottwals v Rencher, 60 Nev 35, 98 P2d 481, 126 ALR 1262.

Anno: 126 ALR 1273; 52 ALR2d 1268-1276.

p. 297, n. 18.

Even though husband and wife consent to be represented by the same attorney in their divorce and in carrying out a property settlement, a fraud is perpetrated upon the wife where the attorney induces her to sign a deed carrying out the settlement without disclosing to her the facts showing a conflict of interest and also his own and his father-in-law's interest in the matter. Gardine v. Cottey, 360 Mo 681, 230 SW2d 731, 18 ALR2d 1100.

It has been held that a former client's consent to an attorney to accept employment from another in a matter adversely affecting an interest of the former client as to which confidence has been reposed, is not evidenced by an ambiguous statement of the former client's vice president with respect to the former attorney's intention to restrict his representation of opposing clients to cases involving differences of time and locale than those involved in the cases in which he had access to the former client's confidential material. Consolidated Theatres, Inc. v Warner Bros. Circuit Management Corp. (CA2d NY) 216 F2d 920, 52 ALR2d 1231.

§ 66. Effect of Former Retainer.

Am Jur quoted in Porter v. Huber (DC) 68 F Supp 132.

Hoffman v. Hogan, 345 Mo 903, 137 SW2d 441.

Am Jur cited in Wilson v Wahl, 182 Kan 532, 322 P2d 804; State v Leigh, 178 Kan 549, 289 P2d 774.

State v Burns (Mo) 322 SW2d 736.

Butler Bros. Development Co. v Butler, 111 Mont 329, 108 P2d 1041.

Adams v. Adams, 156 Neb 778, 58 NW2d 172.

p. 297, n. 20. Consolidated Theatres, Inc. v Warner Bros. Circuit Management Corp. (CA2d NY) 216 F2d 920, 52 ALR2d 1231.

Gottwals v Rencher, 60 Nev 47, 98 P2d 481, 126 ALR 1262.

Re Themelis, 117 Vt 19, 83 A2d 507.

Anno: 52 ALR2d 1250 et seq.

p. 297, n. 1. Consolidated Theatres, Inc. v Warner Bros. Circuit Management Corp. (CA2d NY) 216 F2d 920, 52 ALR2d 1231.

Sedlak v Duda, 144 Neb 567, 13 NW2d 892, 154 ALR 490.

Gottwals v Rencher, 60 Nev 47, 98 P2d 481, 126 ALR 1262.

Re Themelis, 117 Vt 19, 83 A2d 507. (Holding also that knowledge of prior employment and consent to adverse employment by the parties might justify an attorney in matters of private interest, but not in a matter of divorce or legal separation where other interests, such as those of the children, are involved.)

Anno: 126 ALR 1271; 52 ALR2d 1247-1250.

The fact that an attorney's relationship to a former client arose merely because he was a law clerk with a firm which represented the client has been held not to take the attorney out of the rule barring him from later representing interests adverse to such client, since it is the work done for the client and the access to confidential information secured from the client which is crucial in determining the attorney's obligation. Consolidated Theatres, Inc. v Warner Bros. Circuit Management Corp. (CA2d NY) 216 F2d 920, 52 ALR2d 1231.

Disqualification of an attorney from representing the plaintiff in a civil action on the ground of his former representation of the defendants in matters as to which confidence was reposed has been held not to be precluded by the fact that the information of adverse impact thus received has not yet been used or may never be so used. Consolidated Theatres, Inc. v Warner Bros. Circuit Management Corp. (CA 2d NY) 216 F2d 920, 52 ALR2d 1231.

p. 298. n. 2. Anno: 52 ALR2d 1253.

Page 298. *Add following note* 2: On the other hand, the view has been taken that, absent the transmission of confidential information from a client to an attorney, the attorney is not thereafter disqualified from representing an interest adverse to that of the client.[2.1]

2.1 Anno: 52 ALR2d 1254.

p. 298. n. 3. Re Themelis, 117 Vt 19, 83 A2d 507.

Anno: 126 ALR 1274; 52 ALR2d 1279 et seq.

On evidence that an attorney representing the plaintiff in an action against the government for amounts allegedly due plaintiff for services performed pursuant to a series of contracts with the Veterans' Administration, had been employed as an attorney by the Veterans' Administration, serving in the office which handled the very contracts involved in the action against the government, and, in addition, had been active in behalf of the government in transactions involving those contracts, the court has held that disqualification of the attorney from representing the plaintiff in the action against the government was warranted. **Anno:** 52 ALR2d 1281.

Page 298. *Add following note* 3: In at least one case the view has been taken that, where an attorney has been employed by one having an interest adverse to the interest of the attorney's former client, the subsequent client may be enjoined from using confidential information obtained by the attorney in his former employment.[3.5] A judgment in favor of the later client, obtained in the litigation in which the later client was represented by the attorney, will be reversed if the trial court's failure to restrain the attorney amounts to a prejudicial error.[3.51] And in at least one instance an attorney's conduct has been held to bar reversal of a judgment against the later client.[3.52]

3.5 Anno: 52 ALR2d 1291.

3.51 Anno: 52 ALR2d 1286-1289.

3.52 Sedlak v Duda, 144 Neb 567, 113 NW2d 892, 154 ALR 490.

Anno: 52 ALR2d 1292.

p. 298, n. 4. Anno: 52 ALR2d 1249.

Page 298. *Add, following note* 5: And conversely, where an attorney acted as legal advisor for a grand jury in an investigation of matters some of which led to a proceeding to remove a district attorney, he cannot defend the district attorney in that proceeding.[5.5]

[5.5] Hawkins v. Eighth Judicial Dist. Ct. 67 Nev 248, 216 P2d 601.

p. 298, n. 6. **Anno:** 126 ALR 1273.

Page 298. *Add at end of section:* No bar exists where the evidence fails to establish that a true attorney-client relationship existed between the attorney and one claiming to have been a former client.[7.5]

[7.5] Consolidated Theatres, Inc. v Warner Bros. Circuit Management Corp. (CA2d NY) 217 F2d 920, 52 ALR2d 1231.

Lester v Gay, 217 Ala 585, 117 So 211, 59 ALR 1561.

Anno: 52 ALR2d 1256–1262.

§ 67. Power to Bind Client as Agent.

Forms: 1 Am Jur Legal Forms 1:1848–1:1855; 2 Am Jur Pl & Pr Forms 2:1207.

Am Jur cited in Laird v Air Carrier Engine Service, Inc. (CA5 Fla) 263 F2d 948.

Atlantic Co. v Farris, 62 Ga App 212, 8 SE2d 665; Auld v Colonial Stores, 76 Ga App 329, 45 SE2d 827 (dissent op).

Jaquith v Stanger, 79 Idaho 49, 310 P2d 805.

p. 298, n. 12.

See Taylor v. Parkview Memorial Asso. 317 Mich 164, 26 NW2d 748, 171 ALR 507, holding that in an action by an executor to foreclose a land contract entered into by the plaintiff's testator as vendor where the defendant relied upon a notice of forfeiture of the contract given by the executor's attorney, testimony of the attorney offered to show limitations on his authority as attorney for the executor is properly excluded as not binding on the defendant where such alleged limitations were not known to him and not made in his presence.

Page 298. *Add, following note* 13: It has been held that while an attorney may be vested with express authority to indorse negotiable paper for and on behalf of his client, his mere rightful possession of a negotiable instrument belonging to the client does not imply such authority; that an attorney at law has no implied authority to indorse the name of his client to a negotiable instrument merely because of the existence of the relationship of attorney and client or because that instrument happens to be connected in some manner with the litigation which the attorney is handling for the client.[13.5]

[13.5] Security Nat. Bank v. Johnson, 195 Okla 107, 155 P2d 249, 169 ALR 790.

§ 68. Authority in Litigation and in Special Employment Distinguished.

Am Jur cited in Laird v Air Carrier Engine Service, Inc. (CA5 Fla) 263 F2d 948.

p. 299, n. 14. **Anno:** 37 ALR2d 493.

p. 299, n. 16. In the absence of express authority for more general representation an attorney's power of representation has been held confined to matters which have been entrusted to him. Consolidated Theatres, Inc. v Warner Bros. Circuit Management Corp. (CA2d NY) 217 F2d 920, 52 ALR2d 1231.

§ 69. Collection of Client's Claim.

Am Jur quoted in John Bean Mfg. Co. v. Citizens Bank, 60 Ga App 615, 4 SE(2d) 924.

McCoy v. Barclay, 250 App Div 682, 295 NYS 130 (n. 18).

Am Jur cited in Security Nat. Bank v. Johnson, 195 Okla 107, 155 P2d 249.

RCL cited in Dacus v. Maryland Casualty Co. 40 N. M. 110, 55 P. (2d) 663.

p. 299, n. 1. **Anno:** 30 ALR2d 949.

p. 300, n. 6. Helgeson v. Farmers Ins. Exchange, 116 Cal App2d Supp 925, 255 P2d 484 (wherein the bank was liable to the client for cashing a check payable to him and the attorney, the check having been indorsed by the attorney, who then absconded with the funds).

Crahe v. Mercantile Trust & Sav. Bank, 295 Ill 375, 129 NE 120, 12 ALR 92.

Anno: 12 ALR 121, 124; 94 ALR 561–564; 37 ALR2d 491–493.

Where an attorney could not contact a client who was in military service at the time, his act in indorsing a draft made payable to his client and purporting to be a release of all claims arising out of an accident in which the client was injured, and in placing such proceeds to the credit of the client, has been held not such an authorized indorsement as to render it the act of the client, since the express authority of the attorney to so act was not shown, nor could implied authority arise from the mere relation of attorney and client. Sainsbury v. Pennsylvania Greyhound Lines Inc. (CA4th Md) 183 F2d 548, 21 ALR2d 266.

p. 300, n. 7. Crahe v. Mercantile Trust & Sav. Bank, 295 Ill 375, 129 NE 120, 12 ALR 92.

Anno: 12 ALR 121, 124; 94 ALR 561–564; 37 ALR2d 493.

p. 300, n. 8. **Anno:** 30 ALR2d 947–949.

Page 300. *Add, at end of section:* On the other hand, the view has been taken that since an attorney employed to collect a claim on behalf of his client has authority to receive cash in settlement of the claim, the authority to indorse and thus convert the commercial paper into cash in settlement of the claim is implied.[12.5] Where there is necessity for haste in collecting the amount represented by a check forwarded to an attorney, it appears that an attorney has the implied power to indorse the check and collect the amount in order to forestall later uncollectibility.[12.51] Where an attorney has customarily indorsed checks made payable to his client, to the knowledge of the bank permitting him to indorse and transfer such commercial paper, an apparent authority has been held to arise in favor of the bank.[12.52]

[12.5] Security Nat. Bank v. Johnson, 195 Okla 107, 155 P2d 249, 169 ALR 790.

Anno: 37 ALR2d 494–496.

[12.51] **Anno:** 37 ALR2d 496.

[12.52] **Anno:** 37 ALR2d 497.

§ 70. Surrender or Waiver of Client's Rights.

Am Jur quoted in Ex parte Industrial Finance & Thrift Co. 255 Ala 464, 51 So2d 894.

McCombs v McCombs, 227 Ark 1, 295 SW2d 774.

Am Jur cited in Bommarito v. Southern Canning Co. (CA8th Mo) 208 F2d 56; Sainsbury v. Pennsylvania Greyhound Lines (CA4th Md) 183 F2d 548, 21 ALR2d 266.

Couch v Landers (Mo) 316 SW2d 588.

McKeague v Freitas, 40 Hawaii 108.

Perkins v Public Serv. Co. 93 NH 459, 45 A2d 210.

Robinson v State (ND) 63 NW2d 521.

p. 300, n. 13 **Anno:** 30 ALR2d 947.

§ 71. Ratification of, or Estoppel to Deny, Unauthorized Acts.

Re Lacivita (CA3 NJ) 255 F2d 365.

Bergum v Palmborg, 239 Minn 569, 58 NW2d 722.

Moe v. Zitek, 75 ND 222, 27 NW2d 10.

p. 301, n. 19.

It has been held that a client ratifies his attorney's act if he does not repudiate it promptly upon receiving knowledge that the attorney has exceeded his authority. Yarnall v. Yorkshire Worsted Mills, 370 Pa 93, 87 A2d 192, 30 ALR 2d 939.

p. 301, n. 20. Yarnall v. Yorkshire Worsted Mills, 370 Pa 93, 87 A2d 192, 30 ALR2d 939.

§ 72. Delegation of Authority.

Forms: 1 Am Jur Legal Forms 1:1856–1:1858.

§ 73. — Employment of Assistant or Associate Counsel.

Forms: 2 Am Jur Pl & Pr Forms 2:1226.

Am Jur cited in Wells, F. & Co. v. San Francisco, 25 Cal2d 37, 152 P2d 625.

Skeen v. Peterson, 113 Utah 483, 196 P2d 708.

§ 74. Imputation of Attorney's Knowledge to Client.

Am Jur quoted in Solomon v. First Nat. L. Ins. Co. (La App) 5 So(2d) 589.

Dumas v. Hartford Acci. & Indem. Co. 94 NH 484, 56 A2d 57.

Wauwatosa Realty Co. v Bishop, 6 Wis2d 230, 94 NW2d 562.

Am Jur cited in Fidelity & C. Co. v. Beeland Bros. Mercantile Co. 242 Ala 591, 7 So (2d) 265.

Freeman v Superior Court, 44 Cal2d 533, 282 P2d 857.

Doner v. Honstead, 61 Idaho 669, 106 P(2d) 868.

Raible v. Raydel, 162 Ohio St 25, 120 NE2d 425.

Phillips v Ball (Okla) 358 P2d 193.

Weiss Apparel, Inc. v. Elks Home Asso. 64 Pa D & C 61.

RCL cited in Solomon v. First Nat. L. Ins. Co. (La App) 5 So(2d) 589.

Rossey v. Mayburg Chemical Co. 58 Pa D & C 532.

p. 302, n. 13. Link v Wabash R. Co. 370 US 626, 8 L ed 2d 734, 82 S Ct 1386.

Re Rule, 25 Cal 2d 1, 152 P2d 1003, 155 ALR 1319.

Katz v. Kowalsky, 296 Mich 164, 295 NW 600, 134 ALR 179

It has been held that an attorney who enters his appearance of record in any litigation is the agent of the party as long as such attorney remains the existing attorney of record, and the party is bound by such attorney's knowledge and notice of the proceedings in that case so long as it is pending. State ex rel. Brubaker v Pritchard, 236 Ind 222, 138 NE2d 233, 60 ALR2d 1239.

§ 75. Knowledge Acquired in Another Transaction or Outside Employment.

Am Jur cited in Phillips v Ball (Okla) 358 P2d 193.

Armstrong v May, 33 Wash 2d 112, 204 P2d 510.

§ 76. Knowledge Acquired in Employment of Another Client.

Am Jur cited in Reeg v West, 160 Cal App 2d 617, 325 P2d 164.

RCL cited in Silbaugh v. Guardian Bldg. & L. Asso. 164 Or 286, 97 P(2d) 943, 99 P(2d) 1017, 101 P(2d) 420.

§ 78. Imputation of Attorney's Negligence to Client.

Am Jur quoted in Beth v. Harris, 208 Ark 903, 188 SW2d 119.

Am Jur cited in Longyear v Edwards, 217 Or 314, 342 P2d 762; Bowles v Creason, 159 Or 129, 78 P2d 324 (n. 5).

Real Estate Com. v McLemore, 202 Tenn 540, 306 SW2d 683.

Texas Employers Ins. Asso. v Wermske, — Tex —, 349 SW2d 90.

RCL cited in Mosher v. Mutual Home & Sav. Asso 35 Ohio L Abs 445, 41 NE(2d) 871.

p. 306, n. 10. Anno: 74 ALR2d 1390.

Page 306. *Add new paragraph at end of section:* It has been held that the clients of an attorney are not liable for damages alleged to have been caused by the attorney's assault on a third party while the third party and the attorney were engaged in taking depositions, for the taking of which the attorney had been employed.[11.5]

[11.5] Pyle v. Ely & Walker Dry Goods Co. (CA5th Miss) 179 F2d 677.

§ 79. Generally.

Forms: 1 Am Jur Legal Forms 1:1859–1:1862; 2 Am Jur Pl & Pr Forms 2:1171–2:1175, 2:1204; 10 Am Jur Pl & Pr Forms 10:1154.

Am Jur cited in Gatewood v. Board of Comrs. 119 Ind App 297, 86 NE2d 298.

Cooper v. Little, 29 Tenn App 685, 201 SW2d 210.

§ 80. Presumption of Authority; Burden of Proving Want of Authority.

Am Jur quoted in Sachs v. Title Ins. & T. Co. 305 Ky 153, 202 SW2d 384.

Am Jur cited in Bowles v. American Brewery (CCA 4th) 146 F2d 842.

Gatewood v. Board of Comrs. 119 Ind App 297 86 NE2d 298.

State ex rel. Coleman v. District Ct. 120 Mont 372, 186 P2d 91; Rieckhoff v. Woodhull, 106 Mont 22, 75 P2d 56 (n. 19).

Harrington v. Buchanan, 222 NC 698, 24 SE 2d 534.

Moe v. Zitek, 75 ND 222, 27 NW2d 10.

Minnesota v. Karp, 84 Ohio App 51, 84 NE2d 76.

Bowles v. Creason, 159 Or 129, 78 P2d 324 (n 19).

RCL quoted in Dacus v. Maryland Casualty Co. 40 NM 110, 55 P2d 663.

RCL cited in Friedman v. Booth Fisheries Corp. 28 Del Ch 211, 39 A2d 761.

§ 81. Sufficiency of Proof of Want of Authority.

Forms: 2 Am Jur Pl & Pr Forms 2:1171-2:1175.

Am Jur cited in Campbell v Hot Springs, 232 Ark 878, 341 SW2d 225.

Mullins v La Bahn, 244 Wis 76, 11 NW2d 519

§ 82. Challenging Authority to Appear.

Forms: 2 Am Jur Pl & Pr Forms 2:1171-2:1174.

Am Jur cited in Waltzinger v Birsner, 212 Md 107, 128 A2d 617.

Mitchell v McDonald, 114 Mont 292, 136 P2d 536.

§ 83. Effect of Unauthorized Appearance.

Am Jur cited in Zorn v. Lowery, 236 Ala 62, 181 So 249 (notes 17–20); A.B.C. Truck Lines v. Kenemer, 247 Ala 543, 25 So2d 511.

Way v. Turner 80 Ga App 814, 57 SE2d 439

State ex rel. Durham v Marion Circuit Court, 240 Ind 132, 162 NE2d 505.

§ 84. Withdrawal or Striking Out of Appearance.

Am Jur cited in State ex rel. Durham v Marion Circuit Court, 240 Ind 132, 162 NE2d 505.

§ 85. Generally.

Am Jur quoted in State ex rel. Shannon v Sterling, 248 Minn 266, 80 NW2d 13.

State Highway Com. v Fortune, 77 SD 302, 91 NW2d 675.

Am Jur cited in England v Doyle (CA9 Cal) 281 F2d 304; Laird v Air Carrier Engine Service, Inc. (CA5 Fla) 263 F2d 948.

Schleiger v Schleiger, 137 Colo 279, 324 P2d 370.

State ex rel. Durham v Marion Circuit Court, 240 Ind 132, 162 NE2d 505.

Timmons v Holmes, 249 Iowa 888, 89 NW2d 371.

Couch v Landers (Mo) 316 SW2d 588.

Noska v Mills (Tex Civ App) 141 SW2d 429.

RCL quoted in Zurich General Acci. & Liability Ins. Co. v. Kinsler, 12 Cal2d 98, 81 P2d 913.

RCL cited in Rains v. Alaska Consol. Oil Fields, 8 Alaska 256

p. 311, n. 4. Hawkeye-Security Ins. Co. v Indemnity Ins. Co. (CA10 Colo) 260 F2d 361, 69 ALR2d 684.

p. 312, n. 6.

See State ex rel. Land Office Comrs. v. Jones, 198 Okla 187, 176 P2d 992, 174 ALR 1.

Page 312. *Add, following note 13:* An attorney employed by the next friend of a minor to conduct litigation for the minor may exercise all the powers and duties of an attorney of record in any litigation.[13.1]

While a court has power to allow an attorney not employed by defendants in a criminal case to appear as their "next friend" under appropriate circumstances such as incapacity or isolation from counsel, such an attorney has no standing to litigate the case where he is a stranger to the defendants, his intervention is unauthorized by them and originally opposed by their counsel, it does not appear that he would be a helpful or chosen champion, and the defendants had able and zealous counsel of their own choice.[13.5]

The fact that a judicial proceeding was instituted by an attorney while employed under a general or periodic retainer contract does not entitle him to continue to act therein for the client after his discharge.[13.52]

[13.1] Garner v. Schilling Co. 128 Fla 353, 174 So 837, 111 ALR 682.

[13.5] Rosenberg v. United States, 346 US 273, 97 L ed 1607, 73 S Ct 1152.

[13.52] **Anno:** 43 ALR2d 681.

§ 86. Exclusiveness of Control.

Am Jur cited in Timmons v Holmes, 249 Iowa 888, 89 NW2d 371.

§ 87. Commencement of Suit or Proceedings by or against Client.

Am Jur quoted in Kupfer v Board of Zoning Appeals, 130 Ind App 55, 162 NE2d 110.

Am Jur cited in Bardahl Mfg. Corp. v District Court of County of Jefferson, — Colo —, 372 P2d 447.

p. 313, n. 9.

A person participates in an arrest to the extent of giving voluntary aid and assistance sufficient to support a malicious prosecution action against him where he is present in his attorney's office when a party is arrested therein by a police officer and thereafter accompanies the attorney to a magistrate's office to which the arrested party is taken by the police officer, and there testifies against such party before the magistrate. **Anno:** 120 ALR 1325.

It has been held that the request of the attorney was, under the circumstances, the request of the client, and that the latter was liable for false imprisonment where the client, having consulted his attorney in relation to a charge of malicious trespass, went with the attorney to an office of a justice of the peace, where the client signed and swore to a complaint, and the attorney, in the client's presence and without protest from him, asked the justice to issue a warrant under the complaint for plaintiff's arrest, whereupon the justice issued a warrant before the filing of an information by the prosecuting attorney. **Anno:** 120 ALR 1325.

One for whose benefit a ca. sa. was issued, at the instance of his counsel, and who approved of the arrest, has been held properly liable for damages for a false imprisonment, although he may not have directed the ca. sa. **Anno:** 120 ALR 1325

In a suit for malicious prosecution based upon a previous civil action brought against plaintiff in the name of defendant as next friend for a minor, on a claim for work and labor, wherein it appeared that the minor's attorney requested defendant if he would allow his name to be used as next friend stating it would not subject him to any trouble or cost and that that was the only way minors could collect their claims legally, it was declared that the evidence of the circumstances under which defendant allowed his name to be used completely negatived any malicious intent on his part. **Anno:** 120 ALR 1325.

§ 89. Attachment and Arrest.

Houser v Frank, 186 Kan 455, 350 P2d 801.

§ 90. Writs, Notices, Pleadings, and Technical Formalities.

Am Jur quoted in Bank For Savings & Trusts v Towe, 231 SC 268, 98 SE2d 539.

Am Jur cited in Kelley v. Abram (DC) 20 F Supp 229 (n 14)

p. 314, n. 14. It has been held that an attorney signing a notice sent in behalf of his client is acting as an agent of the client, and his act is the act of the client. Bulldog Concrete Forms Sales Corp. v Taylor (CA7th Ind) 195 F2d 417, 49 ALR2d 1.

Page 314. *Add, following note* 14: Service of process respecting active actions may be made upon attorneys of record in litigation that has not been finally concluded.[14.5]

[14.5] Pike v. Pike, 24 Wash2d 735, 167 P2d 401, 163 ALR 1314.

Service upon the attorney of record of an appellant in a divorce action of an order to show cause why she should not comply with the trial court's order respecting the custody of the children, is sufficient. Pike v. Pike, 24 Wash2d 735, 167 P2d 401, 163 ALR 1314.

§ 91. Stipulations and Agreements.

Am Jur quoted in Schleiger v Schleiger, 137 Colo 279, 324 P2d 370; Middleton v Stavely, 124 Colo 88, 235 P2d 596.

Am Jur cited in Acme Poultry Corp. v. United States (CCA4th) 146 F2d 738, writ of certiorari denied in 324 US 860, 89 L ed 1417, 65 S Ct 865; Eury v. Huff (CCA4th) 141 F2d 554.

Couch v Landers (Mo) 316 SW2d 588.

Rieckhoff v. Woodhull, 106 Mont 22, 75 P2d 56 (n 18)

Gottwals v. Rencher, 60 Nev 35, 98 P2d 481, 126 ALR 1262.

Mueller v Eucenham, 33 NJ Super 156, 109 A2d 462; State v Mulvaney, 21 NJ Super 457, 91 A2d 359; State v Graham, 19 NJ Super 70, 88 A2d 5.

State v. Barley, 240 NC 253, 81 SE2d 772.

Union Storage & Transfer Co. v Smith, 79 ND 605, 58 NW2d 782.

RCL cited in Grocery & Food Warehousemen Local Union v. Kroger Co. 364 Pa 195, 70 A2d 218.

Page 314. *Add, following note* 6: It has been held that an attorney may bind his client by an agreement not to proceed in a pending suit without first notifying counsel for the opposing party.[6.5]

[6.5] State ex rel. Land Office Comrs. v. Jones, 198 Okla 187, 176 P2d 992, 174 ALR 1.

p. 314, n. 18. Cahaley v. Cahaley, 216 Minn 175, 12 NW2d 182, 157 ALR 1.

Gottwals v. Rencher, 60 Nev 35, 98 P2d 481, 126 ALR 1262.

An attorney employed to conduct litigation may, without the knowledge of his client, bind the client by a stipulation waiving a jury trial. Shores Co. v. Iowa Chemical Co. 222 Iowa 347, 268 NW 581, 106 ALR 198.

§ 92. — Limitations on Power.

Am Jur cited in United States ex rel. Goldsby v Harpole (CA5 Miss) 263 F2d 71, cert den 361 US 838, 4 L ed 2d 78, 80 S Ct 58.

De Long v Owsley, 308 Ky 128, 213 SW2d 806.

Couch v Landers (Mo) 316 SW2d 588.

Rieckhoff v. Woodhull 106 Mont 22, 75 P2d 56 (n 10) (dissent op).

State v. Barley, 240 NC 253, 81 SE2d 772.

RCL quoted in Sudekum v. Fasnacht, 236 Mo App 455, 157 SW2d 264.

RCL cited in World F. & M. Ins. Co. v. Tapp, 286 Ky 650, 151 SW2d 428.

Page 315. *Add, following note* 12: An attorney, in making an agreement with another attorney on a matter affecting procedure only, must act in the utmost good faith to the end that all the substantive rights of his client are fully protected, and a party should not be made to suffer because of a misunderstanding between counsel in the case in connection with such an agreement.[12.5]

[12.5] Cahaley v. Cahaley, 216 Minn 175, 12 NW 2d 182, 157 ALR 1.

An agreement between attorneys for an extension of time to answer, which is indefinite in its terms, should not be construed by counsel technically or strictly, in taking a default

judgment, so as to deprive a party unjustly of his rights, but rather in the spirit of professional courtesy and mutual helpfulness. Cahaley v. Cahaley, 216 Minn 175, 12 NW2d 182, 157 ALR 1.

§ 93. Conclusiveness of Admissions of Attorney.

Am Jur quoted in Smith v. State, 217 Miss 123, 63 So2d 557

Am Jur cited in General Constr. Co. v Hering Realty Co. (DC SC) 201 F Supp 487.

RCL cited in Ellis v. Ellis, 8 Alaska 373.

§ 94. — When Not Binding on Client.

Am Jur cited in State Highway Com. v Fortune, 77 SD 302, 91 NW2d 675.

Cato v Silling, 137 W Va 694, 73 SE2d 731.

§ 95. Incurring Incidental Expenses.

Am Jur cited in Skeen v. Peterson, 113 Utah 483, 196 P2d 708

p. 317, n. 1. He may bind his client for the cost and expense of printing briefs, abstracts of record, appeal papers and the like. Petrando v Barry, 4 Ill App2d 319, 124 NE2d 85.

§ 96. Release of Client's Cause of Action.

Forms: 1 Am Jur Legal Forms 1:1863; 2 Am Jur Pl & Pr Forms 2:1206.

Am Jur cited in Bath v. Norman, 226 NC 502, 39 SE2d 363.

Gasior v Wentz (ND) 89 NW2d 886; Mongeon v Burkebile, 79 ND 234, 55 NW2d 445.

p. 317, n. 3.

Authority of an attorney to indorse and collect a check given to his client for a release of a claim for personal injuries, so as to preclude appeal by the client from an adverse judgment in an action to recover damages for the injuries, may not be implied from the mere relationship of client and counsel. Sainsbury v. Pennsylvania Greyhound Lines, Inc. (CA4th Md) 183 F2d 548, 21 ALR2d 266.

§ 97. Dismissal, Discontinuance, Nonsuit, Retraxit, or Reinstatement.

Am Jur cited in Mongeon v Burkebile, 79 ND 234, 55 NW2d 445.

p. 318, n. 9. Anno: 56 ALR2d 1293.

p. 318, n. 10. Anno: 56 ALR2d 1292.

p. 318, n. 11. Anno: 56 ALR2d 1292.

Page 318. *Add following note* 11: The rule prevailing in most jurisdictions is that an attorney employed to prosecute an action has implied authority, by virtue of such employment, to have the action discontinued or dismissed where such discontinuance or dismissal will not operate as a bar to the institution of a new action on the same cause, or, as expressed in some cases, where the dismissal or other termination is "without prejudice."[11.5] On the other hand, according to most authorities, an attorney has no general or implied authority by virtue of his employment, to have an action dismissed, or to consent to the dismissal thereof, where such dismissal would operate as a bar to a subsequent action on the same cause or as a surrender of any substantial right or claim of the client, usually referred to as a dismissal "with prejudice" or "on the merits."[11.51] Special authorization by the client is ordinarily necessary for such purpose.[11.52] The rule that the dismissal of an action with prejudice is not within the scope of the general authority of an attorney has been held applicable in the case of an attorney acting in an official capacity as well as in the case of one privately employed.[11.53] Where special authorization is necessary in order to make a dismissal or other termination of an action by an attorney binding on the client, the decisions are generally to the effect that it will be presumed, prima facie, that the attorney acted under the pursuant to such authorization.[11.54]

A dismissal or discontinuance at the instance of the plaintiff's attorney for the following reasons, respectively, has been considered to be within the scope of his general or implied authority: the absence of the plaintiff when the case was called for trial;[11.55] the probability of a defeat on the merits;[11.56] the insufficiency of the evidence then known or available;[11.57] and to permit the use of a part defendant as a witness on behalf of the plaintiff.[11.58] But the fact that an attorney believes that the client is not entitled to prevail in the action does not authorize him to dismiss it with prejudice without the client's consent.[11.59]

The authority of an attorney to dismiss an action upon a compromise or settlement of the case has usually been made to depend upon his authority to make or accept such compromise or settlement.[11.6]

[11.5] Bacon v Mitchell, 14 ND 454, 106 NW 129, 4 LRA NS 244.

Virginia Concrete Co. v Board of Supervisors of Fairfax County, 197 Va 821, 91 SE2d 415, 56 ALR2d 1283.

Anno: 56 ALR2d 1291.

[11.51] Turner v Fleming, 37 Okla 75, 130 P 551, 45 LRA NS 265, Ann Cas 1915B 831.

Virginia Concrete Co. v Board of Supervisors of Fairfax County, 197 Va 821, 91 SE2d 415, 56 ALR2d 1283.

Anno: 56 ALR2d 1292.

[11.52] **Anno:** 56 ALR2d 1293.

[11.53] Virginia Concrete Co. v Board of Supervisors of Fairfax County, 197 Va 821, 91 SE2d 415, 56 ALR2d 1283.

Anno: 56 ALR2d 1295.

[11.54] **Anno:** 56 ALR2d 1295.

[11.55] **Anno:** 56 ALR2d 1296.

[11.56] Bacon v Mitchell, 14 ND 454, 106 NW 129, 4 LRA NS 244.

Anno: 56 ALR2d 1296.

[11.57] **Anno:** 56 ALR2d 1296.

[11.58] **Anno:** 56 ALR2d 1296.

[11.59] Virginia Concrete Co. v Board of Supervisors of Fairfax County, 197 Va 821, 91 SE2d 415, 56 ALR2d 1283.

Anno: 56 ALR2d 1296.

[11.6] **Anno:** 56 ALR2d 1296.

p. 318, n. 12. Anno: 56 ALR2d 1293, 1294.

It has been held that a retraxit can be entered only by the plaintiff in person in open court, and not by his attorney except upon special authority. Virginia Concrete Co. v Board of Supervisors of Fairfax County, 197 Va 821, 91 SE2d 415, 56 ALR2d 1283.

p. 318, n. 13. Board of Comrs. of Funded Debt v Younger, 29 Cal 147, 87 Am Dec 164.

Anno: 56 ALR2d 1294.

Page 318. *Add at end of section:* Where an action is dismissed or otherwise terminated at the instance of an attorney acting without proper authority, the client is ordinarily entitled to have the order or judgment set aside and the cause reinstated,[15.5] or he may have the order or judgment amended or corrected so as to show that the dismissal or discontinuance is "without prejudice," upon timely application for such relief and a showing of his right thereto.[15.51] Where the dismissal was made or agreed to in connection with a compromise or settlement of the client's claim, the remedy of the latter has been held to be in the nature of a rescission, so as to require, as a condition of relief, that the adverse party be placed in statu quo.[15.52] And where the settlement was unauthorized, there may be circumstances under which the plaintiff will be remitted to his remedy against his attorney.[15.53]

15.5 Turner v Fleming, 37 Okla 75, 130 P 551, 45 LRA NS 265, Ann Cas 1915B 831.

Virginia Concrete Co. v Board of Supervisors of Fairfax County, 197 Va 821, 91 SE2d 415, 56 ALR2d 1283.

Anno: 56 ALR2d 1299.

15.51 Anno: 56 ALR2d 1299.

15.52 Anno: 56 ALR2d 1299.

15.53 Anno: 56 ALR2d 1299.

§ 98. Compromise of Cause of Action.

Am Jur cited in Sainsbury v. Pennsylvania Greyhound Lines (CA4th Md) 183 F2d 548, 21 ALR2d 266.

People v. Wilson 78 Cal App2d 108, 177 P2d 567.

McKeague v Freitas, 40 Hawaii 108.

Fillhardt v. Schmidt, 291 Ky 668, 165 SW2d 155.

Gasior v Wentz (ND) 89 NW2d 886.

Sustrik v Jones & Laughlin Steel Corp. 189 Pa Super 47, 149 A2d 498.

Virginia Concrete Co. v Board of Supervisors of Fairfax County, 197 Va 821, 91 SE2d 415; Harris v Diamond Constr. Co. 184 Va 711, 36 SE2d 573.

RCL cited in Jenkins v. Bowling Green, 261 Ky 679, 88 SW2d 692.

Galbraith v. Monarch Gold Dredging Co. 160 Or 282, 84 P2d 1110.

p. 318, n. 16. Ricketts v. Pennsylvania R. Co. (CCA2d NY) 153 F2d 757, 164 ALR 387.

Cole v. Myers, 128 Conn 223, 21 A2d 396, 136 ALR 226 (assistant corporation counsel appearing in case for city).

Anno: 30 ALR2d 945–947; 42 ALR2d 1359 (will contest).

An attorney at law has been held to be without authority to compromise a pending action without specific authority from his client, especially where the contract of employment expressly provides that neither the attorney nor client may settle or compromise the claim without the written consent of the other or without all parties being present and agreeing thereto. National Valve & Mfg. Co. v Wright, 205 Okla 571, 240 P2d 766, 29 ALR2d 1448.

p. 319, n. 17. Anno: 30 ALR2d 950.

p. 319, n. 18. Cole v. Myers, 128 Conn 223, 21 A2d 396, 136 ALR 226

p. 319, n. 20. Anno: 30 ALR2d 951.

p. 319, n. 2. Anno: 30 ALR2d 953.

p. 320, n. 4. Anno: 42 ALR2d 1360 (will contest).

p. 320, n. 5. Anno: 30 ALR2d 949.

§ 99. — Ratification or Estoppel to Repudiate.

Am Jur cited in Conder Petroleum Co. v. Greene (Tex Civ App) 164 SW2d 713.

p. 320 n. 12. Anno: 30 ALR2d 955, 956.

A stipulation settling a replevin action, executed without authority by plaintiff's attorney, has been held ratified by the plaintiff where, with knowledge of the terms of the settlement, he accepts the net proceeds of the cash sum paid by the defendant thereunder, makes his first formal objection about eight months later without claiming his counsel's lack of authority, and does not repudiate the stipulation until the lapse of twenty months. Yarnall v. Yorkshire Worsted Mills, 370 Pa 93, 87 A2d 192, 30 ALR2d 939.

An abuse of discretion has been held not committed by the trial court in refusing, without a hearing, a rule to show cause why a stipulation settling a replevin action should not be set aside on the ground of absence of authority of the attorney, where it affirmatively appears from the petition taken in connection with the record facts before the court that the settlement had been ratified by the petitioner. Yarnall v. Yorkshire Worsted Mills, 370 Pa 93, 87 A2d 192, 30 ALR2d 939.

p. 320, n. 14. Anno: 30 ALR2d 955.

§ 100. Submission to Arbitration, Reference, or Amicable Action.

Am Jur cited in New Bedford Defense Products Division, etc. v Local No. 1113, International Union, etc. (DC Mass) 160 F Supp 103, affd (CA1) 258 F2d 522.

§ 101 Consenting to or Confessing Judgment.

Am Jur quoted in Renken v Sidebotham (Mo App) 227 SW2d 99.

Kelly v Walker, 208 Tenn 388, 346 SW2d 253.

p. 322, n. 16.

If the defendant assents to a decree by its solicitor, it is equivalent to a finding of fact that the solicitor was authorized to act as he did, and it binds the court on appeal so far as the question is one of fact. Phillips v. Acacia Mut. L. Ins. Co. 124 Fla 179, 168 So 34, citing RCL.

§ 102. Generally.

Forms: 1 Am Jur Legal Forms 1:1864–1:1866.

Am Jur cited in Scarth v Scarth, 211 Or 121, 315 P2d 141.

RCL cited in Damm v. Damm, 77 RI 24, 72 A2d 839.

§ 103. Collection or Satisfaction of Judgment.

Am Jur quoted in Glenwood Lumber & Coal Co. v. Hammers, 226 Iowa 788, 285 NW 277.

Am Jur cited in Wherry v. Rambo, 97 Cal App2d 569, 218 P2d 142.

Smith v Ward, 161 Kan 453, 169 P2d 93.

p. 323, n. 1. Garner v. Schilling Co. 128 Fla 353, 174 So 837, 111 ALR 682.

Shaffer v. McCrackin, 90 Iowa 578, 58 NW 910, 48 Am St Rep 465.

As to authority when employed by next friend or guardian ad litem of infant to conduct litigation for infant, see INFANTS.

p. 323, n. 3. Anno: 30 ALR2d 949.

§ 104. Sale, Transfer, or Assignment of Judgment or Its Proceeds.

Am Jur quoted in Re Booth (Prob Ct) 10 Ohio Ops 147, 25 Ohio L Abs 598 (n 6).

p. 323, n. 10. Mohler's Appeal, 5 Pa 418, 47 Am Dec 413 (authority to assign).

§ 105. Release of Judgment or Lien Thereof.

RCL cited in Doxsee Co. v. Persons Claiming Interest, 3 Cal2d 609, 45 P2d 192.

§ 106. Opening, Modifying, Vacating, or Reviewing Judgment.

Am Jur cited in Keane v. Allen, 69 Idaho 53, 202 P2d 411.

p. 324, n. 16.

A final divorce decree cannot be contested by the complainant's attorney of record after its entry because of complainant's failure properly to enter substitution of another attorney or pay in full the fees due the attorney of record. Annotation: 169 ALR 1014.

p. 324, n. 19. Anno: 171 ALR 258; 42 ALR 2d 1119–1122.

In several cases the view has been taken that, at least under the circumstances, the service of a motion to modify a divorce decree or other judgment as to child custody upon the attorney who represented the opposing party would be valid and effective. **Anno:** 42 ALR2d 1119.

Page 324. *Add following note* 20: In a number of cases the effectiveness of the service of a motion to modify a divorce decree or other judgment as to child custody upon the attorney who represented the opposing party has been denied.[20.5]

20.5 Anno: 42 ALR2d 1117–1119, 1122; 71 ALR2d 1402.

Adequate notice of a proceeding, instituted after expiration of the time for an appeal to modify a final decree awarding the custody of a minor child, has been held not given to the opposing parties by its service upon the attorney who represented them in the original proceeding, in the absence of anything appearing of record as to continuation of the attorney's authority. Moore v Lee (Fla) 72 So2d 280, 42 ALR2d 1112.

The fact that the husband's service of notice to modify the divorce decree as to child custody was made upon the wife's attorney during the same term of court as that in which the original

decree was entered has been held not sufficient to make such service upon the wife's attorney effective, particularly in view of the fact that such attorney asserted that he was no longer employed by the wife. **Anno:** 42 ALR2d 1122.

§ 107. Prosecuting Appeal or Writ of Error.

Am Jur cited in Zorn v. Lowery, 236 Ala 62, 181 So 249 (n 8).

RCL cited in Jones v Banner Creamery (Tex Civ App) 214 SW2d 487

p. 325, n. 8. Hawkeye-Security Ins. Co. v Indemnity Ins. Co. (CA10 Colo) 260 F2d 361, 69 ALR2d 684.

§ 116. Settlement or Compromise Out of Court.

Forms: 1 Am Jur Legal Forms 1:1867, 1:1868.

Am Jur cited in Sentco, Inc. v McCulloh (Fla) 84 So2d 498

State ex rel. McNabb v Allen Superior Ct. 225 Ind 402, 75 NE2d 788.

Purman's Estate, 358 Pa 187, 56 A2d 86, 175 ALR 1129; Wahl v. Strous, 344 Pa 402, 25 A2d 820.

p. 328, n. 13. Butler v. Young, 121 W Va 176, 2 SE2d 250, 121 ALR 1119.

As to effect of stipulation against compromise without attorney's consent in contingent fee contract, see infra, § 163 (Supp).

§ 118. Dismissal of Suit.

RCL cited in Re Grimes, 170 Or 204, 131 P2d 448

§ 119. Effect of Client's Fraud or Collusion.

Am Jur cited in State ex rel. McNabb v. Allen Superior Ct. 225 Ind 402, 75 NE2d 788.

Gravity Drainage Dist. v. Edwards, 207 La 1, 20 So2d 405.

§ 120. Generally.

Am Jur cited in Fowler v. American Federation of Tobacco Growers, Inc. 195 Va 770, 80 SE2d 554.

p. 331, n. 15.

It has been held that an attorney who voluntarily engages to render services for another without compensation is liable for the consequences of his improper management and may not allege lack of consideration as a defense. Glenn v. Haynes, 192 Va 574, 66 SE2d 509, 26 ALR2d 1334.

Page 331. *Add new paragraph following note* 17: The basis for holding an attorney liable for the loss of his client's money or property in his possession or entrusted to him, where the loss results from causes other than criminal conduct on the part of the attorney and where there is no question of commingling, is generally negligence on his part.[17.5]

In the one case in which a former client sought to recover damages allegedly suffered as a consequence of the attorney's subsequent representation of his adversary, the court, without considering the ethical questions involved, denied the relief sought.[17.52]

[17.5] Glenn v. Haynes, 195 Va 574, 66 SE2d 509, 26 ALR2d 1334.

Anno: 26 ALR2d 1340

[17.52] **Anno:** 52 ALR2d 1290.

§ 121. Liability on Contract.

Am Jur cited in Lucas v Hamm, 56 Cal 2d 583, 15 Cal Rptr 821, 364 P2d 685, cert den 368 US 987, 7 L ed 2d 525, 82 S Ct 603.

p. 331, n. 4. Anno: 116 ALR 1021.

p. 332, n. 5. Anno: 116 ALR 1021.

p. 332, n. 6. Anno: 116 ALR 1023.

p. 332, n. 7. Anno: 116 ALR 1025.

§ 122. Injury Resulting from Violation of Authority or Instructions.

Am Jur cited in Merriman v. Merriman, 290 Ill App 139, 8 NE2d 64.

p. 332, n. 10. Anno: 45 ALR2d 46 et seq.

p. 332, n. 15. Anno: 45 ALR2d 17.

p. 332, n. 16. Anno: 45 ALR2d 32.

§ 123. Fraud, Unfair Dealing, or Unlawful Exactions.

Forms: 2 Am Jur Pl & Pr Forms 2:1283, 2:1284

p. 333, n. 19. It has been held that all the elements of actionable fraud are set forth by a complaint against an attorney by his client, where it is alleged that the plaintiff was deprived of her equity in realty as a result of her reliance upon fraudulent misrepresentations made to her by the attorney pursuant to a conspiracy with other defendants, under which the plaintiff was persuaded to execute a quitclaim deed of her realty to the other defendants in return for promises to make payments on the mortgage debt, and under which the attorney and the other defendants planned to sell the property and share the profits. Lietz v Primock, 84 Ariz 273, 327 P2d 288, 67 ALR2d 1262.

§ 124. Negligence in Performance of Duties.

Forms: 2 Am Jur Pl & Pr Forms 2:1281 2:1295.

Am Jur cited in Kendall v. Rogers, 181 Md 606, 31 A2d 312.

Meagher v Kavli, 256 Minn 54, 97 NW2d 370.

Hodges v Carter, 239 NC 517, 80 SE2d 144.

p. 333, n. 5. Anno: 45 ALR2d 11 et seq.

p. 334, n. 7. Anno: 45 ALR2d 17.

p. 334, n. 8. Anno: 45 ALR2d 18.

p. 334, n. 10. Anno: 45 ALR2d 15.

§ 125. — What Amounts to Negligence.

Am Jur quoted in Sjobeck v. Leach, 213 Minn 360, 6 NW2d 819.

Am Jur cited in Meagher v Kavli, 256 Minn 54, 97 NW2d 370.

Glenn v Haynes, 192 Va 574, 66 SE2d 509, 26 ALR2d 1340.

p. 334, n. 18. Anno: 45 ALR2d 14.

p. 334, n. 19. Anno: 45 ALR2d 11 et seq.

p. 334, n. 20. Pete v Henderson, 124 Cal App2d 487, 269 P2d 78, 45 ALR2d 58.

Anno: 45 ALR2d 63.

p. 335, n. 1. Glenn v. Haynes, 192 Va 574 66 SE2d 509, 26 ALR2d 1334.

p. 335, n. 5. Glenn v. Haynes, 192 Va 574, 66 SE2d 509, 26 ALR2d 1334.

§ 126. — Errors of Judgment and Mistakes of Law.

Am Jur cited in Lucas v Hamm, 56 Cal 2d 583, 15 Cal Rptr 821, 364 P2d 685, cert den 368 US 987, 7 L ed 2d 525, 82 S Ct 603.

Meagher v Kavli, 256 Minn 54, 97 NW2d 370.

Hodges v Carter, 239 NC 517, 80 SE2d 144.

p. 335, n. 6. Hodges v Carter, 239 NC 517, 80 SE2d 144, 45 ALR2d 1.

Anno: 45 ALR2d 16.

p. 335, n. 7. Hodges v Carter, 239 NC 517, 80 SE2d 144, 45 ALR2d 1.

Anno: 45 ALR2d 15–17.

p. 335, n. 8. Sullivan v. Stout, 120 NJL 304, 199 A 1, 118 ALR 211

p. 336, n. 10. Anno: 45 ALR2d 15.

§ 127. — Ignorance of the Law.

Am Jur cited in Meagher v Kavli, 256 Minn 54, 97 NW2d 370.

§ 128. Negligence in Preparing and Conducting Litigation.

Forms: 2 Am Jur Pl & Pr Forms 2:1271-2:1273, 2:1275–2:1278.

Am Jur cited in Meagher v Kavli, 256 Minn 54, 97 NW2d 370.

p. 336, n. 15. Hodges v Carter, 239 NC 517, 80 SE2d 144, 45 ALR2d 1.

Anno: 45 ALR2d 5.

p. 336, n. 16. Noziska v Aten, 35 SD 451, 152 NW 694, Ann Cas 1916C 589 (defective service of process).

Anno: 45 ALR2d 30–52.

In several cases an attorney has been held guilty of actionable negligence where the client suffered the loss of an action or other damages because of the lawyer's negligent misnomer of plaintiff or defendant. **Anno:** 45 ALR2d 35.

p. 336, n. 18. Anno: 45 ALR2d 11 et seq.

p. 336, n. 19. Anno: 45 ALR2d 11 et seq.

p. 336, n. 1. Hodges v Carter, 239 NC 517 80 SE2d 144, 45 ALR2d 1.

Anno: 45 ALR2d 16.

Page 336. *Add at end of section:* The general principles as to duty and proof have been applied in a wide variety of circumstances involving numerous alleged acts of misconduct taking place at every stage of the proceeding from initiation of the action to the failure to properly enter judgment or to appeal after adverse judgment, in most of which the attempt to hold the attorney liable has been unsuccessful, either because of negligence or because of the inability of the failure of proof on the basic issue to demonstrate that the damages alleged were occasioned by the attorney's fault rather than by the weaknesses of the client's case in the original proceedings.[1.5]

Claims that an attorney was liable for damages because of his allegedly negligent withdrawal from a case he had been engaged to prosecute or defend have been rejected in a number of cases, the courts concluding either that there was no showing of negligence under the circumstances or that the damages complained of had not been shown to have been approximately caused by the attorney's act.[1.51] Occasional unsuccessful attempts have been made to recover from an attorney on the theory that he had negligently advised his client as to the acceptance or rejection of an offer of compromise.[1.52]

Negligence of an attorney in failing to take proper steps to protect his client's right of appeal or review has been held actionable where, as a result, the right of appeal was lost,[1.53] or where it appeared that such an appeal would have resulted favorably to the client.[1.54] An attorney may also be held liable where he wrongfully takes an appeal under circumstances in the light of which he should have realized it would be fruitless.[1.55] It has frequently been held that charges of negligence in failing to obtain appellate review or a new trial after an unfavorable judgment or verdict below would not support a verdict against the attorney in the absence of a showing that if the appeal or new trial had been obtained a judgment more favorable to the plaintiff would have resulted.[1.56]

1.5 Anno: 45 ALR2d 11, 22–58.

An attorney has been held not liable for a loss sustained by his client by the dismissal of his action against foreign insurance companies for want of proper service of process, where the attorney followed a method theretofore prevailing in the state without challenge for two decades or more. Hodges v Carter, 239 NC 517, 80 SE2d 144, 45 ALR2d 1.

1.51 Anno: 45 ALR2d 45, 46.

1.52 Anno: 45 ALR2d 48.

1.53 Pete v Henderson, 124 Cal App2d 487, 269 P2d 78, 45 ALR2d 58.

Anno: 45 ALR2d 52.

1.54 Anno: 45 ALR2d 52.

1.55 Anno: 45 ALR2d 53.

1.56 Pete v Henderson, 124 Cal App2d 487, 269 P2d 78, 45 ALR2d 58.

Anno: 45 ALR2d 55–58.

§ 129. Negligence in Enforcing Judgment.

Forms: 2 Am Jur Pl & Pr Forms 2:1285.

Am Jur cited in Lundberg v Backman, 11 Utah 2d 330, 358 P2d 987.

p. 337, n. 3. Anno: 45 ALR2d 49.

p. 337, n. 6. Anno: 45 ALR2d 53, 54.

§ 130. Negligence in Collection of Claims.

Forms: 2 Am Jur Pl & Pr Forms 2:1271–2:1274, 2:1296.

Am Jur cited in Beach v. Goepfert (CCA8th) 147 F2d 480; El Paso v. West (CCA5th) 102 F2d 927, rehearing denied in (CCA5th) 104 F2d 96 and writ of certiorari denied in 308 US 557, 84 L ed 492, 60 S Ct 111.

p. 337, n. 9. Anno: 45 ALR2d 22–30.

p. 337, n. 10. Anno: 45 ALR2d 23 et seq.

p. 337, n. 11. Anno: 45 ALR2d 23.

p. 338, n. 12. Anno: 45 ALR2d 24, 25.

§ 131. Failure to Remit; Loss or Conversion of Money Collected.

Forms: 2 Am Jur Pl & Pr Forms 2:1282.

Am Jur quoted in Glenn v. Haynes, 192 Va 574, 66 SE2d 509, 26 ALR2d 1340.

RCL cited in State ex rel. Nebraska State Bar Asso v. Niklaus, 149 Neb 859, 33 NW2d 145.

p. 338, n. 15. Anno: 26 ALR2d 1342.

p. 338, n. 16. Glenn v. Haynes, 192 Va 574 66 SE2d 509, 26 ALR2d 1334.

Anno: 26 ALR2d 1342.

p. 338, n. 17. Glenn v. Haynes, 192 Va 574 66 SE2d 509, 26 ALR2d 1334.

Anno: 26 ALR2d 1345.

p. 338, n 19. Anno: 26 ALR2d 1343–1345.

Page 338. *Add new paragraph at end of section:* Some jurisdictions, expressly or by implication, support the view that an attorney may set off his claim for unrelated services against his client's claim for money collected, either under the theory of attorney's lien or under the rule with respect to offset of debts generally.[19.5] But some courts, while recognizing the right of an attorney to set off his claim for services resulting in the collection of money for a client against the client's claim for the fund,[19.51] have denied the attorney's right to set off his claim for unrelated services against the client's claim for the money collected.[19.52]

19.5 White v. Ward, 157 Ala 345, 47 So 166, 18 LRA NS 568.

Anno: 173 ALR 429.

19.51 Anno: 173 ALR 434.

19.52 Noel Estate v. Dickson & Denny, 212 La 313, 31 So2d 810, 173 ALR 423.

Anno: 173 ALR 434.

Attorneys may not, in a client's action against them to recover the proceeds of a judgment recovered by the attorneys for the client, assert a reconventional demand based on claims for fees for various unrelated services rendered and suits filed during a period of years, under a code provision requiring that the demand in reconvention, though different from the main action, be necessarily connected with and incidental to the same. Noel Estate v. Dickson & Denny, 212 La 313, 31 So2d 810, 173 ALR 423.

Attorneys may not, in a client's action against them to recover the proceeds of a judgment recovered by the attorneys for the client, maintain a plea of setoff and compensation based upon unliquidated claims for fees for various services rendered and suits filed during a period of years, under a code provision that in order for compensation to take place between two debts, they must be equally liquidated. Noel Estate v. Dickson & Denny, 212 La 313, 31 So2d 810, 173 ALR 423.

§ 132. Negligence or Mistake in Investigating, Abstracting, or Conveying Title.

Forms: 2 Am Jur Pl & Pr Forms 2:1279, 2:1280, 2:1297.

Am Jur cited in Gagne v Bertran, 43 Cal 2d 481, 275 P2d 15 (dissent op).

Page 338. *Add, following the word* "matter" *in the second line of the section:*[19.1]

19.1 Sullivan v. Stout, 120 NJL 304, 199 A 1, 118 ALR 211.

Page 338. *Add, following note* 1: An attorney employed to make title search does not, by accepting the employment, assume to warrant the title or the correctness of his work.[1.1]

1.1 Sullivan v. Stout, 120 NJL 304, 199 A 1, 118 ALR 211.

A certificate by an attorney employed to make a title search that he has examined the title and that the title to the property in question is vested in fee simple in person's name does not amount to an express warranty of title, but is merely evidence of the act done by the attorney in purported satisfaction of the obligation assumed by him in accepting such employment. Sullivan v Stout, 120 NJL 304, 199 A 1, 118 ALR 211.

§ 133. Drafting, Preserving, and Recording Legal Documents.

Forms: 2 Am Jur Pl & Pr Forms 2:1298.

p. 339, n. 5. Anno: 65 ALR2d 1368 (drawing invalid will, liability when employed by potential beneficiary).

p. 339. n. 7. Anno: 26 ALR2d 1342.

§ 134. Liability for Acts of Partner, Assistant, Clerk, or Agent.

Forms: 2 Am Jur Pl & Pr Forms 2:1300.

p. 339, n. 11. Anno: 26 ALR2d 1343.

p. 339, n. 14. Rouse v. Pollard, 130 NJ Eq 204, 21 A2d 801, 136 ALR 1105.

A client who goes to a law firm, states a specific legal service as the reason for her visit, and is introduced to a member of the firm for the performance of that service, has no justification therein for relying upon the responsibility of the partnership for any disconnected service which may be assumed by that member outside one that is characteristically within the practice of law. Rouse v. Pollard, 130 NJ Eq 204, 21 A(2d) 801, 136 ALR 1105.

Page 339. *Add, following note* 14: And, as a general proposition, it would seem that the acceptance or receipt of money for investment generally, or for investment in the future in undesignated securities, is not within the ordinary scope of the business of a law firm, so as to charge a law firm with liability for the misconduct of a partner growing out of the receipt or acceptance of money from a client for such purpose, in the absence of knowledge of or consent to and ratification of such a transaction.[14.5]

[14.5] **Anno:** 136 ALR 1110.

See Rouse v. Pollard, 130 NJ Eq 204, 21 A(2d) 801, 136 ALR 1105.

In England it appears that the practice was, and perhaps to some extent still is, prevalent to receive money from clients for the purpose of supplying other clients with loans, the solicitor apparently deriving his fee from the transaction by searching the title and drawing up the necessary documents of conveyance and security. Under the English decisions, and apparently as an outgrowth of this practice, it has been held or stated that the receipt of money for investment in a specific or particular security is within the scope of the ordinary business of an attorney, and that law firm (or the individual partners thereof) is liable for the conduct of a member or partner thereof in connection with receiving money from a client for the purpose of investing it in a specific security, notwithstanding that the other members or partners may have no knowledge of the transaction. **Anno:** 136 ALR 1112. See Blair v. Bromley, 5 Hare 542, 67 Eng Reprint 1026, 19 Eng Rul Cas 450.

Members of a law firm are not estopped to deny authority of another member to invest funds for a client so as to render them liable for misappropriation of funds which a client intrusted to him for that purpose, because, without knowledge on their part of any misconduct by him, he paid out of the client's funds a relatively small sum in payment of a charge for legal services rendered by the firm to her, the propriety and amount of which are not questioned. Rouse v. Pollard, 130 NJ Eq 204, 21 A2d 801, 136 ALR 1105

p. 340, n. 17. Anno: 26 ALR2d 1343.

§ 135. Form of Remedy.

Am Jur cited in Armour & Co. v Lambdin, 154 Fla 86, 16 So2d 805.

p. 340, n. 1. Anno: 45 ALR2d 15.

p. 340, n. 2.

A suit may be maintained by a client against his attorneys to recover a specific sum as the proceeds of a judgment recovered by the attorneys for the client, without suing for a general accounting relative to the attorneys' entire services, including not only those rendered in the suit producing the funds in question but also those in unrelated matters. Noel Estate v. Dickson & Denny, 212 La 313, 31 So2d 810, 173 ALR 423.

§ 137. Applicability of Statute of Limitations.

Am Jur cited in Beach v. Goepfert (CCA 8th) 147 F2d 480; El Paso v. West (CCA 5th) 102 F(2d) 927, rehearing denied in (CCA 5th) 104 F2d 96, and writ of certiorari denied in 308 US 557, 84 L ed 492, 60 S Ct 111.

p. 341, n. 9. Huffman's Estate, 349 Pa 59, 36 A(2d) 640, 151 ALR 1384.

Anno: 151 ALR 1388.

Leading text writers also lay down this rule. **Anno:** 151 ALR 1389.

p. 341, n. 10. Huffman's Estate, 349 Pa 59, 36 A(2d) 640, 151 ALR 1384.

Anno: 151 ALR 1388.

Where there are additional facts which change the relationship between an attorney and the client for whom he has received or collected money to an express and continuing trust, the attorney will not be allowed to avail himself of the statute of limitations against an action by the client for the money collected or received. **Anno:** 151 ALR 1392.

In at least one case the court seems to have indicated that the attorney's position as an officer of the court prohibited him under proper circumstances of availing himself of the statute of limitations as a defense in an action brought against him by his client for his failure to pay over money collected for such client. **Anno:** 151 ALR 1393.

It may be noted that cases which hold that the statute of limitations does not begin to run against an action against an attorney for money collected or received for a client until the client has made a demand for the remittance thereof (see 34 Am Jur 148, Limitation of Actions, § 185) seems to predicate the requirement of a demand for remittance upon the necessity of ending a trust relationship existing prior to such demand between the attorney and the client. **Anno:** 151 ALR 1394

p. 341, n. 11.

See 34 Am Jur 148, Limitation of Actions, § 185.

Page 341. *Add at end of section:* Some conflict of opinion exists among the courts as to which of several statutes of limitation applies to an action against an attorney for negligence in the performance of professional services.[11.5] In a number of cases the courts, while going on the theory that an action against an attorney for negligence in the performance of his professional duty was an action upon a contract, have held that the statute of limitations governing such actions was that limiting the time for bringing an action for malpractice.[11.51] In other cases, the statute of limitations dealing with actions for malpractice has been held inapplicable in actions against attorneys for negligence.[11.52]

In a number of cases, the courts, without going into any discussion of the theory of the plaintiff's action, have held that an action against an attorney for his negligence in the performance of professional services is based on breach of contract and is accordingly governed by the statute of limitations applicable to contract actions.[11.53] The statute of limitations governing an action upon a contract, obligation or liability not founded upon an instrument of writing has been held to apply to an action against an attorney for negligence in the performance of professional services.[11.54] And in at least one jurisdiction it has been said that the determinative question was rather whether the plaintiff in his declaration stated a cause of action for injuries to the person, and that if so, then the statute of limitations applicable to such actions, and not the statute applicable to contract actions, would govern.[11.55]

11.5 **Anno:** 49 ALR2d 1216–1223.
11.51 **Anno:** 49 ALR2d 1218.
11.52 **Anno:** 49 ALR2d 1219.
11.53 Cornell v Edsen, 78 Wash 662, 139 P 602, 51 LRA NS 279.
Anno: 49 ALR2d 1219–1221.
11.54 **Anno:** 49 ALR2d 1221–1223.
11.55 Bland v Smith, 197 Tenn 683, 277 SW2d 377, 49 ALR2d 1212.
Anno: 49 ALR2d 1217.

The one-year statute of limitations applicable to actions for personal injuries, rather than the six-year statute of limitations applicable to actions on contracts, has been held to apply to an action by a client against his attorney, where it appears from the declaration that the action is based on an injury to the person for which damages are sought. Bland v Smith, 197 Tenn 683, 277 SW2d 377, 49 ALR2d 1212.

§ 138. Pleading.

Forms: 2 Am Jur Pl & Pr Forms 2:1271–2:1273, 2:1275, 2:1277, 2:1279–2:1285.

p. 341, n. 12. Lietz v Primock, 84 Ariz 273, 327 P2d 288, 67 ALR2d 1262.

p. 341, n. 14. Anno: 45 ALR2d 14, 15.

§ 139. Burden of Proof.

Am Jur cited in Dreka v. Whitehair, 150 Fla 517, 8 So2d 23.

p. 342, n. 19. Anno: 45 ALR2d 14.

It has been held that a prima facie case for the recovery by a client of jewelry entrusted to her attorney, sufficient for submission to the jury, is established by proof showing delivery to the attorney, the client's title and right to immediate possession, and a failure to return the jewelry upon demand, and that the burden shifted to the attorney to show that the failure of delivery was not due to the absence of reasonable care for its protection and safe delivery, under the circumstances of the attorney's engagement. Glenn v. Haynes, 192 Va 574, 66 SE2d 509, 26 ALR2d 1334.

p. 342, n. 1. Anno: 45 ALR2d 14.
p. 342, n. 2. Anno: 45 ALR2d 21, 26, 29.
p. 342, n. 3. Anno: 45 ALR2d 19–21.
p. 342, n. 4. Anno: 45 ALR2d 22.

§ 141. Trial; Questions of Law and Fact.

p. 343, n. 14.

The degree of care required to be exercised by an attorney to protect a client's property in the attorney's possession from loss is for determination by the court, but the care exercised is a question of fact for determination by the jury under proper instructions from the court. Glenn v. Haynes, 192 Va 574, 66 SE2d 509, 26 ALR2d 1334.

p. 343, n. 16. It has been held that in an action against an attorney by his former client for negligence in failing to file timely notice of an appeal, so that the latter is compelled to pay a judgment against him, the question whether such judgment is erroneous and would have been reversed on the appeal is in issue and should be determined by the trial court in the new action. Pete v Henderson, 124 Cal App2d 487, 269 P2d 78, 45 ALR2d 58.

§ 142. Measure and Mitigation of Damages.

Forms: 2 Am Jur Pl & Pr Forms 2:1271–2:1273, 2:1275, 2:1277, 2:1279, 2:1280, 2:1282.

p. 343, n. 18. Anno: 45 ALR2d 63 et seq.

Damages recoverable upon proof of the required facts in an action against an attorney by his former client for negligence in failing to file timely notice of an appeal from an erroneous judgment, have been held to include so much of the amount the client was compelled to pay thereon as he would not have been required to pay on determination of the appeal. Pete v Henderson, 124 Cal App2d 487, 269 P2d 78, 45 ALR2d 58.

It has been held that where the attorney is engaged to defend an action, which is lost because of his negligence, the amount of the judgment suffered by the client is a proper element of recovery. **Anno:** 45 ALR2d 67.

p. 344, n. 19. Anno: 45 ALR2d 69.

Page 344. *Add following note* 3: Interest on the amount of the claim lost due to the attorney's negligence has been held recoverable.[3.5] Expenses or costs incurred by the client as a result of the negligence of an attorney entrusted with litigation have occasionally been held to constitute a proper element of recovery in a malpractice action.[3.51] Fees or expenses paid to the attorney or otherwise expended by the client as a result of the attorney's negligence have been held a proper element of damages.[3.52]

3.5 **Anno:** 45 ALR2d 70.
3.51 **Anno:** 45 ALR2d 68.
3.52 Pete v Henderson, 124 Cal App2d 487, 269 P2d 78, 45 ALR2d 58.
Anno: 45 ALR2d 69.

§ 143. Generally.

Forms: 2 Am Jur Pl & Pr Forms 2:1286–2:1289.

Am Jur cited in Re Ferrell (Mun Ct App Dist Col) 172 A2d 555.

Re Butler, 137 Ohio St 115, 28 NE2d 196.

p. 344, n. 10.

The concern of the court in a summary proceeding against an attorney by or in the interest of the client is not the legal right of the affiant as affected by the attorney's acts, but the alleged misconduct of the attorney himself, who is the court's own officer. Re Long, 287 NY 449, 40 NE(2d) 247, 141 ALR 651.

p. 344, n. 11.

A client has no absolute right to invoke a summary remedy against an attorney to require him to turn over money or papers in his possession belonging to the client: the remedy is always subject to the discretion of the court, and it is for the court to say when and under what circumstances it will entertain the proceedings. Re Long, 287 NY 449, 40 NE(2d) 247, 141 ALR 651.

That money was paid to attorneys by an incompetent prior to the adjudication of incompetency does not deprive the court of power in summary proceedings to require the return of the money to his committee. Re Long, 287 NY 449, 40 NE(2d) 247, 141 ALR 651.

§ 144. As Affected by Right to Jury Trial.

Forms: 2 Am Jur Pl & Pr Forms 2:1286–2:1289.

Am Jur cited in People's Sav. Bank v. Chesley, 138 Me 353, 26 A(2d) 632

Weatherly v Longoria (Tex Civ App) 292 SW 2d 139, error ref n r e.

§ 145. Necessity of Relation of Attorney and Client.

Forms: 2 Am Jur Pl & Pr Forms 2:1286–2:1289.

Am Jur cited in Brown v Superior Court, 78 Ariz 120, 276 P2d 540

p. 346, n. 5. Anno: 65 ALR2d 1371 (drawing invalid will, liability to beneficiary).

§ 146. Procedure.

Forms: 2 Am Jur Pl & Pr Forms 2:1286–2:1289.

Am Jur cited in Re Butler, 137 Ohio St 115, 28 NE(2d) 196.

p. 346, n. 10. Anno: 141 ALR 655.

See Re Long, 287 NY 449, 40 NE(2d) 247, 141 ALR 651.

Page 346. *Add, following note* 10: And he is also entitled to introduce evidence.[10.5]

10.5 **Anno:** 141 ALR 655.

See Re Long, 287 NY 449, 40 NE(2d) 247, 141 ALR 651 (a summary proceeding to compel attorneys forthwith to return to the committee for their incompetent client a sum of money, which the incompetent had paid them for services rendered in the incompetency proceeding and in accordance with a written memorandum signed by him after the papers in the incompetency proceeding had been filed, in which it was held that the attorneys should have been given opportunity to call witnesses and to confront and cross-examine the witnesses from whom came the evidence upon which the charge of professional misconduct was based. The court stated that it did not mean to prescribe exact rules of procedure to be followed in a summary proceeding of this character, but pointed out that the attorneys were entitled at least to an opportunity to be heard—to test the basis of the charge against them by cross-examination of witnesses and to offer evidence which might affect the conclusion by the court upon the facts of record). Heffren v Jayne, 39 Ind 463, 13 Am Rep 281 (in which the court said "In this quasi prosecution, the defendant should be permitted to show the circumstances under which the money was withheld, in mitigation, if not in justification, of their conduct"); White v. Ward, 157 Ala 345, 356, 47 So 166, 18 LRA(NS) 568 (overruling Macdonald v. State, 143 Ala 101, 39 So 257) (in which it was held that an attorney, proceeded against summarily under a statute, for failure to pay over money collected for his client, was not deprived of the right to defend on the merits in case he failed to pay the money into court, by a provision of the statute that he might avoid interest and penalty by payment of the money into court to await judgment).

p. 347, n. 14. Re Long, 287 NY 449, 40 NE(2d) 247, 141 ALR 651.

§ 147. Generally.

Am Jur quoted in Wall v Johnson (Fla) 80 So2d 362.

Am Jur cited in Hoppe v. Klapperich, 224 Minn 224, 28 NW2d 780, 173 ALR 819.

Waggoner v Glacier Colony of Hutterites, 131 Mont 525, 312 P2d 117.

p. 348, n. 3. See Biakanja v Irving, 49 Cal 2d 647, 320 P2d 16, 65 ALR2d 1358 (in which the court refused to apply the privity rule to permit a notary public who had negligently failed to supervise the execution of a will drawn by him to escape liability to a person named as a beneficiary in the ineffective instrument, and, so far as in conflict with its present decision disapproved of that in Buckley v Gray, 110 Cal 339, 42 P 900, 31 LRA 862, 52 Am St Rep 88).

Anno: 65 ALR2d 1364, 1370 (drawing invalid will).

Page 348. *Add, following note* **6:** The general rule is that even though the attorney retains as payment for his services, or for some other debt owing by his client, under an agreement with the latter, part or all of the proceeds of a judgment recovered by the client which is subsequently reversed, he is not obliged to make restitution to the judgment debtor provided he acted in good faith in prosecuting the action in which the judgment was recovered. But if the judgment was void, or if the attorney knew it was obtained by fraud or he otherwise did not act in good faith in retaining the money, he is liable to make restitution.[6.5]

[6.5] **Anno:** 87 ALR 175–178.

See Am Law Inst Restatement of Restitution, § 74 (comment h).

p. 348, n. 7.

An attorney forfeits the immunity which he enjoys as a quasi-judicial officer as to acts done in the performance of his duties to his client when he knowingly becomes an instrumentality for the perpetration of a fraud or for the malicious prosecution and imprisonment of a party against whom he knows his client has no just claim or cause of arrest. Hoppe v. Klapperich, 224 Minn 224, 28 NW2d 780, 173 ALR 819.

§ 149. On Contracts Made in Interest of Client.

Am Jur cited in Moran v Loefler-Greene Supply Co. (Okla) 316 P2d 132.

p. 349, n. 17. McCloskey v Bril, 286 App Div 143, 142 NYS2d 5, affd per curiam 1 NY2d 755, 152 NYS2d 301, 135 NE2d 53.

§ 153. Generally.

Practice Aids: Attorneys' Fees, **Am Jur Proof of Facts** pp 233 et seq.

Forms: 1 Am Jur Legal Forms 1:1869-1:1873; 2 Am Jur Pl & Pr Forms 2:1227, 2:1232, 2:1238–2:1240, 2:1255.

Am Jur cited in Desny v Wilder, 46 Cal2d 715, 299 P2d 257; Re Reade, 31 Cal2d 669, 191 P2d 745.

Hightower v Trinity Church of Covington (Ky) 313 SW2d 858.

RCL cited in Wilson v. Goldman (Mo App) 104 SW(2d) 681

p. 352, n. 12. Anno: 78 ALR2d 339, 365.

§ 154. Necessity of Employment or Retainer.

Practice Aids: Attorneys' Fees, **Am Jur Proof of Facts** pp 233 et seq.

Am Jur cited in Bogorad v Schwarz (CA4th Md) 208 F2d 704; Berry v. Root (CCA5th) 148 F2d 945, writ of certiorari denied in 326 US 755, 90 L ed 453, 66 S Ct 91.

Geier v Laughlin (Mun Ct App Dist Col) 129 A 2d 401.

Hightower v Trinity Church of Covington (Ky) 313 SW2d 858.

Re Interstate Trust & Banking Co. 235 La 825, 106 So 2d 276.

R. C. L. quoted in Becht v. Miller, 279 Mich. 629, 273 NW 294

p. 352, n. 16. Anno: 78 ALR2d 324–388.

p. 352, n. 17. Anno: 78 ALR2d 361–375.

Page 352. *Add, following note* **17:** An attorney employed to prosecute a claim on a contingent basis may not retain out of the amount recovered the expense incurred in employing another attorney to assist him on appeal, although such employment was authorized by the client, where he failed to explain that the terms of his retainer bound him to do all the work required.[17.1] Nor may the client employ another attorney to assist in the litigation and deduct his compensation from the percentage due the original attorney under a contingent fee contract.[17.2]

[17.1] **Manzo v. Dullea (C. C. A. 2d) 96 F. (2d) 135, 116 A.L.R. 1241.**

[17.2] **Annotation: 116 A.L.R. 1248.**

p. 352, n. 18. Burnett v Graves (CA5 Tex) 230 F2d 49, 56 ALR2d 1, cert den 351 US 984, 100 L ed 1498, 76 S Ct 1051 (applying Texas law).

Caughlan v International Longshoremen's & Warehousemen's Union, 52 Wash 2d 656, 328 P2d 707, 78 ALR2d 313.

For a collection and detailed discussion of cases considering what constitutes acceptance or ratification of, or acquiescence in, services rendered by an attorney so as to raise an implied promise to pay the reasonable value thereof, see the annotation in 78 ALR2d 318.

p. 352, n. 19. Anno: 78 ALR2d 331, 332.

p. 352, n. 20. Anno: 78 ALR2d 333.

p. 352, n. 1. Anno: 78 ALR2d 334.

§ 155. —Liability of Third Person Benefited by Attorney's Services to Another.

Am Jur quoted in United Services Auto. Asso. v Hills, 172 Neb 128, 109 NW2d 174.

Draper v Draper, 24 Tenn App 548, 147 SW 2d 759.

Am Jur cited in Berry v. Root (CCA 5th) 148 F2d 945, writ of certiorari denied in 326 US 755, 90 L ed 453, 66 S Ct 91.

Re Reade, 31 Cal2d 669, 191 P2d 745.

Gibson v. Gibson, 122 Ind App 559, 106 NE2d 102

Re Interstate Trust & Banking Co. 235 La 825, 106 So 2d 276.

McKevitt v. Golden Age Breweries, 14 Wash 2d 50, 126 P2d 1077.

RCL quoted in Christian Women's Benev. Asso. v. Atlanta Trust Co. 181 Ga. 576, 183 S. E. 551.

RCL cited in Eckford v. Atlanta. 173 Ga 650. 160 SE 773 (note 12)

p. 353, n. 2. Anno: 78 ALR2d 328.

p. 353, n. 3. Anno: 78 ALR2d 376.

p. 353, n. 4. Anno: 78 ALR2d 375–388.

p. 353, n. 5. Anno: 78 ALR2d 379.

§ 156. Right of Unlicensed Attorney to Fees.

Am Jur cited in Hardy v. San Fernando Valley Chamber of Commerce. 99 Cal App2d 572, 222 P2d 314.

Taft v Amsel, 23 Conn Supp 225, 180 A2d 756.

p. 353, n. 10. Anno: 118 ALR 652.

p. 353, n. 11. Anno: 118 ALR 653.

p. 354, n. 13.

The fact that an attorney, who had practiced for many years in other states, failed to obtain a license to practice in Idaho, where he handled a probate matter. has been held not to preclude his recovery for services rendered in that matter, since by comity attorneys from other states are usually accorded the special privilege of handling an isolated matter without being licensed. **Anno:** 118 ALR 654.

Page 354. *Add, following note* 14: There is authority to the effect that an attorney failing to pay a required annual registration fee or license tax is entitled to collect for legal services rendered.[14.1]

[14.1] **Anno:** 118 ALR 653.

§ 157. Attorneys Appointed to Defend Indigents or Prosecute Disbarment Proceedings.

p. 354, n. 17. Ruckenbrod v. Mullins. 102 Utah 548. 133 P(2d) 325, 144 ALR 839.

Anno: 130 ALR 1440: 144 ALR 847

p. 354, n. 18. Ruckenbrod v. Mullins. 102 Utah 548. 133 P(2d) 325. 144 ALR 839.

Anno: 130 ALR 1444: 144 ALR 847.

But the fact that attorneys are properly required by the state to be licensed does not, of itself, justify the state in requiring them to render services gratuitously to indigent defendants. Ruckenbrod v. Mullins. 102 Utah 548. 133 P(2d) 325. 144 ALR 839

Page 354. *Add, following* "process of law" *in the eleventh line in the section:*[18.5]

[18.5] Ruckenbrod v. Mullins. 102 Utah 548. P(2d) 325, 144 ALR 839.

Anno: 130 ALR 1442; 144 ALR 848.

Page 354. *Add, following note* 19: And even though a statute makes it the duty of the court to assign counsel to an accused who is without means of employing one, it has been held that in order to render a county responsible. the legislature must make some provision specially providing for the payment of compensation to assigned counsel.[19.5]

[19.5] **Anno:** 130 ALR 1442.

p. 354, n. 20. Anno: 130 ALR 1445; 144 ALR 848.

p. 354, n. 21. Anno: 130 ALR 1445.

To require an attorney to defend a criminal prosecution for a pauper defendant without receiving any compensation for his services is in conflict with a constitutional provision that "no man's particular services shall be demanded without just compensation." Knox County Council v. State, 217 Ind 493. 29 NE(2d) 405. 130 ALR 1427.

p. 354, n. 22. Anno: 130 ALR 1445.

Page 354. *Add, following note* 22: In one of these jurisdictions it has been held that a statute having the effect of forbidding any allowance or recovery against a county for attorneys' fees for defending a pauper in a criminal case, unless there is an existing appropriation by the county council at the time, is unconstitutional as depriving the courts of their inherent power to see that the constitutional right of an accused to be represented by counsel is given effect, but that the inherent power of a court in a criminal prosecution against a pauper to see that the constitutional right of the defendant to be represented by counsel is given effect, is not unconstitutionally impeded by a legislative enactment requiring that, on a change of venue, the compensation of counsel appointed by the court shall be settled and allowed by the judge of the court from which the change of venue is granted.[22.5]

Many of the states at the present time have statutes which provide for the compensation of attorneys assigned to defend indigent persons accused of crime. Some of these statutes appear to extend the right to public compensation to all crimes, others to all felonies, but in one state at least, the right is limited to those appointed to defend persons accused of an offense punishable by death.[22.6]

[22.5] Knox County Council v. State, 217 Ind 493, 29 NE(2d) 405, 130 ALR 1427.

Anno: 130 ALR 1448.

[22.6] **Anno:** 130 ALR 1450 et seq (which sets out in detail cases arising under various statutes): 144 ALR 848.

Reimbursement of assigned attorneys for personal and incidental expenses, in addition to compensation for services, have been provided by statute. See annotation in 130 ALR 1461

p. 355, n. 1. Anno: 144 ALR 848; 55 ALR2d 1085 et seq.

The general rule (established in Griffin v Illinois, 351 US 12, 100 L ed 891, 76 S Ct 585, 55 ALR2d 1055. reh den 351 US 958, 100 L ed 1480, 76 S Ct 844) that an indigent convicted of crime is, as a matter of federal constitutional law, entitled to state aid in obtaining appellate review of trial errors where review of such errors is available to persons able to pay the attendant expenses, does not reach the question whether such an indigent is entitled to be furnished with counsel to prosecute his appeal. A clear solution to this question must await further development of the Griffin rule. **Anno:** 55 ALR2d 1085.

p. 355, n. 2. Anno: 55 ALR2d 1085.

§ 158. Right to Retaining Fee.

Forms: 1 Am Jur Legal Forms 1:1874–1:1881.

§ 159. Generally.

Am Jur quoted in Reid v Johnson (Fla App) 106 So 2d 624.

Re Irwin, 162 Or 221, 91 P2d 518.

Am Jur cited in Spilker v. Hankin, 88 App DC 206, 188 F2d 35.

Potter v. Daily, 220 Ind 43, 40 NE(2d) 339.

Higgins v Beaty, 242 NC 479, 88 SE2d 80.

Ofstad v. Beck, 65 SD 387, 274 NW 498 (notes 16–18).

Stiers v. Hall, 170 Va 569, 197 SE 450 (notes 16–18).

RCL cited in Wilson v. Goldman (Mo App) 104 SW(2d) 681.

p. 356, n. 16. Higgins v Beaty, 242 NC 479, 88 SE2d 80, 54 ALR2d 600.

p. 356, n. 17. Higgins v Beaty, 242 NC 479, 88 SE2d 80, 54 ALR2d 600.

p. 356, n. 3. Gair v Peck, 6 NY2d 97, 188 NYS 2d 491, 160 NE2d 43, 77 ALR2d 390, motion gr 6 NY2d 983, 191 NYS2d 951, 161 NE2d 736, app dismd and cert den 361 US 374, L ed 2d 380, 80 S Ct 401.

p. 356, n. 4. Anno: 43 ALR2d 684.

It has been held that since an attorney possesses superior knowledge of the work which a retainer is likely to involve, it is only fair to expect him to designate clearly the services covered by the retainer when he accepts employment, and if he later claims compensation for work which he contends was not included in the retainer, ambiguities and doubts concerning the agreement should be resolved against him. **Anno:** 43 ALR2d 684.

§ 160. Contracts Made during Existence of Relation of Attorney and Client.

Forms: 1 Am Jur Legal Forms 1:1882–1:1886; 2 Am Jur Pl & Pr Forms 2:1226.

Am Jur quoted in Stiers v. Hall, 170 Va 569, 197 SE 450 (notes 9–15)

Am Jur cited in Spilker v Hankin, 88 App DC 206, 188 F2d 35.

Lawrence v. Tschirgi, 244 Iowa 386, 57 NW2d 46.

Re Schanzer's Estate, 7 App Div 2d 275, 182 NYS2d 475, affd 8 NY2d 972, 204 NYS2d 349, 169 NE2d 11.

Skeen v. Peterson, 113 Utah 483, 196 P2d 708.

R. C. L. cited in Rippey v. Wilson, 280 Mich. 233, 273 NW 552.

§ 161. — Increasing Attorney's Compensation.

Forms: 2 Am Jur Pl & Pr Forms 2:1226.

Am Jur cited in Skeen v. Peterson, 113 Utah 483, 196 P2d 708.

RCL cited in State v. MacIntyre, 238 Wis 406, 298 NW 200.

Page 358. *Add at end of section:* The right of a retained attorney to be actively or specially employed by the client for compensation in addition to the specified retainer fee depends upon whether the contract contains any provision to that effect.[4.5]

[4.5] **Anno:** 43 ALR2d 692.

§ 162. Contracts Made after Completion of Services or Termination of Relation.

Forms: 2 Am Jur Pl & Pr Forms 2:1225.

Am Jur cited in Potter v. Daily, 220 Ind 43, 40 NE(2d) 339.

Am Jur cited in Burleson v. Morse (Tex Civ App) 172 SW(2d) 361.

Stiers v. Hall, 170 Va 569, 197 SE 450 (n. 5).

RCL cited in La Fleaur v. Kinard (Tex Civ App) 161 SW2d 144.

§ 163. Contracts for Contingent Fees.

Forms: 1 Am Jur Legal Forms 1:1887–1:1908; 2 Am Jur Pl & Pr Forms 2:1229, 2:1230.

As to the amount of compensation to which the attorney is entitled under a contingent fee contract as affected by expenses incurred by the attorney, see infra, § 206 (Supp.).

Am Jur cited in Cone v. Benjamin, 157 Fla 800, 27 So2d 90

R. C. L. quoted in Hollister v. Ulvi, 199 Minn. 269, 271 N. W. 493; Adkins v. Staker, 130 Ohio St. 198, 198 N. E. 575.

R. C. L. cited in American Vitrified Products Co. v. Crooks, 20 Ohio L. Abs. 627, motion to certify record overruled. June 12. 1935

p. 359, n. 9. Gair v Peck, 6 NY2d 97, 188 NYS2d 491, 160 NE2d 43, 77 ALR2d 390, motion gr 6 NY2d 983, 191 NYS2d 951, 161 NE2d 736, app dismd and cert den 361 US 374, 4 L ed 2d 380, 80 S Ct 401.

A contingent fee arrangement between an attorney and his client has been held not in itself subject to condemnation as unethical. Re Quinn, 25 NJ 284, 135 A2d 869, 70 ALR2d 956.

Page 359. *Add, following note* 13: Stipulations contained in contracts between an attorney and his client whereby the attorney's right to compensation is expressly made contingent upon the successful prosecution of the suit, providing against compromise or settlement without the attorney's consent, have generally been held invalid as antagonistic to those considerations of public policy which favor an amicable adjustment of litigation.[13.1] But in numerous cases stipulations against the client's compromising his cause of action without consulting the attorney have been held valid, at least in the absence of any showing of bad faith.[13.2] And there is a sharp conflict of authority upon the question of the effect of the invalidity of a stipulation against compromise by the client upon the enforceability of other provisions of the contract fixing the attorney's compensation. Thus, in a number of cases in which this question arose, the entire contract was held to be vitiated; and some other cases in which the exact point was not raised may also be regarded as supporting that view.[13.3] However, about an equal number of decisions in which the particular point was raised have taken the view that, notwithstanding the invalidity of the stipulation against compromise by the client, the rest of the contract may be enforced, at least in a proper case.[13.4]

[13.1] Butler v. Young, 121 W Va 176, 2 SE(2d) 250, 121 ALR 1119.

Anno: 121 ALR 1122.

This result has been reached in various kinds of actions, of which those to recover for personal injuries have been by far the most numerous. **Anno:** 121 ALR 1122.

[13.2] **Anno:** 121 ALR 1125.

[13.3] **Anno:** 121 ALR 1127.

[13.4] St. Louis-San Francisco R. Co. v. Hurst, 198 Ark 546, 129 SW(2d) 970, 122 ALR 965; Butler v. Young, 121 W Va 176, 2 SE(2d) 250. 121 ALR 1119.

Anno: 121 ALR 1129.

p. 360, n. 17.

A statute authorizing an attorney to contract for a portion of the proceeds of a client's cause of action not in excess of 50 per cent of the net amount of the judgment recovered has been held not to apply to a layman agreeing to have proceedings instituted and to pay the expenses thereof in return for an oil and gas lease and a portion of the minerals in the land to be recovered. Cox v. Freeman, 204 Okla 138, 227 P2d 670, 28 ALR2d 1230.

Page 360. *Add following note* 17: The few cases considering court rules limiting the amount of contingent fees or otherwise imposing conditions on contingent fee contracts have reached varying results as to the validity of such a rule, although the courts are not in conflict as to the general principles to be applied, being in substantial agreement that if the rule merely sets forth procedural aids or requirements, it is valid, whereas if it establishes substantive law opposed to that in force in the state, it is invalid.[17.5]

[17.5] **Anno:** 77 ALR2d 412.

In an action for a declaratory judgment, an attack was made on a rule promulgated by the New York Supreme Court, Appellate Division. First Judicial Department, pertaining to the amount of contingent fees in claims and actions for personal injury and wrongful death. The rule included a tenatative schedule, subject to variation under justifiable circumstances, characterizing as unreasonable and unconscionable the collection of contingent fees in excess of certain percentages for specified amounts of recovery. Among other claims, the contention was made that the rule conflicted with a statute providing for the compensation of an attorney to be governed by agreement, express or implied. The validity of the rule was upheld. Gair v Peck, 6 NY2d 97, 188 NYS2d 491, 160 NE2d 43, 77 ALR2d 390, motion gr 6 NY2d 983, 191 NYS2d 951, 161 NE2d 736, app dismd and cert den 361 US 374, 4 L ed 2d 380, 80 S Ct 401.

§ 164. — Consideration Affecting Validity.

Practice Aids: Attorneys' Fees, **Am Jur Proof of Facts** pp 233 et seq.

Forms: 2 Am Jur Pl & Pr Forms 2:1229.

Am Jur quoted in Fitzpatrick v. Kellner 187 Miss 843, 193 So 911.

Am Jur cited in Cone v. Benjamin, 157 Fla 800, 27 So2d 90.

RCL quoted in American Vitrified Products Co. v. Crooks, 20 Ohio L. Abs. 627, mo-

tion to certify record overruled. June 12. 1935.

p. 360, n. 19. It has been held that a contingent fee which reaches or approaches 50 per cent of the recovery ceases to be a measure of due compensation for professional services rendered, and makes the lawyer a partner or proprietor in the lawsuit. Gair v Peck, 6 NY2d 97, 188 NYS2d 491, 160 NE2d 43, 77 ALR2d 390, motion gr 6 NY2d 983, 191 NYS2d 951, 161 NE2d 736, app dismd and cert den 361 US 374, 4 L ed 2d 380, 80 S Ct 401.

It has been held that the percentage charged by an attorney under a contingent fee agreement may be greater where the amount of the claim is small than where the recovery is large, without rendering the fee unlawful. Gair v Peck, 6 NY2d 97, 188 NYS2d 491, 160 NE2d 43, 77 ALR2d 390, motion gr 6 NY2d 983, 191 NYS2d 951, 161 NE2d 736, app dismd and cert den 361 US 374, 4 L ed 2d 380, 80 S Ct 401.

p. 360, n. 1.

A contract between an attorney and client that the attorney shall have one third of the amount recovered for his client in litigation over the ownership of property is one to be closely scrutinized to safeguard the client against overreaching by the attorney. Norrell v Chasan, 125 NJ Eq 230, 4 A2d 88, 120 ALR 1238.

p. 360, n. 2.

An agreement between the executors of an estate amounting to more than a million dollars, and a law firm of which one of them was a member, for the rendition of services in the settlement of the estate and the adjustment of inheritance taxes, in consideration of a fee of reasonable amount, is not against public policy, particularly where the compensation of the executors was limited by the will to 5 per cent of the income of the estate in excess of $15,000 per annum. Jones v. Peabody, 182 Wash 148, 45 P(2d) 915, 100 ALR 64.

§ 165. — Effect of Agreement to Pay Costs and Expenses.

Am Jur cited in Cone v. Benjamin, 157 Fla 800, 27 So2d 90.

§ 166. — In Divorce and Alimony Proceedings.

Forms: 2 Am Jur Pl & Pr Forms 2:1228.

Am Jur quoted in Evans v. Hartley, 57 Ga. App. 598, 196 S. E. 273 (n. 13).

Am Jur cited in Cone v. Benjamin, 157 Fla 800, 27 So2d 90.

Dannenberg v. Dannenberg, 151 Kan 600, 100 P2d 667.

Bucknam v. Bucknam, 347 Mo 1039, 151 SW(2d) 1097.

State ex rel. Nebraska State Bar Asso. v Jensen, 171 Neb 1, 105 NW2d 459; State ex rel. Nebraska State Bar Asso. v Dunker, 160 Neb 779, 71 NW2d 502.

Re Smith, 42 Wash2d 188, 254 P2d 464.

RCL quoted in Opperud v. Bussey, 172 Okla 625, 46 P (2d) 319.

p. 362, n. 13. Since contingent fee contracts in divorce actions are contrary to public policy they should be eradicated from practice, and, moreover, an attorney in a divorce action may not recover what his services are reasonably worth. Baskerville v Baskerville, — Minn —, 75 NW2d 762, overruling Klampe v Klampe, 137 Minn 227, 163 NW 295, and 145 Minn 404, 177 NW 629.

§ 167. — Effect of Agreement as Equitable Assignment.

Am Jur cited in Com. v. Benjamin, 157 Fla 800, 27 So2d 90.

Page 362. *Add, following* "of the judgment" *in third line of the section:* or proceeds of settlement.

p. 362, n. 14. Mirasola v. Rodgers, 120 W Va 685, 200 SE 30, 124 ALR 1504.

Anno: 124 ALR 1513.

An agreement between the payee of a note and an attorney that the latter should collect the note and have for his fee a fixed portion of what he could collect, constitutes an immediate equitable assignment pro tanto of that portion. Mirasola v. Rodgers, 120 W Va 685, 200 SE 30, 124 ALR 1504.

As to collusive settlement prior to collection or suit as extinguishing such equitable assignment, see infra, § 172 (Supp.).

p. 362, notes 17, 18. Anno: 124 ALR 1509.

Page 362. *Add, following note* 19: Under some circumstances it has been held that an attorney has an equitable assignment under a contingent fee contract of a portion of his client's share in a decedent's estate,[19.5] while under other circumstances the existence of such an assignment has been denied.[19.51]

19.5 **Anno:** 175 ALR 1139.

19.51 **Anno:** 175 ALR 1137.

An agreement by the distributee of a decedent's estate to pay an attorney retained to look after her interests a stated percentage of all she should receive after paying the fees of another attorney is not an equitable assignment pro tanto of the distributee's interest. Purman's Estate, 358 Pa 187, 56 A2d 86, 175 ALR 1129.

§ 168. Generally.

Forms: 2 Am Jur Pl & Pr Forms 2:1259.

§ 169. Fraud, Bad Faith, Negligence.

Am Jur cited in Re Thomasson, 347 Mo 748, 148 SW(2d) 757.

Page 363. *Insert at beginning of section:* A lawyer who does not at all times represent his client with undivided fidelity is not entitled to compensation for his services.[6.5]

6.5 Re Thomasson, 355 Mo 274, 196 SW2d 155, 170 ALR 1170.

p. 363, n. 9. It has been held that an attorney's delay from October 18 to October 24 in filing an answer is not such neglect as justifies the client in refusing to pay his fee, where a default judgment had been entered against the client as of October 13, so that the answer would not have been effective even though filed immediately. Lyons v Hall (La App) 90 So2d 519, 60 ALR2d 1003.

§ 170. Serving Adverse Interests.

Am Jur cited in Estate of Rorem, 245 Iowa 1125, 66 NW2d 292, 47 ALR2d 1089.

p. 363, n. 12. It has been held that the good faith or honesty of an attorney representing adverse interests without consent of the parties does not entitle him to compensation. Re Estate of Rorem, 245 Iowa 1125, 66 NW2d 292, 47 ALR2d 1089.

An executor's attorney whose services are found to have a reasonable value of $2,000 has been held not deprived of the right to any compensation by his representation of the executor's brother in a suit brought by the latter to establish his and the executor's equitable interest in realty of the estate, which was opposed by the other beneficiaries under the will, where it appeared that the suit was commenced nearly two years after the estate was opened and after much of the attorney's work was done, and where the other beneficiaries were at all times represented by other attorneys of their own choice; error was not committed under such circumstances by making a reduced award of $1,500. Re Estate of Rorem, 245 Iowa 1125, 66 NW2d 292, 47 ALR2d 1089.

Page 363. *Add at end of section:* Where an attorney has accepted employment to represent an interest adverse to that of a former client, the courts have, on the facts presented, held that the attorney's conduct did not free the former client from the obligation to pay the attorney the fees called for by the contract between the attorney and the former client.[12.5] In some, but not all, cases the courts have refused to enforce the employment contract between the attorney and the later client.[12.51]

12.5 **Anno:** 52 ALR2d 1289.

12.51 **Anno:** 52 ALR2d 1289, 1290.

§ 171. Failure of Performance, Withdrawal, or Abandonment of Case.

Forms: 2 Am Jur Pl & Pr Forms 2:1259.

Am Jur quoted in Odom v Hilton, 105 Ga App 286, 124 SE2d 415.

Am Jur cited in Moore v Fellner, 50 Cal 2d 330, 325 P2d 857.

Empire State Ins. Co. v Chafetz (CA5 Fla) 302 F2d 828.

R. C. L. quoted in Beaumont v. J. H. Hamlen & Son, 190 Ark 630, 81 SW2d 24.

RCL cited in Young v. Tian (Tex Civ App) 150 SW(2d) 317.

p. 364, n. 18.

An attorney's abandonment of his client so as to lose his rights under the contract between them cannot be predicated upon his advice and protest to the client against making what he regarded as an improvident settlement of an action which had been advanced by him and counsel employed by him to the point of being set for trial, notwithstanding that the client had the right to settle without attorney's consent. St. Louis-San Francisco R. Co. v. Hurst, 198 Ark 546, 129 SW(2d) 970, 122 ALR 965.

Refusal of an attorney having a contingent fee contract to aid his client in making what the former regards as an improvident settlement does not amount to a violation of his contract or defeat recovery under a statute which gives him a lien upon the cause of action, the client having made the settlement without his consent. St. Louis-San Francisco R. Co. v. Hurst, 198 Ark 546, 129 SW(2d) 970, 122 ALR 965.

§ 172. Discharge or Prevention of Performance by Client.

Am Jur quoted in Goodkind v. Wolkowsky, 132 Fla 63, 180 So 538 (notes 20–2).

Am Jur cited in Com. use of Clay County v. Sizemore, 269 Ky. 722, 108 S. W. (2d) 733 (notes 20, 1).

South Carolina Pub. Serv. Authority v. Weeks, 201 SC 199, 22 SE(2d) 249.

p. 364, n. 1. Wojcik v Miller Bakeries Corp. 2 NY2d 631, 142 NE2d 409; Re Montgomery, 272 NY 323, 6 NE2d 40, 109 ALR 669 (stating that an attorney engaged under a contract for a definite purpose, and not under a general retainer, is entitled to compensation on quantum meruit).

See infra, § 182 (Supplement).

If the discharge of an attorney by client is without cause, the client is liable for compensation and damages. Echlin v. Superior Ct. 13 Cal (2d) 368, 90 P(2d) 63, 124 ALR 719.

Where an attorney has no lien in the absence of an agreement therefor, his remedy for a wrongful discharge is by an independent action. Echlin v. Superior Ct. 13 Cal (2d) 368, 90 P2d 63, 124 ALR 719.

A client exercising his power to discharge his attorney and terminate the relation subjects himself to liability in the amount of the reasonable value of services rendered, and under some conditions to liability for damages for breach of contract where the discharge has been wrongful. Re Lachmund, 179 Or 420, 170 P2d 748, 166 ALR 479

When an executor employs, as attorney for the estate, the person selected by the testator, without employing such attorney for any definite time or for the completion of a specified project, it is within both the power and the right of the executor to discharge the attorney, at any time, subject only to liability to compensate the attorney in the reasonable value of the services rendered prior to termination of the employment. Re Lachmund, 179 Or 420, 170 P2d 748, 166 ALR 479.

p. 364, n. 3.

Judgment for plaintiff in an action for services rendered as attorney is supported by a finding that plaintiff was employed to prosecute a claim for personal injuries sustained in an automobile accident for a fee of one third of the recovery in case of suit or one fourth if settlement should be obtained and worked on the case until he obtained a settlement, notwithstanding further findings that the defendant subsequently retained another attorney unknown to the plaintiff until that attorney entered appearance in the action which the plaintiff had brought and that the draft in settlement was made payable to the client and such attorney, where it was also found that plaintiff was never discharged as attorney. Miller v Urban, 123 Conn 331, 195 A 193, 118 ALR 951.

In case of the substitution of attorneys without cause, the discharged attorney's right to recover a fee which by agreement was contingent on recovery of money or other property does not arise until recovery through the services of the substituted attorney. Echlin v. Superior Ct. 13 Cal (2d) 368, 90 P(2d) 63, 124 ALR 719.

Page 364. *Add, following note* 3: Where an agreement between the payee of a note and an attorney that the latter should collect the note and have for his fee a fixed portion of what he should collect constitutes an immediate equitable assignment pro tanto of that portion,[3.1] a collusive settlement, prior to collection or suit, between payee and payor, after the latter has notice of the attorney's assignment, does not extinguish it.[3.2]

An attorney who is discharged for sufficient cause has no right of recovery.[3.3]

When the employment under a general or periodic retainer fee or salary contract is for a definite period, the wrongful discharge of attorney prior to the expiration of the specified period constitutes a breach of the contract, and has been variously held to entitle the attorney to the stated compensation for the entire period,[3.5] or to be compensated on the basis of quantum meruit for services theretofore performed under the contract,[3.51] or to the recovery of damages.[3.52]

[3.1] See supra, § 167 (Supp.).

[3.2] Mirasola v. Rodgers, 120 W Va 685, 200 SE 30, 124 ALR 1504.

[3.3] Re Montgomery, 272 NY 323, 6 NE(2d) 40, 109 ALR 669

[3.5] **Anno:** 43 ALR2d 680.

[3.51] **Anno:** 43 ALR2d 680.

[3.52] **Anno:** 43 ALR2d 680.

§ 173. —Settlement Compromise, or Dismissal of Suit.

Forms: 2 Am Jur Pl & Pr Forms 2:1221, 2:1260.

Page 365. *Add, following note* 9: A statute providing that where an action or cause of action is settled by agreement without the consent of the attorney for plaintiff, the court shall upon motion enter judgment for a reasonable fee in favor of such attorney, does not contemplate the service of more than one attorney or firm of attorneys, and does not contemplate a fee to the attorney retained by the client and to a firm of attorneys employed by the former to assist him.[9.5]

[9.5] St. Louis-San Francisco R. Co. v. Hurst, 198 Ark 546, 129 SW(2d) 970, 122 ALR 965.

§ 175. Death, Incapacity, or Disbarment of Attorney.

Am Jur quoted in Roe v. Sears, R. & Co. (CCA 7th) 132 F(2d) 829.

p. 365, n. 13. Re Montgomery, 272 N. Y 323, 6 N. E. (2d) 40, 109 A.L.R. 669 (holding that where the attorney is employed under express contract, recovery is limited in quantum meruit to the contract price).

p. 365, n. 14. Re Montgomery, 272 N. Y. 323, 6 N. E. (2d) 40, 109 A.L.R. 669.

As to measure of recovery being limited by terms of contract, see infra, § 201.

Page 366. *Add, following note* 20: However the contrary view has been taken.[20.5]

[20.5] Stein v. Shaw. 6 NJ 525. 79 A2d 310.

§ 176. Illegality of Contract of Employment.

R. C. L. quoted in Hollister v. Ulvi. 199 Minn. 269. 271 N. W. 493.

§ 177. — Contracts Procured through Solicitation.

Am Jur quoted in Bump v District Ct. 232 Iowa 623. 5 NW(2d) 914.

RCL cited in Brown v. Durham, 175 Okla 500. 53 P2d 551; Re Durham. 190 Okla 588. 126 P(2d) 69.

§ 178. — Right to Compensation on a Quantum Meruit.

Am Jur quoted in Ownby v Prisock, — Miss —, 138 So 2d 279.

Am Jur cited in Rosenberg v. Lawrence, 10 Cal. (2d) 590, 75 P. (2d) 1082 (notes 17. 18) (dissent. op.).

RCL cited in Rosenberg v. Lawrence, 10 Cal2d 590, 75 P2d 1082, affirming (Cal App) 69 P(2d) 200; Evans v. Hartley. 57 Ga App 598, 196 SE 273.

p. 367, n. 17. Butler v. Young, 121 W Va 176. 2 SE(2d) 250. 121 ALR 1119

p. 367, n. 18. Darnell v. Broken Bow, 139 Neb 844. 299 NW 274. 136 ALR 101.

p. 367. n. 19.

In Callahan v. Jones, 200 Wash 241, 93 P (2d) 326, 123 ALR 1178, a statute forbidding a prosecuting attorney from being engaged as attorney or counsel for any party in a civil action depending upon the same facts as those involved in a criminal proceeding participated in by him was held to preclude the recovery on the contract or on quantum meruit of fees for services rendered in the recovery of stolen property, based upon an agreement made previous to the termination of the prosecution undertaken by such officer for the theft thereof

p. 368, n. 1. McCarthy v. Santangelo, 137 Conn 410, 78 A2d 240 (where the agreement created an inducement to violate public policy).

Page 368. *Add, following note* 5: And where an attorney is to receive one-third of an alimony award as his compensation for services in a divorce action, he will not be allowed recovery on quantum meruit.[5.3]

A fee on a quantum meruit basis is in effect provided for by a statute which provides in terms that in case settlement without consent of the attorney is made by parties after suit is filed, the court shall upon motion enter judgment for a reasonable fee in favor of such attorney and against the party in whose favor judgment may have been rendered, if the cause had proceeded to trial, and that the amount shall not necessarily be limited to the amount of the settlement.[5.5]

[5.3] McCarthy v. Santangelo. 137 Conn 410. 78 A2d 240.

[5.5] St. Louis-San Francisco R. Co. v. Hurst, 198 Ark 546. 129 SW(2d) 970. 122 ALR 965.

§ 180. Retention of Fees from Funds in Hand.

Page 369. *Add new paragraph at end of section:* Some jurisdictions, expressly or by implication, support the view that an attorney may set off his claim for unrelated services against his client's claim for money collected, either under the theory of attorney's lien or under the rule with respect to offset of debts generally.[9.5] Some courts, while recognizing the right of an attorney to set off his claim for services resulting in the collection of money for a client against the client's claim for the fund, have denied the attorney's right to set off his claim for unrelated services against the client's claim for the money collected.[9.51]

[9.5, 9.51] See supra, § 131 (Supp).

§ 181. Remedy by Suit.

Forms: 2 Am Jur Pl & Pr Forms 2:1211, 2:1212, 2:1214–2:1220, 2:1222–2:1226. 2:1229–2:1231. 2:1233, 2:1236. 2:1237.

Am Jur cited in Bolte v. Rainville. 138 NJ Eq 508. 48 A2d 191.

p. 369, n. 13. Lyons v Hall (La App) 90 So2d 519, 60 ALR2d 1003.

§ 182. — For Wrongful Discharge.

Forms: 2 Am Jur Pl & Pr Forms 2:1220.

Am Jur quoted in Goodkind v. Wolkowsky. 132 Fla 63. 180 So 538 (notes 4–5).

Am Jur cited in Berry v Nichols, 227 Ark 297, 298 SW2d 40.

p. 370, n. 4. Re Montgomery. 272 N. Y. 323, 6 N. E. (2d) 40, 109 A.L.R. 669.

Anno: 54 ALR2d 616 et seq.

p. 370, n. 5. Higgins v Beaty. 242 NC 479. 88 SE2d 80, 54 ALR2d 600.

Anno: 54 ALR2d 609 et seq.

p. 370, n. 6. Re Montgomery. 272 N. Y. 323. 6 N. E. (2d) 40. 109 A.L.R. 669.

Anno: 54 ALR2d 615. 618–620.

p. 370, n. 7. Anno: 54 ALR2d 616.

p. 370, n 8. Anno: 54 ALR2d 608, 609.

Page 370. *Add new paragraph following note* 9: It seems that in practically all jurisdictions an attorney employed under a contingent fee contract who is discharged without fault on his part may maintain an action to recover the reasonable value of his services rendered up to the time of his discharge.[9.51] And in some jurisdictions such a discharge of such an attorney is regarded as putting an end to the contract, so that his recovery of compensation, if any, must be upon quantum meruit.[9.53] However, other jurisdictions, in addition to the right to maintain an action for the reasonable value of the services, permit such a discharged attorney to maintain an action to recover damages as for breach of the contract,[9.55] or permit him to recover as for constructive performance.[9.57] In jurisdictions where the discharged attorney may recover as for constructive performance, it is logical to suppose that three courses are open to him: (1) an action to recover the stipulated contingent fee, (2) an action for damages for breach of contract, or (3) a suit on quantum meruit. That choice of remedies has been distinctly recognized in at least one jurisdiction.[9.59] According to one view, if the attorney elects to sue for the fee his suit must be brought after the client has obtained a settlement or otherwise recovered in his action.[9.61] But according to certain other cases, recovery of the full fee, as damages, may be based on any showing that the client's claim was collectible or that the attorney probably would have succeeded in collecting it.[9.63] It has been intimated that if the attorney acquiesces in his discharge his right to recover will be limited to the quantum meruit.[9.65]

[9.51] **Anno:** 136 ALR 252.

[9.53] **Anno:** 136 ALR 232, 254.

See Cole v. Myers, 128 Conn 223. 21 A(2d) 396. 136 ALR 226.

[9.55] **Anno:** 136 ALR 232, 242.

[9.57] **Anno:** 136 ALR 232, 233.

[9.59] **Anno:** 136 ALR 232.

[9.61] **Anno:** 136 ALR 232.

[9.63] **Anno:** 136 ALR 232, 245.

[9.65] **Anno:** 136 ALR 233.

It is not clear, however, what, if anything, is to be done to manifest nonacquiescence in a discharge, since an offer to continue performance of the employment contract must ordinarily be futile, and in fact absurd. The cases contain little to indicate that such an offer is required. **Anno:** 136 ALR 233.

As to measure of damages where attorney employed under contingent fee contract is discharged without fault on his part, see infra, § 202.

§ 183. Recovery in Client's Action.

Am Jur quoted in Grigsby v. Hopkins (Tex Civ App) 218 SW2d 275, refused.

As to right to contest entry of final divorce decree on ground of nonpayment of fees, see supra, § 106 (Supplement).

p. 370, n. 10. As to inclusion of attorneys' fees in judgment in action for wages due, under statute providing therefor, see MASTER AND SERVANT.

As to the right of a court in a bastardy proceeding to order a father to pay attorneys' fees, under a statute requiring him to support the child, see BASTARDS, Vol. 7, § 129, n. 17.1 (Supp.)

p. 370, n. 11. It has been held that the court in a divorce action has no authority to fix the amount of attorneys' fees each party is to pay their respective attorneys. O'Neill v O'Neill, 164 Neb 674, 83 NW2d 92, 66 ALR2d 875.

§ 184. Right of Attorney to Continue Action Which Client Has Settled or Compromised.

Forms: 2 Am Jur Pl & Pr Forms 2:1254.

Am Jur quoted in Mabry v. Knabb, 151 Fla 432, 10 So(2d) 330.

§ 185. — Divorce or Other Marital Action.

Forms: 2 Am Jur Pl & Pr Forms 2:1228.

Am Jur quoted in State ex rel. McNabb v. Allen Superior Ct, 225 Ind 402, 75 NE2d 788.

Am Jur cited in Hadlock v Hadlock (Fla App) 137 So 2d 873.

Hardy v Hardy, 228 Ind 295, 92 NE2d 221; State ex rel. McNabb v Allen, Superior Ct, 225 Ind 402, 75 NE2d 788.

Kull v. Brown (Tex Civ App) 165 SW2d 1011.

p. 373, n. 11. As to right to contest entry of final divorce decree on ground of nonpayment of fees, see supra, § 106 (Supplement).

§ 186. Recourse against Adverse Party Where Suit Is Compromised or Settled.

Forms: 2 Am Jur Pl & Pr Forms 2:1234, 2:1235, 2:1243.

Am Jur cited in Kull v. Brown (Tex Civ App) 165 SW(2d) 1011.

§ 187. Pleading.

Forms: 2 Am Jur Pl & Pr Forms 2:1211, 2:1212, 2:1214-2:1220, 2:1222-2:1226, 2:1229, 2:1231 2:1233 2:1235

p. 374, n. 5. It has been held that, in an action by an attorney to recover compensation for legal services, an averment of a specified sum as the "agreed and reasonable fee" must be considered in the conjunctive, as pleaded. Caughlan v International Longshoremen's & Warehousemen's Union, 52 Wash 2d 656, 328 P2d 707, 78 ALR2d 313.

§ 188. Burden of Proof.

Am Jur quoted in Missildine v. Miller, 231 Iowa 371, 1 NW(2d) 110.

Am Jur cited in De Long v. Owsley (Ky) 239 SW2d 58.

Buechner v. Goodman, 174 Md 131, 197 A 586 (n. 10).

§ 189. — As to Fairness of Contract; Presumptions.

Am Jur cited in Setzer v Robinson, 57 Cal 2d 213, 18 Cal Rptr 524, 368 P2d 124.

Woods v First Nat. Bank, 314 Ill App 340, 41 NE2d 235.

Lawrence v. Tschirgi, 244 Iowa 386, 57 NW2d 46.

De Long v. Owsley (Ky) 239 SW2d 58.

Buechner v. Goodman, 174 Md 131, 197 A 586 (n. 20).

State v. MacIntyre, 238 Wis 406, 298 NW 200.

R. C. L. cited in Rippey v. Wilson, 280 Mich. 233, 273 N. W. 552.

§ 190. Proof of Value of Services.

Practice Aids: Attorneys' Fees, **Am Jur Proof of Facts** pp 233 et seq.

Am Jur quoted in Curran v Security Ins. Co. (DC Ark) 195 F Supp 562, app dismd (CA8) 296 F2d 733.

Murray v Eagle (Okla) 300 P2d 652.

Am Jur cited in De Long v. Owsley (Ky) 239 SW2d 58.

Buechner v. Goodman, 174 Md 131, 197 A 586.

State ex rel. Beck v Associates Discount Corp. 168 Neb 298, 96 NW2d 55, mod and reh den 168 Neb 803, 97 NW2d 583.

Miller v. Burkett, 191 Okla 521, 130 P2d 996.

RCL cited in Citron v. Fields, 30 Cal App (2d) 51, 85 P(2d) 534.

Baruch v. Giblin, 122 Fla 59, 164 So 831.

p. 376, n. 9.

Objection should be sustained to the testimony of an experienced lawyer as to reasonable attorney's fee for the defense of accident claims within the coverage of an employers liability policy where, in answer to a hypothetical question based upon the data in a tabulation prepared by the statistical department of the insured, he stated that the reasonable value of the services would be exactly the figure shown by the tabulation, which was in itself inadmissible in evidence as not reflecting the actual expense or attorneys' fees incurred in respect of the particular claims in question. Ocean Acci. & G. Corp. v. Southwestern Bell Teleph. Co (CCA 8th) 100 F(2d) 441, 122 ALR 133, writ of certiorari denied in 306 US 658, 83 L ed 1056, 59 S Ct 775.

§ 191. — Admissibility of Expert Testimony.

Practice Aids: Attorneys' Fees, **Am Jur Proof of Facts** pp 233 et seq.

Am Jur cited in Campbell v. Green (CCA 5th) 112 F(2d) 143.

Wildes v Dappinian, 87 RI 131, 138 A2d 823.

p. 377, n. 18. Re Dehner, 230 Iowa 490, 298 NW 656, 143 ALR 669.

But the court may not ignore the factual testimony as to the extent and nature of the services. Re Dehner, 230 Iowa 490, 298 NW 656, 143 ALR 669.

§ 192. — Conclusiveness of Expert Evidence.

Practice Aids: Attorneys' Fees, **Am Jur Proof of Facts** pp 233 et seq.

Am Jur quoted in Adams v Brothers, 155 Kan 29, 122 P(2d) 757

State ex rel. Beck v Associates Discount Corp. 168 Neb 298, 96 NW2d 55, mod and reh den 168 Neb 803, 97 NW2d 583.

Am Jur cited in Campbell v Green (CCA 5th) 112 F(2d) 143.

State v Zachary, — Or —, 370 P2d 237.

Gulf Paving Co v Lofstedt 144 Tex 17 188 SW2d 155; Brown Oil Tools, Inc. v Broughton (Tex Civ App) 353 SW2d 505, error ref n r e.

p. 378, n. 19.

In determining what would be a reasonable fee for the services of an attorney in an action, the trial court and the court on appeal are not required to lay aside their general knowledge and ideas of the value of such services, and are not entirely controlled by the testimony in behalf of one of the parties, although it is not directly contradicted by the other party. St. Louis-San Francisco R. Co. v. Hurst, 198 Ark 546, 129 SW(2d) 970, 122 ALR 965.

§ 194. Trial; Questions for Court and Jury.

Am Jur cited in Steiner v. Stein, 2 NJ 367 66 A2d 719.

Page 378. *Add at end of section:* Whether a general or periodic retainer fee or salary contract may have been mutually rescinded or modified by the acts or conduct of the parties has been held, under particular circumstances, to be a question of fact.[9.5] The services to be covered by the amount specified in a general or periodic retainer contract have been held, in some cases, to present a question of fact for the jury.[9.51]

9.5 Anno: 43 ALR2d 681.
9.51 Anno: 43 ALR2d 689.

§ 195. Under Express Contract.

Forms: Am Jur Pl & Pr Forms 2:1213.

Am Jur quoted in Higgins v Beaty, 242 NC 479, 88 SE2d 80

Am Jur cited in National Bank of Topton v Holland, 190 Pa Super 501, 154 A2d 252.

p. 378, n. 11.

The amount to be taken as a basis for computing the fee of an attorney successfully prosecuting, for a percentage of any amount recovered, a claim on a fire insurance policy containing a standard mortgagee clause against an insurer which, upon the occurrence of the loss, had paid the mortgagee and taken an assignment of the mortgage but had refused to pay the owner of the insured property the amount by which the loss exceeded the mortgage, is the amount recovered and not the balance paid by the insurer after deducting the mortgage debt, for which the owner was personally liable. Manzo v. Dullea (C. C. A.) 96 F. (2d) 135, 116 A.L.R. 1241.

Page 379. *Add following note* 14: Where an attorney's contingent fee is, under the contract between him and his client, to be based on a percentage or fraction of the judgment or award recovered by the client, and the total amount eventually allowed the latter includes an item of interest, the questions whether, and how, the allowance of interest affects the computation of the attorney's fee depend on such variable factors as the language of the contingent fee contract, the effect of applicable statutes, and the conduct of the parties during the time the attorney-client relationship existed, and no firm answers of a general nature can be made.[14.5]

14.5 Anno: 82 ALR2d 953.

It has been held that, under an agreement between an attorney and his client for a contingent fee based on the "amounts recovered" in a condemnation suit, under which agreement the client is to retain all of a specified amount, which had previously been offered him by the condemnor, and the attorney is to receive graduated percentages of the excesses over various stipulated amounts of recovery, the attorney is not entitled to have the interest on the condemnation award added to the amount of such award for the purpose of determining the amount of his fee, but is entitled to so much of such interest as is attributable to the attorney's portion of the award under the terms of the agreement. Maw v Noble, 10 Utah 2d 440, 354 P2d 121, 82 ALR2d 949.

Page 379. *Add at end of section:* Contingent fees may be disallowed as between attorney and client in spite of contingent fee retainer agreements, where the amount becomes large enough to be out of all proportion to the value of the professional services rendered.[15.5]

15.5 Gair v Peck, 6 NY2d 97, 188 NYS2d 491, 160 NE2d 43, 77 ALR2d 390, motion gr 6 NY2d 983, 191 NYS2d 951, 161 NE2d 736, app dismd and cert den 361 US 374, 4 L ed 2d 380, 80 S Ct 401.

§ 196. — When Contract Is Invalid.

p. 379, nn. 17, 18. Slayton v Russ, 205 Ark 474, 169 SW2d 571, 146 ALR 64.

Anno: 143 ALR 732; 56 ALR2d 48.

§ 197. — For Additional Services.

Am Jur cited in Wolf v Mutual Ben. Health & Acci. Asso. 188 Kan 694, 366 P2d 219.

Page 379. *Add new paragraph at end of section:* One employed as general counsel for a corporation, or to attend to another's legal business generally, or within a specified area or district, at a stated salary or for other specified compensation, is not ordinarily entitled to extra compensation for legal services performed for the client during the period of such employment, in the absence of any agreement or understanding to that effect.[7.5] The phrase "court appearances," as used in a provision that the attorney is to receive extra compensation therefor, is not necessarily limited to the physical appearance of the attorney in court, and may, under some circumstances, include work one in his office in connection with pending litigation.[7.51]

Whether the work or services for which the additional compensation is claimed was within the reasonable contemplation of the parties at the time the contract was entered into may be a consideration of importance in determining the question.[7.52] The fact that the attorney makes no claim for extra compensation for particular services at the time of the rendition thereof,[7.53] or not until after the termination of the contract of employment,[7.54] has been given consideration as weighing against his right to such compensation.

7.5 Anno: 43 ALR2d 684.

7.51 Froedtert Grain & Malting Co. v Peter P. Woboril, Inc. 265 Wis 456, 61 NW2d 855, 43 ALR2d 671.

Anno: 43 ALR2d 684.

7.52 Anno: 43 ALR2d 684.
7.53 Anno: 43 ALR2d 684.
7.54 Anno: 43 ALR2d 684.

§ 198. Under Implied Contract.

Practice Aids: Attorneys' Fees, **Am Jur Proof of Facts** pp 233 et seq.

Forms: 2 Am Jur Pl & Pr Forms 2:1256–2:1258.

Am Jur quoted in Curran v Security Ins. Co. (DC Ark) 195 F Supp 562, app dismd (CA8) 296 F2d 733.

Monsanto Chemical Co. v Grandbush (DC Ark) 162 F Supp 797.

Forbes v Whitsitt, 155 Kan 598, 127 P2d 450.

Am Jur cited in Schwartz v Schwerin, 85 Ariz 242, 336 P2d 144.

Hill v Superior Court, 46 Cal 2d 169, 293 P2d 10 (dissent op).

Beard v Westmoreland, 90 Ga App 632, 84 SE2d 93.

Trask v Kam (Hawaii) 352 P2d 320.

Wollard v Peterson, 145 Kan 631, 66 P2d 375 (notes 9–14).

Daly v. Donovan, 200 Minn 323, 273 NW 814 (n.8).

Prince v. Pathfinder L. Ins. Co. 133 Neb 705, 276 NW 661 (notes 9–13, 16).

Re Nixon, 21 NJ Mis R 333, 32 A(2d) 359.

Bolton v. Marshall, 153 Ohio St 250, 91 NE2d 508.

Page 380. *Add, following* "reasonably worth" *in the third line on the page:*[7.5]

7.5 Anno: 143 ALR 675; 56 ALR2d 18.

The courts recognize that the matter of fixing attorneys' fees is a matter of great difficulty and delicacy. **Anno:** 143 ALR 676.

A court cannot lay down any ironclad, inflexible rule for the fixing of attorneys' fees which can be applied in every case to determine the amount which will be reasonable and just compensation to an attorney. **Anno:** 143 ALR 676.

It has been said that while the difficulties are greater in the case of attorneys' fees, the underlying principles are the same as those governing the amount of compensation for nonprofessional services. On the other hand, it has been said that "there is but little analogy between the elements that control the determination of a lawyer's fee and those which determine the compensation of skilled craftsmen in other fields." **Anno:** 143 ALR 677.

The courts in a number of cases involving allowances to attorneys for services rendered to a semipublic trust, or pursuant to a semiofficial appointment, have set up as the criterion of their compensation the amounts paid to public officers for comparable services. **Anno:** 143 ALR 692; 56 ALR2d 45.

For a discussion the reasonableness, adequacy, or excessiveness of specific fees in specific types of actions, see annotation in 143 ALR 728 et seq.; 56 ALR2d 50–205.

The failure of an attorney, at the outset of his engagement, to inform the client what his fee would be and to keep detailed time records of services performed on behalf of the client has been held not to estop the attorney from claiming a large fee which the jury, on ample evidence, finds to be reasonable, notwithstanding a smaller fee previously charged the client for related services. Burnett v Graves (CA5th Tex) 230 F2d 49 56 ALR2d 1, cert den 351 US 984, 100 L ed 1498, 76 S Ct 1051.

p. 380, n. 8. Greenfield Villages, Inc. v. Thompson (Fla) 44 So2d 679.

Re Atwood's Trust, 227 Minn 495, 35 NW2d 736, 9 ALR2d 1126.

Cooke v. Gove, 61 Nev 55, 114 P(2d) 87, 135 ALR 855.

Anno: 143 ALR 718; 56 ALR2d 43.

It is proper for the court or jury to take into consideration the amounts usually charged or allowed for similar services in the same locality. **Anno:** 143 ALR 718; 56 ALR2d 43.

It has been held that the amount charged by an attorney in a case cannot be taken into consideration in determining the reasonable value of the services rendered by the attorney for the opposing party in the same case. **Anno:** 143 ALR 720.

It has been said that where the engagement admittedly was for the handling of the specific litigation, what the attorneys were charging in other cases, or what the circumstances were in which a different basis of compensation was made, were matters foreign to this already complex case. Burnett v Graves (CA5th Tex) 230 F2d 49, 56 ALR2d 1, cert den 351 US 984, 100 L ed 1498, 76 S Ct 1051.

It has frequently been recognized that the courts may look to minimum fee schedules adopted by bar associations as at least persuasive evidence of what constitutes a reasonable fee for legal services. **Anno:** 143 ALR 719, s. 56 ALR2d 45.

p. 380, n. 9. Huffman's Estate, 349 Pa 59, 36 A(2d) 640, 151 ALR 1384.

Anno: 56 ALR2d 18 et seq.

A fee of 20 per cent of the recovery of $6,581 in an action for damage to real property as a result of bridge construction has been held inadequate and increased to 25 per cent in Noel Estate, Inc. v Dickson & Denny, 212 La 313, 31 So2d 810, 173 ALR 423, the court noting that the litigation extended over a period of almost 10 years and was heard by the supreme court on two different occasions, that it required the presentation of expert testimony on valuation, involved numerous points of law, and required the attorneys to engage in numerous conferences and make several trips to another city, and that other attorneys involved in similar litigation had collected from 25 per cent to 33⅓ per cent of the amount of recovery.

A charge of $250 has been held to be reasonable, under the circumstances, for services in defending a suit against a landlord under the rent control laws, where a default judgment had been entered, an answer was filed, the default judgment was set aside, the case was refixed for trial, and finally a dismissal was obtained for lack of prosecution. Lyons v Hall (La App) 90 So2d 519, 60 ALR2d 1003.

It has been said that the intangibles which bear upon the fairness of an attorney's fee defy translation into simple mathematics. Re Quinn 25 NJ 284, 135 A2d 869, 70 ALR2d 956.

p. 380, n. 10. Burnett v Graves (CA5th Tex) 230 F2d 49, 56 ALR2d 1, cert den 351 US 984, 100 L ed 1498, 76 S Ct 1051; Bank of China v Wells Fargo Bank & Union Trust Co. (DC Cal) 104 F Supp 59, affd (CA9th) 209 F2d 467, 48 ALR2d 172.

Frazer v First Nat. Bank, 235 Ala 252, 178 So 441, 126 ALR 1.

Louisville, N. A. & C. R. Co. v Wallace, 136 Ill 87, 26 NE 493, 11 LRA 787.

Re Atwood's Trust, 227 Minn 495, 35 NW2d 736, 9 ALR2d 1126.

Darnell v Broken Bow, 139 Neb 844, 299 NW 274, 136 ALR 101.

Huffman's Estate, 349 Pa 59, 36 A2d 640, 151 ALR 1384.

Anno: 143 ALR 697, 707, s. 56 ALR2d 34, 37–41.

p. 380, n. 11. Burnett v Graves (CA5th Tex) 230 F2d 49, 56 ALR2d 1, cert den 351 US 984 100 L ed 1498, 76 S Ct 1051; Bank of China v Wells Fargo Bank & Union Trust Co. (DC Cal) 104 F Supp 59, affd (CA9th) 209 F2d 467, 48 ALR2d 172.

Frazer v First Nat. Bank, 235 Ala 252, 178 So 441, 126 ALR 1.

St. Louis San Francisco R. Co. v Hurst, 198 Ark 546, 129 SW2d 970, 122 ALR 965.

Louisville, N. A. & C. R. Co. v Wallace, 136 Ill 87, 26 NE 493, 11 LRA 787.

Nomey v Pacific Mut. Life Ins. Co. 212 La 820, 33 So2d 531, 1 ALR2d 946.

Re Atwood's Trust, 227 Minn 495, 35 NW2d 736, 9 ALR2d 1126.

Christ's Home v Mattson, 140 NJ Eq 433, 55 A2d 14, 173 ALR 651.

Huffman's Estate, 349 Pa 59, 36 A2d 640, 151 ALR 1384.

Anno: 143 ALR 678–682, s. 56 ALR2d 20–24.

The novelty of the issues involved in the litigation has been referred to as affecting the difficulty, and hence the value, of legal services. **Anno:** 143 ALR 681, s. 56 ALR2d 23.

An award of $80,000 for services in successfully setting aside a lease of oil and gas interests has been sustained in Burnett v Graves (CA5th Tex) 230 F2d 49, 56 ALR2d 1, cert den 351 US 984 100 L ed 1498, 76 S Ct 1051, the court saying that there was an abundance of convincing expert evidence that characterized the litigation as difficult and complex, and fraught with much danger, and the handling of it by the attorneys as reflecting skilful ingenuity, especially in view of the acknowledged capacity of formidable adversaries with known repute as aggressive, vigorous, and tenacious fighters.

p. 380, n. 12. Bank of China v Wells Fargo Bank & Union Trust Co. (DC Cal) 104 F Supp 59, affd (CA9th) 209 F2d 467, 48 ALR2d 172.

Louisville, N. A. & C. R. Co. v Wallace, 136 Ill 87, 26 NE 493, 11 LRA 787.

Re Atwood's Trust, 227 Minn 495, 35 NW2d 736, 9 ALR2d 1126.

Darnell v Broken Bow, 139 Neb 844, 299 NW 274, 136 ALR 101.

Huffman's Estate, 349 Pa 59, 36 A2d 640, 151 ALR 1384.

Anno: 143 ALR 689, s. 56 ALR2d 28.

However, it has been indicated that the attorney's unique skill or experience should not be considered where the case was not such as to call for such specialized ability. **Anno:** 56 ALR2d 30.

p. 380, n. 14. Bank of China v Wells Fargo Bank & Union Trust Co. (DC Cal) 104 F Supp 59, affd (CA9th) 209 F2d 467, 48 ALR2d 172.

Nomey v Pacific Mut. Life Ins. Co. 212 La 820, 33 So2d 531, 1 ALR2d 946.

Re Atwood's Trust, 227 Minn 495, 35 NW2d 736, 9 ALR2d 1126.

Re Quinn, 25 NJ 284, 135 A2d 869, 70 ALR2d 956.

Re Lachmund's Estate, 179 Or 420, 170 P2d 748, 166 ALR 479.

Huffman's Estate, 349 Pa 59, 36 A2d 640, 151 ALR 1384.

Higgins v J. B. Farnum Co. 61 RI 262, 200 A 538, 117 ALR 1003.

Anno: 143 ALR 693, s. 56 ALR2d 31.

Page 380. *Add following note* 14: Other general factors, more or less constant in the cases, which may properly be considered in passing upon the amount to be allowed as reasonable compensation to an attorney are the time and labor involved,[14.2] whether other employment is lost because of the undertaking,[14.21] the degree or amount of responsibility assumed by the attorney,[14.22] the contingency or certainty of the compensation,[14.23] the general economic conditions and price trends,[14.24] the overhead expenses of the attorney,[14.25] the number of attorneys employed, where the nature of the proceedings require the employment of two or more attorneys or firms,[14.26] the duplication of the services,[14.27] and the amount of useless or unnecessary work performed.[14.28]

There is some conflict in the expressions of the courts as to the propriety of considering the ability of the client to pay in assessing attorneys' fees. It has been said that this factor should not be considered, except perhaps in connection with the client's inability to pay a normal fee.[14.29] However, in a large number of cases the courts have taken cognizance of the financial status of the person to be charged in fixing reasonable compensation for legal services.[14.3] These general principles have been applied by the courts in awarding, or passing upon the propriety of, fees for services in a wide variety of actions or circumstances.[14.31]

14.2 Bank of China v Wells Fargo Bank & Union Trust Co. (DC Cal) 104 F Supp 59, affd (CA9th) 209 F2d 467, 48 ALR2d 172.

St. Louis-San Francisco R. Co. v Hurst, 198 Ark 546, 129 SW2d 970, 122 ALR 965.

Louisville, N. A. & C. R. Co. v Wallace, 136 Ill 87, 27 NE 493, 11 LRA 787.

Re Atwood's Trust, 227 Minn 495, 35 NW2d 736, 9 ALR2d 1126.

Darnell v Broken Bow, 139 Neb 844, 299 NW 274, 136 ALR 101.

Huffman's Estate, 349 Pa 59, 36 A2d 640, 151 ALR 1384.

Anno: 143 ALR 682, s. 56 ALR2d 24.

14.21 Mellon v Fulton, 22 Okla 636, 98 P 911, 19 LRA NS 960.

Anno: 143 ALR 688, s. 56 ALR2d 27.

14.22 Re Atwood's Trust, 227 Minn 495, 35 NW2d 736, 9 ALR2d 1126.

Anno: 143 ALR 698, s. 56 ALR2d 35.

14.23 Oxborough v St. Martin, 169 Minn 72, 210 NW 854, 49 ALR 1115.

Anno: 143 ALR 705, s. 56 ALR2d 36.

14.24 Anno: 143 ALR 721, s. 56 ALR2d 46.

14.25 Anno: 143 ALR 721, s. 56 ALR2d 47.

14 26 Anno: 143 ALR 686.

14.27 Anno: 143 ALR 685, s. 56 ALR2d 49.

14.28 Anno: 143 ALR 686, s. 56 ALR2d 49.

In sustaining an award against a claim of inadequacy, the court in Cirimele v Shinazy, 134 Cal App2d 50, 285 P2d 311, 52 ALR2d 860, pointed out that a good deal of the legal work for which compensation was sought had to do with defendant's successful motion for change of venue, and said that the trial court might well have considered that plaintiff brought this expense upon himself by filing the action in the wrong county in the first place.

14.29 Anno: 143 ALR 716, s. 56 ALR2d 41.

14.3 Huffman's Estate, 349 Pa 59, 36 A2d 640, 151 ALR 1384 (estate matters).

Garden v Riley, 116 W Va 723, 183 SE 46, 143 ALR 662.

Anno: 143 ALR 712, s. 56 ALR2d 41.

14.31 Anno: 143 ALR 728 958, s. 56 ALR2d 50–205

p. 381, n. 15. Garden v. Riley. **116 W Va** 723, 183 SE 46, 143 ALR 662

Anno: 143 ALR 684: 56 ALR2d 26.

p. 381. n. 16. Anno: 143 ALR 682.

A $10,000 fee charged by two lawyers for their services in negotiating for the refinancing of a mortgage against a resort tract, drawing up a trust agreement for the holding of the tract for development and sale, and expending efforts over a two-year period in organization, promotion, and management, has been held not to be excessive. Appeal of Burke, 378 Pa 616 108 A2d 58, 47 ALR2d 1367.

Page 381. *Add, following note* 16: Generally, if a party desires to litigate, he must pay his attorney a reasonable fee for his professional services; and if the amount involved is small and the client instructs the attorney to do a large amount of work, the former cannot complain if the bill seems disproportionately large, providing he had a full knowledge of the facts.[16.1] On the other hand, there is some duty resting upon the attorney, if he intends to base his bill entirely upon the reasonable value of his services, to make clear to the client that the amount of work involved will cause the fee to be out of proportion to the money involved, so that the client may determine whether or not he desires to proceed with the matter.[16.2] If the attorney, under such circumstances, fails to so inform his client, the court may feel justified in reducing the fee.[16.3]

16.1 Higgins v. J. B. Farnum Co. 61 RI 262, 200 A 538, 117 ALR 1003.

Annotation: 117 A.L.R. 1008.

16.2 Higgins v. J. B. Farnum Co. 61 RI 262, 200 A. 538, 117 A.L.R. 1003.

Annotation: 117 A.L.R. 1008.

16.3 Higgins v. J. B. Farnum Co. 61 RI 262 200 A. 538, 117 A.L.R. 1003 (the fee was reduced as being excessive).

Annotation: 117 A.L.R. 1008.

Page 381. *Add new paragraph following note* 18: In several jurisdictions the courts have held that they may take into account, in determining the amount to be allowed as counsel fees, the fact that the services were necessarily, or by agreement, to be rendered gratuitously unless successful.[18.5] However, in other jurisdictions the courts have held that as a general rule the fact that an attorney has agreed that he shall make no charge for his services unless successful, or that the services are necessarily gratuitous unless successful, cannot be considered in determining the amount to be allowed as compensation.[18.6]

18.5 Anno: 135 ALR 860.

18.6 Cooke v. Gove. 61 Nev 55, 114 P(2d) 87. 135 ALR 855.

Anno: 135 ALR 865.

§ 199. Interest on Fees.

p. 381, n. 20.

Where a claim for attorney's fees, not fixed by agreement, is filed before a commissioner of accounts and the amount thereof is contested before the commissioner and is reduced by him, interest is chargeable on the amount allowed only from the date of the filing of the commissioner's report fixing the amount of the recovery, when the commissioner's report is finally affirmed. Garden v. Riley, **116 W Va** 723, 183 SE 46 143 ALR 662

p. 381, n. 2. It has been held that interest on the amount of compensation awarded an attorney for legal services runs from the date of the demand for such compensation, but interest on attorneys' fees awarded in the action for compensation commences on the date of the judgment. Burnett v Graves (CA5th Tex) 230 F2d 49, 56 ALR2d 1, cert den 351 US 984, 100 L ed 1498, 76 S Ct 1051.

§ 200. Statutory Limitation on Amount of Fees.

Am Jur cited in Haberberger v. Myer. 4 NJ 116, 71 A2d 717.

p. 381, n. 7. Annotation: 103 A.L.R. 907.

An attorney is not unconstitutionally deprived of his property, in violation of the Federal Constitution, by being limited to a fee of $3 for preparing the papers to secure a claim under the War Risk Insurance Act of September 2, 1914, chap. 293 (38 Stat. at L. 711).

Margolin v. United States, 269 U. S. 93, 70 L. ed. 176, 46 S. Ct. 64.

p. 382, n. 9.

The Supreme Court of the United States has nullified the holdings in the state courts in regard to the inapplicability of such statutes to contracts entered into before the enactment of the legislation restricting the amount of fees. Annotation: 69 L. ed. 779.

§ 201. On Death of Attorney.

p. 382, n. 11. Re Montgomery, 272 N. Y. 323, 6 N. E. (2d) 40, 109 A.L.R. 669.

§ 202. On Discharge by Client.

Am Jur quoted in Higgins v Beaty, 242 NC 479, 88 SE2d 80.

Am Jur cited in Berry v Nichols, 227 Ark 297, 298 SW2d 40

Bolton v Marshall, 153 Ohio St 250, 91 NE2d 508.

p. 382, n. 16. Re Montgomery, 272 N. Y. 323, 6 N. E. (2d) 40, 109 A.L.R. 669.

Page 382. *Add, following note* 16: As to whether, in a suit upon quantum meruit, an express contract as to the amount of compensation will control the recovery there is a conflict of authority.[16.1] Some courts hold that where the attorney is discharged without cause, he is not limited by the contract price, but may recover the reasonable value of his services, whatever that value may be.[16.11] Other courts declare that an attorney discharged without cause cannot recover in quantum meruit more than he would have been entitled to had he been permitted to complete the performance of his contract.[16.12]

[16.1] **Anno:** 109 ALR 674; 54 ALR2d 621.

[16.11] Re Montgomery, 272 N. Y. 323, 6 N. E. (2d) 40, 109 A.L.R. 669.

Anno: 109 ALR 675; 43 ALR2d 679; 54 ALR 2d 621.

The fact that the contract under which an attorney is employed has been canceled and annulled by the discharge of the attorney without fault on his part cannot limit the amount of recovery by the attorney upon quantum meruit, although it may be considered in fixing the amount of the reasonable value of the service rendered. Re Montgomery, 272 N. Y. 323, 6 N. E. (2d) 40, 109 A.L.R. 669.

The allowance of $10,000 for services rendered by an attorney under a contract by which he was to receive $5,000, where he had been discharged without cause after he had performed about five sixths of the service contracted for, was held, in the circumstances, to be the fair and reasonable value of the service rendered, and his right to compensation on the quantum meruit basis held not limited to the contract price. Re Montgomery, 272 N. Y. 323, 6 N. E. (2d) 40, 109 A.L.R. 669

[16.12] **Anno:** 109 ALR 676; 54 ALR2d 623.

p. 382, n. 17. Higgins v. Beaty, 242 NC 479, 88 SE2d 80, 54 ALR2d 600.

See Denio v. Huntington Beach, 22 Cal(2d) 580, 140 P(2d) 392, 149 ALR 320.

Anno: 54 ALR2d 611-614, 628.

Page 382. *Add following note* 17: Where an attorney who was substituted signed a stipulation with the new attorney that he was to receive 20 per cent of the recovery, a trial judge before whom the case was settled could not disregard the stipulation.[17.5]

[17.5] Wojcik v Miller Bakeries Corp. 2 NY2d 631, 142 NE2d 409.

p. 382, n. 19. Anno: 54 ALR2d 628.

p. 382, n. 20. Anno: 54 ALR2d 614, 615, 623-626.

p. 383, n. 1. As to application of this principle to quantum meruit actions, see preceding notes in this section.

p. 383, n. 2. Re Montgomery, 272 N. Y. 323, 6 N. E. (2d) 40, 109 A.L.R. 669.

Gair v Peck, 6 NY2d 97, 188 NYS2d 491, 160 NE2d 43, 77 ALR2d 390, motion gr 6 NY2d 983, 191 NYS2d 951, 161 NE2d 736, app dismd and cert den 361 US 374, 4 L ed 2d 380, 80 S Ct 401.

Anno: 54 ALR2d 615, 621.

Page 383. *Add following note* 2: It has generally been held that an attorney who is discharged without cause or fault on his part before completely performing the specific work he was employed to do under a contract providing for a stipulated retainer fee, or a specific fixed fee, plus certain contingent fees may recover the retainer fee, or fixed fee, contracted to be paid.[2.5]

[2.5] Genrow v Flynn, 166 Mich 564, 131 NW 1115, 35 LRA NS 960, Ann Cas 1912D 638.

Anno: 54 ALR2d 626-628.

p. 383, n. 3. See Crowley v. Wolf, 281 NY 59, 22 NE(2d) 234, 131 ALR 970, infra, § 203 (Supp.). See infra, notes 5.51 et seq. (Supp.)

p. 383, notes 4-5. See infra, notes 5.51 et seq (Supp.).

Page 383. *Add new paragraph following note* 5: There seems to be no doubt that an attorney employed under a contingent fee contract who is discharged without fault on his part may, if he so elects, recover simply the reasonable value of the services rendered up to the time of his discharge.[5.51] And there is an increasing tendency to hold that an attorney so employed who is so discharged is not, as a general rule, entitled to recover on the contract, but may recover merely on a quantum meruit the reasonable value of the services he rendered.[5.52] However, in the majority of jurisdictions wherein the question has arisen, it has been held that an attorney employed under a contingent fee contract and discharged without fault on his part may recover damages as for breach of contract.[5.53] But in a minority of jurisdictions there has been laid down the doctrine (based largely on an opinion rendered by the New York Court of Appeals in the year 1916) that a client has the "right" to discharge his attorney at any time, with or without cause regardless of the terms of the employment contract, and that consequently the attorney cannot recover damages as for breach of contract, even though the agreement provided for a contingent fee.[5.54]

In some jurisdictions an attorney employed under a contingent fee contract who is discharged without fault on his part may recover, as damages, the full stipulated fee which, if expressed in percentage, is ordinarily computed on the amount the client is able to secure by settlement or judgment after the attorney's discharge. In some instances the rule allowing such recovery has been qualified, however, to the extent that it has been held that the attorney may recover a stipulated percentage computed on amount received by client after the attorney's discharge; that he may recover a stipulated percentage computed on amount recovered by substituted attorney, less reasonable abatements to be made in respect of expenses saved, etc.; that he may recover a stipulated percentage computed on amount secured in a settlement by substituted attorney; or that he may recover stipulated a percentage of the amount of the offer of a settlement procured by him for the client in accordance with her instructions, notwithstanding she then discharged him and refused to complete the settlement.[9.55] Damages consisting of the full stipulated fee have frequently been allowed where the client prosecuted his claim with success or obtained a settlement thereof after the discharge of the attorney.[5.56] And according to certain cases, the attorney may recover as damages the full contingent fee on establishing the collectibility of the client's claim or that the attorney would have succeeded in collecting it.[5.57] In other cases, however, it has been considered that damages amounting to the full fee can be recovered by the attorney only after the client has recovered on his claim.[5.58] Some cases, although allowing the attorney to recover as for breach of contract, do not allow the full fee as the measure of damages where the employment contract had not been substantially performed.[5.59]

Where the attorney's recovery is merely upon the quantum meruit, the terms of the contract, although not controlling, are frequently regarded as matter to be taken into consideration in determining the amount to be allowed.[5.61] Thus, it has been held that in estimating the reasonable value of the services rendered by the discharged attorney the court may take into consideration the fact that the services were rendered upon a contingent basis.[5.62] However, some cases hold or affirm that the amount of recovery to be allowed to the discharged attorney on the quantum meruit is to be determined without regard to the terms of the contract.[5.63] And where the discharge of the attorney is regarded as canceling his contract of employment the terms of the contract are not regarded as actually establishing the standard of compensation. So, a percentage of such amount as the client may recover cannot be allowed as the reasonable value of services rendered by the discharged attorney.[5.64]

In fixing the amount to be recovered by the discharged attorney on quantum meruit, consideration is frequently given to the ultimate result of the client's litigation.[5.65] However, as has already been indicated, several cases have held that the reasonable value of the services of the discharged attorney, as recoverable on a quantum meruit, cannot be fixed at a percentage of such amount as the client may recover in his suit.[5.66] It has been held that the amount to be allowed to the attorney on a quantum meruit is not to be fixed with reference to the possible or wholly speculative results which he might have achieved in the litigation had he been permitted to continue.[5.67] It has also been held that the amount to be allowed to the discharged attorney is to be determined in view of the character of the services he was capable of rendering, and which he did render.[5.68]

In many cases it has been held that an attorney employed under a contingent fee contract who is discharged without fault on his part may, at least in some circumstances, recover the full stipulated fee on the theory of constructive performance.[5.69] In most of these cases where recovery of the full fee was apparently allowed as for full performance the client had obtained a judgment or settlement subsequent to the attorney's discharge.[5.71] But in some instances the right to recover the full fee has been upheld notwithstanding the client had not obtained judgment or settlement in his suit.[5.73] Particularly where the attorney's discharge was prior to recovery by the client, but in some instances where substituted attorneys had successfully prosecuted the client's case, the view taken in numerous instances has been that the discharged attorney cannot recover the full contingent fee as for full performance.[5.74] Thus, the doctrine that the attorney cannot recover the full contingent fee has in some instances been adhered to even where subsequent to the discharge the client had fully or substantially recovered on his claim.[5.75]

[5.51] Echlin v. Superior Ct. 13 Cal(2d) 368, 90 P(2d) 63, 124 ALR 719; Cole v. Myers, 128 Conn 223, 21 A(2d) 396, 136 ALR 225; Crowley v. Wolf, 281 NY 59, 22 NE(2d) 234, 131 ALR 970; Martin v. Camp, 219 NY 170 627, 221 NY 631, 114 NE 46, 1072, 116 NE 1060, LRA1917F 402; Scheinesohn v. Lemonek, 84 Ohio St 424, 95 NE 913, Ann Cas 1912C 737

Anno: 136 ALR 252.

[5.52] Cole v. Myers, 128 Conn 223, 21 A(2d) 396, 136 ALR 226; Crowley v Wolf, 281 NY 59, 22 NE(2d) 234, 131 ALR 970; Martin v. Camp, 219 NY 170, 627, 221 NY 631, 114 NE 46, 1072, 116 NE 1060, LRA1917F 402.

Anno: 136 ALR 254.

[5.53] Brodie v. Watkins, 33 Ark 545, 34 Am Rep 49; Echlin v. Superior Ct. 13 Cal(2d) 368, 90 P(2d) 63, 124 ALR 719; Bartlett v. Odd Fellows' Sav. Bank, 79 Cal 218, 21 P 743, 12 Am St Rep 139; Scheinesohn v Lemonek, 84 Ohio St 424, 95 NE 913, Ann Cas 92C 737; First Nat. Bank & T. Co. v. Bassett, 183 Okla 592, 83 P(2d) 837, 118 ALR 1276; Polsley & Son v. Anderson, 7 W Va 202, 23 Am Rep 613.

Anno: 136 ALR 242.

In First Nat. Bank & T. Co. v. Bassett, 183 Okla 592, 83 P(2d) 837 118 ALR 1276, where the discharged attorney was allowed to recover the reasonable value of his services up to the time of his discharge, taking into consideration the final results achieved by the substituted attorneys, the court declared that the recovery in such a case "seems to be allowed upon the contract, quantum meruit entering as a measure for determining the value of the services rendered, and not in itself providing the basis of recovery."

[5.54] Cole v. Myers, 128 Conn 223, 21 A(2d) 396, 136 ALR 226; Martin v. Camp, 19 NY 170, 627, 221 NY 631, 114 NE 46, 1072, 116 NE 1060, LRA1917F 402.

Anno: 136 ALR 244.

In Martin v. Camp, 219 NY 170, 627, 221 NY 631, 114 NE 46, 1072, 116 NE 1060, LRA 1917F 402, where the action was brought to recover damages for breach of the attorney's contract entitling him to a percentage of the amount recovered, it was held that such recovery was not allowable, because, the court said, the discharge of the attorney did not constitute a breach of the contract, it being an implied term of the contract that the client might terminate it at any time, with or without cause. Consequently the court declared that the attorney was limited to recover the reasonable value of the services rendered up to the time of his discharge. This rule, the court stated, was "well calculated to promote public confidence in the members of an honorable profession whose relation to their clients is personal and confidential," yet it is to be observed that the court said that the rule that the attorney is limited to a recovery upon a quantum meruit "does not relate to a case where the attorney in entering into such a contract has changed his position or incurred expense, or to a case where an attorney is employed under a general retainer for a fixed period to perform legal services in relation to matters that may arise during the period of the contract."

In Cole v. Myers, 128 Conn 223, 21 A(2d) 396, 136 ALR 226, the view was taken that an attorney employed on a percentage contract and discharged without fault on his part is not entitled to recover damages.

5.55 **Anno:** 136 ALR 245.

5.56 **Anno:** 136 ALR 247.

In Brodie v. Watkins, 33 Ark 545, 34 Am Rep 49, where the attorney's contract entitled him to 10 per cent of the amount which might be collected, but about a year after his services commenced he was discharged, without fault on his part, and other attorneys of high standing were employed who recovered property of the value of $10,000, it was held that that amount might be taken as a guide in estimating the pecuniary loss sustained by the discharged attorney, since it might be supposed that he would have done as well as those substituted for him. This ruling proceeded upon the general principle that where there is "a special agreement for labor, service, or the delivery of goods, at a stipulated value, and the party bound to the services or the delivery is ready and willing to perform his part, but it is wrongfully prevented by the other, the measure of damages is the profit which would have inured to the party willing to perform, if the contract had been fully executed on both sides."

5.57 **Anno:** 136 ALR 249.

In Scheinesohn v. Lemonek, 84 Ohio St 424, 95 NE 913, Ann Cas 1912C 737, where the attorney was to receive for his services 25 per cent of the amount he should collect, but was discharged before rendering any services and before the client had been in any way benefited, it was held that the rule of quantum meruit could not, under such circumstances, apply, but that nevertheless a cause of action for breach of contract accrued to the attorney, so that upon his establishing that the claim was collectible he was entitled to recover damages, that the right to such recovery did not depend on whether or not the claim was afterwards collected by some one else, and that the measure of recovery was "the value of the attorney's anticipated services" as "fixed by the agreement of the parties," that is, it seems, one fourth of the amount of the claim which was collectible. The court said that "the fact of the impracticability of ascertaining a satisfactory measure of damages sustained by the attorney" from the breach differentiated the case from those of the breach of ordinary contracts of employment.

5.58 **Anno:** 136 ALR 250.

An attorney employed on a contingent fee contract who is discharged without cause may recover the reasonable value of his services up to the time of his discharge in an action brought for that purpose, or he may sue for the fee contracted to be paid; but if the suit is of the latter character the cause of action does not become complete until the client recovers on his claim. Echlin v. Superior Ct. 13 Cal(2d) 368. 90 P(2d) 63. 124 ALR 719.

5.59 First Nat. Bank & T. Co. v. Bassett, 183 Okla 592, 83 P(2d) 837, 118 ALR 1276; Polsley & Son v. Anderson, 7 W Va 202, 23 Am Rep 613.

Anno: 136 ALR 250.

In First Nat. Bank & T. Co. v. Bassett, 183 Okla 592, 83 P(2d) 837, 118 ALR 1276, although the court conceded that the attorney (who was employed under a percentage contract which specified that the fee should be received "if and when the recovery should finally be determined") was, in the measure of his recovery, limited to the reasonable value of the services rendered up to the time of his discharge, it was nevertheless held that his claim was on the contract and that the final results achieved in the litigation were elements to be considered in fixing the amount of his recovery.

The view has been taken that "if the compensation under the contract is contingent on the success of the suit, and the attorney is discharged without fault on his part, the measure of damages is not the contingent fee, but a reasonable compensation for the services actually rendered." **Anno:** 136 ALR 251.

5.61 **Anno:** 136 ALR 255.

5.62 **Anno:** 136 ALR 256.

5.63 **Anno:** 136 ALR 257.

5.64 **Anno:** 136 ALR 256.

The Kentucky rule is that the discharged attorney may recover, on the quantum meruit, "the contract price, abated by such sum as is reasonably represented by the unperformed part of the labor." **Anno:** 136 ALR 257.

5.65 **Anno:** 136 ALR 258.

5.66 See supra, n. 5.64.

5.67, 5.68 **Anno:** 136 ALR 258.

5.69 **Anno:** 136 ALR 235.

5.71 **Anno:** 136 ALR 235.

If the attorney's contract is to be regarded as having been substantially performed, with success to the client, at the time the discharge occurred, there is no reason for denying recovery of the stipulated contingent fee. **Anno:** 136 ALR 241.

In McGowan v. Parish, 237 US 285, 59 L ed 955, 35 S Ct 543, where the attorneys, having agreed to prosecute and collect a claim against the government in consideration of 20 per cent of whatever might be awarded or collected, succeeded in securing the passage of an act of Congress authorizing payment of the claim, under which act they applied to the Secretary of the Treasury for payment but without success, following which they were discharged and other attorneys substituted who obtained payment through a mandamus proceeding, it was held, in a suit in equity, that since the services of the discharged attorneys were admittedly of great value and had resulted in securing to the client "a complete right to the payment of the money," and it was his fault and not theirs that the final steps to recover it were not taken by them, no reason was shown why they should not receive the stipulated fee, the amount thereof having been deposited with the court.

5.73 **Anno:** 136 ALR 240.

5.74 **Anno:** 136 ALR 234.

5.75 **Anno:** 136 ALR 237.

§ 203. On Dismissal or Discontinuance of Action by Client.

p. 383, n. 6. See infra, this section (Supp.).

Page 383. *Add new paragraph following note 8:* Usually, an attorney whose contract of employment in a civil case provides for a contingent fee only cannot recover compensation under the contract, where the client abandons the litigation without a recovery or successful defense. In so ruling the courts have ordinarily attached no importance to the client's loss of faith in the litigation, even where such fact has distinctly appeared.[8.51] But ordinarily an attorney employed on a contingent fee basis may recover the reasonable value of services rendered, where without his consent his client discontinues the litigation, because of an apparent loss of faith therein.[8.53] It thus seems that in order wholly to defeat the attorney's claim to compensation it must appear not merely that the client lost faith in the litigation and exercised his right to abandon it, but that he had good cause for so doing. And there is much in the cases to suggest that the attorney must have been allowed a reasonable opportunity to bring about a favorable result.[8.55]

8.51 Crowley v. Wolf, 281 NY 59, 22 NE(2d) 234, 131 ALR 970.

Anno: 131 ALR 977.

8.53 **Anno:** 131 ALR 975.

See, however, Crowley v. Wolf, 281 NY 59, 22 NE(2d) 234, 131 ALR 970, which seems to indicate that if a client, after having allowed the attorney a reasonable opportunity to prosecute the claim successfully, reasonably, and with probable correctness, concludes that the claim is without merit, and abandons it, the attorney, though employed on a contingent fee contract, may be discharged without right to any compensation whatever, and in which the question whether a dismissal precludes a recovery by the attorney upon a quantum meruit was apparently regarded as depending on whether the dismissal was "wrongful" or was "justified." There is some further authority tending to support this view. **Anno:** 131 ALR 974.

[8.55] **Anno:** 131 ALR 974.

See, however, Crowley v. Wolf, 281 NY 59, 22 NE(2d) 234, 131 ALR 970, which holds in effect that a client has the right to discontinue and abandon a suit at any time when he becomes satisfied that his cause of action lacks merit, and is not bound to continue the litigation merely in order to give counsel employed on a contingent fee basis an opportunity to earn a fee, especially where the cause of action has been the subject of a trial in which an adverse judgment was rendered.

§ 204. On Settlement or Compromise by Client.

Am Jur quoted in Forman v. Kennedy, 156 Fla 219, 22 So2d 890.

Am Jur cited in Jellico Coal Min. Co. v. Pope, 292 Ky 171, 166 SW(2d) 287.

p. 384, n. 14.

Where an insurance adjuster obtained a settlement for less than the face value of the policy by inducing the insured to abandon his lawyer and save the contingent fee which he had contracted to pay, it was held that the jury might well have concluded that, but for the interference, the attorney would have recovered the full amount of the policy for his client, and that the damages for the wrongful interference with the contract should therefore embrace all elements reasonably flowing therefrom and not be limited by the amount of the settlement made in its perpetration. State Farm Fire Ins. Co. v. Gregory (CA4th SC) 184 F2d 447.

p 384, n. 17.

In determining what would be a reasonable fee for an attorney as regards his statutory lien where the action was settled by agreement of the parties without his consent, the court takes into consideration the amount of time and labor involved, the skill and ability of the attorney, and the nature and extent of the litigation. St. Louis-San Francisco R. Co. v. Hurst, 198 Ark 546, 129 SW(2d) 970, 122 ALR 965.

In St. Louis-San Francisco R. Co. v. Hurst, 198 Ark 546, 129 SW(2d) 970, 122 ALR 965, an allowance of a fee of $1,000 on a quantum meruit in favor of the attorney in an action for personal injuries against a railroad in which a judgment for $3,000 was demanded, and which was settled by the parties without the attorney's consent, was held upon consideration of the entire record to be excessive, and subject to modification by reducing the amount to $500.

§ 205. When Adversary Agrees to Pay Fee.

Forms: 1 Am Jur Legal Forms 1:1909.

Page 385. *Add following note 5:* The "reasonable attorney fee" for which provision is made in case suit is brought is not necessarily gauged by the legal services actually rendered, but is limited to reasonable compensation for legal services that are reasonably necessary under the circumstances of the case.[5.5]

[5.5] Cirimele v Shinazy, 134 Cal App2d 50, 285 P2d 311, 52 ALR2d 860.

Page 385. *Add a new paragraph following note 7:* In the majority of the cases in which the question of the propriety of awarding attorneys' fees on appeal, pursuant to a contractual provision, has been considered, the petition for such fees has either been granted by the appellate court, or the allowance of such fees by the trial court has been approved on appeal.[7.5] Thus, pursuant to contractual provisions, attorneys' fees have been allowed on appeal where an appeal was necessary in order for the appellant to protect his contractual rights,[7.51] a judgment in favor of the appellee was affirmed on appeal,[7.52] and where, although judgment in favor of the appellee was reversed on a prior appeal (for which appeal attorneys' fees were being asked), the right of such appellee to judgment was later established.[7.53] In some of the cases the appellate court, in awarding attorneys' fees for both the trial and the appeal of an action, has designated the amount of the fee applicable to the trial and the amount applicable to the appeal, while in other cases the court has merely awarded a lump-sum fee for both the trial and the appeal.[7.54]

In the majority of the cases in which it has been held that attorneys' fees could not properly be awarded for an appeal, the reasoning of the courts has been that the contractual right to attorneys' fees was merged in the judgment and that the liability of the defendant as established by the judgment could not later be enlarged by the imposition of additional attorneys' fees.[7.56] In other cases the courts have been of the opinion that the allowance of attorneys' fees on appeal was not within the contemplation of the contract involved.[7.57] In still other cases the court has said that it had no jurisdiction to award attorneys' fees for an appeal,[7.58] or that it knew of no basis for making such an allowance.[7.59]

[7.5] **Anno:** 52 ALR2d 864 et seq.

[7.51] **Anno:** 52 ALR2d 866.

[7.52] **Anno:** 52 ALR2d 865.

[7.53] Cirimele v Shinazy, 134 Cal App2d 50, 285 P2d 311, 52 ALR2d 860 (plaintiff allowed to recover attorneys' fees for two appeals).

Anno: 52 ALR2d 867, 868.

[7.54] **Anno:** 52 ALR2d 868–871.

It has been held that, since $100 amounted to 40 per cent of the recovery over and above the sum the lessee conceded he owed, it could not be said that such amount was inadequate as a fee for the trial of the case. The court said, however, that a contractual provision for reasonable attorneys' fees for enforcing the provisions thereof applied as well to legal services on appeal as it did to legal services for the trial of the case, that the lessor was entitled to a reasonable attorney's fee for each of the two appeals, and that $75 was a reasonable fee for each of such appeals, a total of $150 for the two appeals. Cirimele v Shinazy, 134 Cal App2d 50, 285 P2d 311, 52 ALR2d 860.

[7.56] **Anno:** 52 ALR2d 871.

[7.57] **Anno:** 52 ALR2d 872–874.

[7.58] **Anno:** 52 ALR2d 874.

[7.59] **Anno:** 52 ALR2d 874.

§ 206. Right to Taxable Costs, Statutory Fees and Expenses.

Am Jur cited in Skeen v. Peterson, 113 Utah 483, 196 P2d 708.

p. 386, n. 18.

The right of an attorney to be reimbursed for expenses of litigation follows as a matter of law from his making the advances for the benefit of the litigation he was employed to conduct, even where his employment was under a contingent fee agreement, if such agreement was silent as to expenses. Manzo v. Dullea (C. C. A. 2d) 96 F. (2d) 135, 116 A.L.R. 1241.

The question of whether or not expenses incurred by the attorney should be paid by the client is not to be judged solely from whether or not they might be taxable as costs against an unsuccessful opponent. The attorney may not, however, recover for expenses necessarily incident to the maintenance of a properly equipped lawyer's office or which were incident to the work he had agreed to perform. Annotation: 116 A.L.R. 1249.

An attorney acting under a contingent fee contract is not entitled to reimbursement for traveling and hotel expenses. Annotation: 116 A.L.R. 1248.

Page 386. *Add, following note* 1: Following the rule that the expenses incurred in the conduct of suits shall be borne by the client and not by his attorney, the courts have held in effect that an attorney employed under a contingent fee contract is not liable for ordinary expenses incurred by him in the conduct of his client's suit.[1.1] Except where the contract specifically provides to the contrary, the courts generally take the view that, under an agreement providing for a contingent fee, an attorney is entitled to be reimbursed for expenses paid, in addition to his percentage of the recovery, that his percentage is to be computed upon the gross recovery, and that he is entitled to reimbursement from the share of his client for disbursements made by him.[1.2]

[1.1] Manzo v. Dullea (C. C. A. 2d) 96 F. (2d) 135, 116 A.L.R. 1241.
Annotation: 116 A.L.R. 1244.

[1.2] Manzo v. Dullea (C. C. A. 2d) 96 F. (2d) 135, 116 A.L.R. 1241.
Annotation: 116 A.L.R. 1245.

§ 207. Division of Compensation between Attorneys Contributing Services.

Forms: 1 Am Jur Legal Forms 1:1910, 1:1911; 2 Am Jur Pl & Pr Forms 2:1231, 2:1233.

Am Jur quoted in Glover v Maddox, 98 Ga App 548, 106 SE2d 288.

McCann v Todd, 203 La 631, 14 So 2d 469.

p. 386, n. 2. Anno: 73 ALR2d 993.

p. 386, n. 3. Carson v McMahan, 215 Or 38, 332 P2d 84, 73 ALR2d 981.
Anno: 73 ALR2d 993.

p. 387, n. 4. Anno: 73 ALR2d 998, 1001.

Page 387. *Add following note* 4: It has been held that where an attorney, after doing considerable work for his client, found it necessary to bring action in another jurisdiction and so sent his client to an attorney in such jurisdiction, the attorneys should share equally in the fee,[4.5] but where an attorney sent a claim for collection by attorneys in another jurisdiction, evidence has been held admissible to show a custom for a different proportionate division of compensation under such circumstances.[4.51] An attorney who "volunteers" his services to attorneys handling a legal matter is not entitled to have the attorney fees divided so that he may have a portion of them.[4.52] The rule that co-operating attorneys should share equally in the division of fees or compensation received, where there is no contract to the contrary, has been applied, notwithstanding the services performed by the respective attorneys were not equal,[4.53] but the circumstances may be such that the fees to co-operating attorneys should be apportioned on a quantum meruit basis.[4.54] Whether the representative of a deceased attorney who had co-operated with another attorney in the conduct of legal matters before his death should share in the compensation on an equal basis with the surviving attorney depends upon the circumstances present.[4.55] It has been held, under the circumstances considered, that where, after an attorney had assisted in the preparation of a case for trial, he was disbarred before trial, he forfeited all right to share in the fees received.[4.56]

[4.5] **Anno:** 73 ALR2d 992, 996.

[4.51] **Anno:** 73 ALR2d 996.

[4.52] **Anno:** 73 ALR2d 997.

[4.53] **Anno:** 73 ALR2d 998.

[4.54] **Anno:** 73 ALR2d 998.

[4.55] **Anno:** 73 ALR2d 1000.
It has been held that where, after recovery in a case in which the plaintiff's attorneys had co-operated in the trial, one of the attorneys died and the others obtained an affirmance on appeal, the attorneys were joint adventurers, and that the fee should be divided equally between the surviving attorneys and the estate of the decedent. Senneff v Healy, 155 Iowa 82, 135 NW 27, 39 LRA NS 219.

[4.56] Davenport v Waggoner, 49 SD 592, 207 NW 972, 45 ALR 1126.
Anno: 73 ALR2d 1000.

p. 387, n. 5. Anno: 55 ALR2d 1404; 78 ALR2d 289.

A law partnership agreement providing that upon the retirement of a partner or upon his death (the others continuing the business), the retiring partner, of his estate in case of his death, should, in addition to his percentage of net profits of the firm received by it in cash up to the date of such death or retirement, also receive the same percentage of net profits of the firm received by it in cash until the expiration of the 18 calendar months next after such retirement or death, has been recognized as enforceable. McClennen v Commissioner (CA1st) 131 F2d 165, 144 ALR 1127.

As to division of fees in bankruptcy cases, see 6 Am Jur 1514, BANKRUPTCY, § 1694.

A withdrawing law partner has been held entitled to an accounting of his share of net profits, notwithstanding a clause of the partnership agreement for an estimate of such net profits by a designated member of the partnership, where the firm has declined to comply with such clause. Jackson v Hunt, Hill & Betts, 7 NY2d 180, 196 NYS2d 647, 164 NE2d 681, 78 ALR2d 272.

That fees which have been earned by a law partnership at the time of the withdrawal of a member thereof have not been paid to the partnership at that time has been held not to preclude the withdrawing partner's right of participation therein under a partnership agreement which provides for payment to a withdrawing partner of his share of the "net profits," where such construction is in accord with the language and structure of the partnership agreement as a whole. Jackson v Hunt, Hill & Betts 7 NY2d 180, 196 NYS2d 647, 164 NE2d 681, 78 ALR2d 272.

p. 387, n. 6. Anno: 78 ALR2d 290.

Page 387. *Add following note* 7: In a few cases in which a partner withdrew from a law firm, it has been held that the remaining partners were entitled to recover compensation for services rendered in finishing the business on hand at the time of withdrawal.[7.5]

[7.5] **Anno:** 78 ALR2d 292.

Page 387. *Add a new paragraph at end of section:* As to attorneys who are "associated in practice," that is, those who share a suite of offices, or adjoining offices, and who, ordinarily, share in such expenses as office rent, the cost of a stenographer, the cost of a library, etc., without being formal partners, in instances in which the evidence established that a fiduciary or trust relationship existed between persons associated in the practice of law, or that the parties were engaged in a joint venture, an accounting has been allowed or has been recognized as proper.[9.5] An accounting between persons associated in the practice of law has been denied where the evidence failed to establish a special partnership creating a fiduciary relationship and the plaintiff was found to have an adequate remedy at law.[9.51]

9.5 **Anno:** 81 ALR2d 1420.

Record in action by an attorney against another attorney with whom he had been associated in the practice of law without a formal partnership, has been held to establish a confidential or fiduciary relationship between the parties and a right to an accounting, in view of the defendant's possession of the books of account, of undisputed evidence of a working agreement between the parties as to some phases of their law practice, and of the defendant's admission of some liability on his part. Whittle v Ellis (Fla App) 122 So 237, 81 ALR 2d 1415.

9.52 Willis v Crawford, 38 Or 522, 63 P 985, 64 P 866, 53 LRA 904.

Anno: 81 ALR2d 1423.

§ 208. Generally.

Forms: 2 Am Jur Pl & Pr Forms 2:1292.

Am Jur cited in Akers v. Akers, 233 Minn 133, 46 NW2d 87.

Re Washington Square Slum Clearance, 5 NY2d 300, 184 NYS2d 585, 157 NE2d 587.

Crawford v Crane, 204 Or 60. 282 P2d 348.

Purman's Estate. 358 Pa 187. 56 A2d 86. 175 ALR 1129.

p. 387, n. 10. Smyth v. Fidelity & D. Co. 326 Pa. 391. 192 A. 640. 111 A.L.R. 481.

Page 388. *Add new paragraph at end of section:* Obviously, whether a statute relating to attorneys' liens supplants and abolishes the common law or equitable liens previously enjoyed by attorneys, or supplements and extends them, or affords a cumulative remedy depends upon the intent of the legislature and the terms in which they have expressed that intent. Generally where the statute purports to cover the entire field of attorneys' liens it is regarded as governing the whole matter to the exclusion of common law or equitable liens.[16.5] However, statutes which relate only to the charging lien do not affect the common-law retaining lien.[16.6]

16.5 **Anno:** 120 ALR 1245.

16.6 **Anno:** 120 ALR 1247.

§ 209. Generally.

Forms: 1 Am Jur Legal Forms 1:1912; 2 Am Jur Pl & Pr Forms 2:1287, 2:1289–1:1290.

Am Jur quoted in Morse v. Eighth Judicial District Ct. 65 Nev 275. 195 P2d 199. 3 ALR2d 136.

Am Jur cited in Bolling v. Bowen (CCA 4th) 118 F(2d) 59.

Davidson v Collier, 104 Ga App 546, 122 SE 2d 465.

Orr v. Mutual Ben. Health & Acci. Asso. 240 Mo App 236. 207 SW2d 511.

Morse v. Eighth Judicial District Ct. 65 Nev 275, 195 P2d 199, 3 ALR2d 136

Crawford v Crane, 204 Or 60, 282 P2d 348.

King v Beale. 198 Va 802. 96 SE2d 765

Capehart v. Church. 136 W Va 929. 69 SE2d 127

RCL cited in Edwards County v Simmons. 159 Kan 41. 151 P2d 960

p. 388, n. 18. King v Beale, 198 Va 802, 96 SE2d 765. 63 ALR2d 746.

Page 388. *Add, following note* 18: It is distinct from the attorney's common-law general retaining lien.[18.5]

18.5 Morse v. Eighth Judicial Dist. Court, 65 Nev 275, 95 P2d 199, 3 ALR2d 136.

p. 388, n. 19.

An attorney's general or retaining lien has its roots in the common law, is founded on general principles of justice, does not depend upon an express agreement, and is effectuated through the exercise of the inherent power of courts over the relation between attorneys and their clients. Norreil v. Chasan, 125 NJ Eq 230. 4 A(2d) 88, 120 ALR 1238.

p 388, n 20. Morse v. Eighth Judicial Dist. Court, 65 Nev 275, 195 P2d 199, 3 ALR2d 136.

Smyth v. Fidelity & D. Co. 326 Pa 391. 192 A 640. 111 ALR 481.

Page 388. *Add new paragraph at end of section:* But the rule that protects the retaining lien of an attorney against a requirement to produce the papers on subpoena duces tecum does not apply where the subpoena is issued in an action brought by him to recover fees for his services, so as to entitle him to refuse to produce records and papers which reflect the nature of the services rendered and the amount of time expended.[3.4]

An attorney having a lien on papers of a former client, which were in his possession has been held not to be bound to produce them on a subpoena duces tecum issued on behalf of a former client.[3.5]

Application for a summary order has been recognized as a proper method of procedure for a client endeavoring to secure the delivery of papers or documents in the possession of his attorney, or former attorney, and upon which the attorney has a retaining lien.[3.51]

3.4 Ross v Wells, 6 Ill App 2d 304. 127 NE2d 519.

3.5 **Anno:** 3 ALR2d 154.

3.51 Re Niagara, L. & O. Power Co., 203 NY 493, 97 NE 33, 38 LRA NS 207, Ann Cas 1913B 234 (in which it was held that one not employing an attorney could not secure a summary order for delivery by the attorney of papers upon which the attorney had a lien for services, by offering to pay what was due the attorney under an employment by another litigant).

Anno: 3 ALR2d 154.

On summary motion in pending litigation for substitution of attorneys for cause and for release of the attorneys' claims for liens and an order for the return of papers, documents, and records in their possession, the court may refuse to hear and determine issues concerning the attorneys right to fees for past services rendered. for which they have instituted independent suit. Morse v Eighth Judicial Dist. Court. 65 Nev 275, 195 P2d 199. 3 ALR2d 136

§ 210. Property to Which Lien Attaches.

Am Jur cited in Akers v. Akers, 233 Minn 133. 46 NW2d 87

Hayes v. Parker, 177 Va 70, 12 SE2d 750.

p. 388, n. 4. Morse v. Eighth Judicial Dist. Court. 65 Nev 275. 195 P2d 199. 3 ALR2d 136.

Smyth v. Fidelity & D. Co. 326 Pa 391. 192 A 640. 111 ALR 481.

An attorney's general or retaining lien, unless excluded by special contract or inconsistent with the particular service, attaches to all papers, books, documents, securities, moneys, and property of the client coming into the possession of the attorney in the course of and with reference to his professional employment, and confers the right to retain possession thereof until the general balance due him for legal services as well as costs and disbursements shall have been paid. Norrell v. Chasan, 125 NJ Eq 230, 4 A(2d) 88, 120 ALR 1238.

An attorney's general or retaining lien is not limited to the moneys due in the particular cause out of which possession of the property came, but embraces all such indebtedness arising out of other matters in which the professional relation existed between his client and himself. Norrell v. Chasan, 125 NJ Eq 230 4 A(2d) 88, 120 ALR 1238.

§ 211. — Money Collected by Attorney.

Page 389. *Add, following note* 17: And one attorney collecting moneys for a client must honor the retaining lien of his co-counsel in the matter when he has notice that co-counsel deems such a lien to exist.[17.5]

[17.5] **Jones v. Miller (CA3d Pa) 203 F2d 131** (holding that an attorney who is informed by his cocounsel in a matter that the cocounsel has a retaining lien on funds coming into the attorney's hands, the lien representing his fee, and the attorney nevertheless turns over the entire amount collected to the client, he is liable to cocounsel to the extent that he held funds that could have been applied on the lien).

§ 212. — Property Not Affected.

Am Jur cited in Akers v. Akers, 233 Minn 133, 46 NW2d 87.

Severns v. Boylan, 75 Ohio App 15, 60 NE2d 521.

p. 390, n. 7.

In a few American cases there is authority to the effect that a client or his succeeding attorney has the right to the production or inspection of papers or documents on which his former attorney has a retaining lien, under certain circumstances, even though security is not required. **Anno:** 3 ALR2d 152.

In a number of English cases the view has been taken that during such retention the client or his succeeding attorney might require the production of the papers thus retained, provided only a particular suit was in progress and the papers pertained to that suit. **Anno:** 3 ALR2d 152.

Where the client needed the papers in his defense to a charge of murder, a capital offense, it has been held that the client was entitled to the production of the papers, notwithstanding the existence of a retaining lien. **Anno:** 3 ALR 2d 153.

§ 213. Services and Compensation Covered by Lien.

Forms: 2 Am Jur Pl & Pr Forms 2:1290.

Am Jur cited in Re Dungeness Timber Co. (DC) 50 F Supp 370.

Greek Catholic Union v. Russin, 340 Pa 295, 17 A2d 402.

p 390, notes 10, 11. Morse v. Eight Judicial Dist. Court, 65 Nev 275, 195 P2d 199, 3 ALR2d 136.

§ 214. Notice of Lien.

Forms: 1 Am Jur Legal Forms 1:1913–1:1916.

§ 216. Waiver or Loss of Lien.

Forms: 1 Am Jur Legal Forms 1:1917, 1:1918.

Page 391. *Add, following note* 18: Since the ultimate purpose of an attorney's retaining lien being to assist the attorney in procuring the amount due from his client, the client may of course require delivery of the papers or documents on which the attorney has a retaining lien, by payment of his indebtedness to the attorney.[18.5]

[18.5] **McPherson v. Cox, 96 US 404, 24 L ed** 746.

Anno 3 ALR2d 159.

p 391 n 19. Anno: 3 ALR2d 159.

p 391, n 20. Anno: 3 ALR2d 159.

Page 391. *Add new paragraph at end of section:* Where an attorney and his client were at issue as to whether anything was due the attorney for services, it has been said that if the attorney failed to bring suit for his services within a time to be limited, or if then should fail to prosecute it diligently, he would be ordered to give up his asserted lien on the papers in his hands.[6.5]

[6.5] **Anno:** 3 ALR2d 154.

§ 217. — Loss of Possession.

Forms: 2 Am Jur Pl & Pr Forms 2:1289.

p. 391, n. 7. Norrell v Chasan, 125 NJ Eq 230 4 A(2d) 88, 120 ALR 1238

King v Beale, 198 Va 802, 96 SE2d 765, 63 ALR2d 746.

Page 391. *Add new paragraph following note* 10: The majority of the cases in which the question has arisen have taken the view that a client may require the delivery of papers or documents held by his attorney under a retaining lien upon the furnishing of adequate bond or other security.[10.5]

[10.5] **Morse v. Eighth Judicial Dist. Court, 65** Nev 275, 195 P2d 199, 3 ALR2d 136.

Re Niagara, L. & O. Power Co. 203 NY 493, 97 NE 33, 38 LRA NS 207, Ann Cas 1913B 234.

Anno: 3 ALR2d 155.

It has been pointed out in some instances that the purpose of the lien is to secure payment, and that, though the lien is surrendered, payment is nevertheless insured, or, even further, that the attorney is benefited by the substitution of the security for the lien, since the lien itself is only passive, and so not enforceable, while the security is enforceable. **Anno:** 3 ALR2d 155.

p 391, n 11. Anno: 3 ALR2d 156.

But see Morse v. Eighth Judicial Dist. Court, 65 Nev 275, 195 P2d 199, 3 ALR2d 136, in which it is said that the advantage of an attorney's general retaining lien is the possibility of forcing the client to settle because of embarrassment and inconvenience caused by the attorney's retention of the papers.

§ 218. Enforcement of Lien.

Am Jur cited in Morse v. Eighth Judicial District Ct. 65 Nev 275, 195 P2d 199, 3 ALR2d 136.

Crawford v Crane, 204 Or 60, 282 P2d 348.

p. 392, n. 13. Hoxsey v. Hoffpauir (CA5th Tex) 180 F2d 84, cert den 339 US 953, 94 L ed 1366, 70 S Ct 841.

Morse v. Eighth Judicial Dist. Court, 65 Nev 275, 195 P2d 199, 3 ALR2d 136.

Smyth v. Fidelity & D. Co. 326 Pa 391, 192 A 640, 111 ALR 481.

Annotation: 111 A.L.R. 487.

Page 392. *Add, following note* 13: Applying the rule that an attorney's retaining lien cannot be actively enforced, courts have held that such a lien does not include the power to sell the subject thereof[13.1] and have refused the attorney any right of action on the debt represented by the papers which he holds.[13.11]

[13.1] **Smyth v. Fidelity & D. Co. 326 Pa. 391,** 192 A. 640, 111 A.L.R. 481 (holding that a general statute permitting lienors to sell the subjects of their liens did not extend to attorneys' retaining liens.

Annotation: 111 A.L.R. 488.

[13.11] Annotation: 111 A.L.R. 488.

Page 392. *Add, following note* 14: Generally, the only advantage which the attorney gains from his retaining lien is the possibility of forcing his client to settle because of the embarrassment, inconvenience, or worry which is caused the client by the attorney's asserting the lien.[14.1] Recognizing this advantage, courts usually refuse to relieve a client by compelling the attorney to permit inspection of, or to produce, the subject of the lien without settlement of the amount due him.[14.11]

[14.1] Annotation: 111 A.L.R. 487.

[14.11] Annotation: 111 A.L.R. 489.

When served with a subpœna duces tecum, an attorney who fails, at the instance of his former client, to produce in court papers in his possession under a retaining lien is not guilty of contempt of court. Annotation: 111 A.L.R. 489.

Page 392. *Add, following note* 15: A statutory lien which supersedes the common-law retaining lien is similar in its nature, and it has been held that such a lien is not actively enforceable in the absence of express provision in that regard.[15.1]

[15.1] Annotation: 111 A.L.R. 491.
p. 392, n. 16. Annotation: 111 A.L.R. 492.

§ 219. Generally.

Forms: 2 Am Jur Pl & Pr Forms 2:1241.

Am Jur cited in Chancey v. Bauer (C. C. A. 5th) 97 F. (2d) 293, rehearing denied in (C. C. A. 5th) 97 F. (2d) 994 (notes 17, 18).

United States v Jacobs (DC Md) 187 F Supp 630, affd (CA4) 298 F2d 469.

Billingham v Thiele (Fla App) 107 So 2d 238, cert discharged (Fla) 109 So 2d 763.

Spethman v. Holeldt. 141 Neb 83, 2 NW(2d) 620.

Crawford v Crane, 204 Or 60, 282 P2d 348.

Capehart v. Church. 136 W Va 929, 69 SE2d 127.

Liberty v. Liberty, 226 Wis 136, 276 NW 121 (notes 17–2).

RCL cited in Knabb v. Mabry, 137 Fla 530, 188 So 586.

p. 392, n 17. Norrell v. Chasan, 125 NJ Eq 230, 4 A(2d) 88, 120 ALR 1238; Smyth v. Fidelity & D. Co. 326 Pa 391, 192 A 640, 111 ALR 481

p. 392, n. 18. Smyth v. Fidelity & D. Co. 326 Pa. 391, 192 A. 640, 111 A.L.R. 481.

An attorney's special or charging lien is one which arises in favor of the attorney for his bill of costs and compensation for his services for procuring the judgment, decree, or award to which it attaches. Norrell v. Chasan, 125 NJ Eq 230 4 A(2d) 88, 120 ALR 1238.

p. 392, n. 19. Morse v. Eighth Judicial Dist. Court, 65 Nev 275, 195 P2d 199, 3 ALR2d 136.

p. 392, n. 1. Morse v. Eighth Judicial Dist. Court, 65 Nev 275, 195 P2d 199, 3 ALR2d 136.

Page 393. *Add, following note* 4: A statute giving an attorney a lien upon the client's cause of action or counterclaim which attaches to a verdict, report, decision, or judgment has reference and applies entirely to a special charging lien, in no way affecting the attorney's common-law retaining lien.[4.5]

[4.5] Morse v. Eighth Judicial Dist. Court. 65 Nev 275. 195 P2d 199. 3 ALR2d 136.

§ 220. Purpose and Basis of Lien

Am Jur cited in Hanna Paint Mfg. Co. v Rodey, Dickason, Sloan, Akin & Robb (CA10 NM) 298 F2d 371.

p. 393, n. 5.

It may be observed that in England at common law a solicitor has two rights which are termed liens—the first being the right to retain property already in his possession until he shall have been paid costs due to him in his professional capacity and the second being a right to ask the court to direct that personal property recovered under a judgment obtained by his exertions stand as security for his costs of such recovery—and that in addition he has by statute a right to apply to the court for a charging order on real or personal property recovered or preserved through his instrumentality in respect of his taxed costs of the suit, matter, or proceeding prosecuted or defended by him. **Anno:** 120 ALR 1244.

p. 393. n. 6 **Anno:** 120 ALR 1244

p. 393, n. 7. Unger v Checker Taxi Co. 30 Ill App 2d 238, 174 NE2d 219, 85 ALR2d 856.
Anno: 120 ALR 1244.

Page 393. *Add, following note* 8: Such a statute being remedial in character, is to be liberally construed.[8.5]

[8.5] Slayton v. Russ. 205 Ark 474, 169 SW(2d) 571, 146 ALR 64.

Page 393. *Add, following note* 10: Statutory provisions which prescribe the conditions under which, or the mode by which, an attorney may secure a charging lien, whether contained in statutes which purport to cover the entire field of attorneys' liens or which relate only to charging liens, are generally held to prevent the attaching of liens of this class except where the statutory conditions exist and the statutory mode is pursued.[10.1]

[10.1] Unger v Checker Taxi Co. 30 Ill App 2d 238, 174 NE2d 219, 85 ALR2d 856.
Annot 120 ALR 1248.

p. 393, n. 11.

An attorney has no lien on real property which was conveyed to him and the opposing counsel, not for the benefit of counsel but in trust for their respective clients, with the understanding that the two attorneys would reconvey the property to one of the clients as soon as a certain agreement could be carried out. Ashman v Shecter, 196 Md 168, 76 A2d 139

p. 394, n. 12. Unger v Checker Taxi Co. 30 Ill App 2d 238, 174 NE2d 219, 85 ALR2d 856.

Myers v Miller, 134 Neb 824, 279 NW 778, 117 ALR 977.

Norrell v. Chasan, 125 NJ Eq 230, 4 A(2d) 88, 120 ALR 1238.

The object of a special or charging lien is to protect the claim of an attorney by equitable interference of the court and to secure to him payment of just charges out of the fruits of his own labor. Myers v. Miller. 134 Neb. 824. 279 N. W. 778, 117 A.L.R. 977.

p. 394, n. 13. Purman's Estate. 358 Pa 187 56 A2d 86. 175 ALR 1129.

§ 221. Agreement Creating Lien.

Am Jur cited in Camp v Park. 226 Ark 1026. 295 SW2d 613.

Neighbors & Danielson v West Nebraska Methodist Hospital. — Neb —, 77 NW2d 667.

Tuttle v Wyman 149 Neb 769. 32 NW2d 742.

p. 394, n. 17. Fifield Manor (Corp.) v Finston, 54 Cal 2d 632. 7 Cal Rptr 377, 354 P2d 1073, 78 ALR2d 813.

Page 394. *Add, following note* 17: The question whether an attorney's contingent-fee contract will give rise to an equitable lien in his favor on the fund recovered through his efforts is one of construction of the particular contract.[17.5]

[17.5] **Anno:** 143 ALR 206.

The basic question in such cases is whether, in the absence of an express provision for a lien, an intent that the fund recovered shall stand as security for payment of the fee sufficiently appears by implication. **Anno:** 143 ALR 206.

Page 394. *Add, following note* 19: Even where the agreement is merely that the attorney shall receive for his services a specified per cent of the amount recovered for the client the effect may be to give the attorney an equitable assignment or lien if in view of all the circumstances of the case, including the conduct of the parties and any declarations made by them in construction of their agreement, it is to be concluded that their understanding was that the attorney should have an interest in or charge on the fund recovered.[19.51]

[19.51] **Anno:** 143 ALR 207.
See Button v. Anderson, 112 Vt 531. 28 A (2d) 404, 143 ALR 195.

Page 395. *Add, following note* 3: It has repeatedly been held that if the client's cause of action is nonassignable, the attorney's contingent-fee contract can give him no lien on the cause of action.[3.51] However, the ordinary contingent-fee contract seems to contemplate, at most, a lien on the fund recovered when it comes into existence, and is not to be construed as intended to give an interest in or lien on the cause of action itself.[3.52] Attorney's contingent-fee contracts are frequently construed as creating equitable liens on funds recovered by settlement or otherwise.[3.53] However, there seems to be no reason why an attorney's contingent-fee contract may not result in an equitable lien on the client's cause of action if the cause of action is assignable in character and it sufficiently appears from the contract that such a lien was contemplated.[3.55] The cases are not in complete agreement as to what language of a lawyer's contingent-fee contract will, under particular circumstances, create in his favor an equitable lien upon the fund recovered for his client. Some of the older cases, especially, have strongly emphasized the idea that the lien does not arise except where the intent to give it distinctly appears. However, most of the cases hold, or recognize, that the contract will give the attorney an equitable lien on the fund recovered where from the terms thereof construed in the light of the attending circumstances, it is in any manner to be implied that the fund shall be charged with payment of the fee.[3.56] Some courts have stressed the idea that an equitable lien arises in favor of the attorney where the terms of his contract, through necessary implication or otherwise, show a distinct appropriation of the prospective fund to the payment of the fee. Conversely, the view has been taken that the contingent-fee contract does not create an equitable lien on the fund recovered where the terms of the contract do not show a distinct appropriation of the fund to the payment of the fee. It is, however, difficult to say that the use of certain contractual phrases or forms of expression, or the omission to use them, is alone determinative of the right to a lien, since the contract as a whole and all the circumstances of the case are to be looked to for the purpose of determining its proper construction.[3.57] It may be stated, generally, that a "mere" contingent-fee contract, that is, one which while providing for a fixed or proportional contingent fee contains no other provision or language indicating, either alone or in the light of the particular circumstances, an intent that the fund recovered shall constitute security for payment of the fee, is not sufficient to create an equitable lien.[3.58] Ordinarily, at least, an agreement which, in substance, is one to pay to the attorney a part of the very fund recovered creates an equitable lien in his favor.[3.59] But words to the effect that the client agrees to pay a part of the fund recovered to the attorney do not create an equitable lien where from the contract as a whole and the accompanying circumstances it does not appear that the fund was to stand as security for the fee.[3.6] The majority of the cases dealing with the effect of an agreement "to pay" a lawyer's contingent fee "from," or "out of," the proceeds of the litigation support the proposition that a stipulation in that form is at least some indication of an intent which will give rise to an equitable lien, if not to an equitable assignment.[3.61] But some cases have taken the view that a mere promise to pay a contingent fee out of the amount recovered does not afford a basis for an equitable lien.[3.62] Ordinarily, where the language is, in substance, that the client will pay "an amount equal to" a specified percentage or fraction of the recovery, no lien is created.[3.63] Usually, an agreement that the attorney shall "have," or "receive," or "retain" for his contingent fee a part of the very fund recovered, or other agreement of like substance, leaves little doubt that, at the least, an equitable lien is created in his favor.[3.64] An agreement that the attorney shall "have" or "receive" a contingent fee "from" or "out of" the fund recovered usually creates an equitable lien thereon.[3.65] But there is reason to suppose that an agreement specifying that an attorney shall receive for his compensation a certain fraction or percentage of "the amount" of the claim recovered, or words of like import, will in many cases be regarded as, on its face, a mere agreement fixing the amount of the compensation and conditioning liability for its payment.[3.66]

In a number of cases the provisions of contingent fee contracts between attorneys and persons claiming a share in a decedent's estate, as well as the surrounding circumstances, have been such as to cause the courts to conclude that an equitable lien was created to protect the attorney's right to his compensation.[3.67] However, the contingent fee contracts in other cases involving a share in a decedent's estate have been held not to create an equitable lien in favor of the attorneys.[3.68]

[3.51] **Anno:** 143 ALR 207.

The importance of this point often appears where, without the concurrence of plaintiff's attorney, the parties to the action settle it before judgment. **Anno:** 143 ALR 207.

[3.52] **Anno:** 143 ALR 207.

On principle, there seems to be no difficulty in allowing the intended lien on the recovered fund, notwithstanding the cause of action (as in case of a personal tort) was not assignable. **Anno:** 143 ALR 207.

In Button v. Anderson, 112 Vt 531, 28 A(2d) 404, 143 ALR 195, it was held that the provision of the Federal statute invalidating transfers or assignments of claims against the United States did not prevent an attorneys' contingent-fee contract from giving rise to an equitable lien in their favor upon money which had been paid out by the United States.

[3.53] **Anno:** 143 ALR 208.

The assumption of the cases generally seems to be that a lien on the client's cause of action itself is not ordinarily to be implied. **Anno:** 143 ALR 208.

[3.55] **Anno:** 143 ALR 209.

Apparently the true point of most of the cases is that an implied stipulation for a lien on the fund recovered does not touch the cause of action. **Anno:** 143 ALR 209.

[3.56] Ingersoll v. Coram, 211 US 335, 53 L ed 208, 29 S Ct 92 (where there is a distinct appropriation of the fund, or the terms of the agreement show that it was intended that the fund should stand as security for the fee); Nutt v. Knut, 200 US 12, 50 L ed 348, 26 S Ct 216; Porter v. White, 127 US 235, 32 L ed 112, 8 S Ct 1217; Peugh v. Porter, 112 US 737 28 L ed 859, 5 S Ct 361 (holding, however that there is no lien on the fund recovered where there was no agreement that the attorney should be paid out of it); Wright v. Ellison, 1 Wall. (US) 16, 17 L ed 555 (conceding that an equitable lien arises where the attorney's employment contract shows a distinct appropriation of the fund to be recovered); Wylie v. Coxe, 15 How (US) 415, 14 L ed 753; Nichols v. Orr, 63 Colo 333, 166 P 561, 2 ALR 449 (where it is agreed that attorney shall receive specified percentage of the amount recovered); De Winter v. Thomas, 34 App DC 80, 27 LRA (NS) 634 (writ of certiorari denied in 215 US 609, 54 L ed 347, 30 S Ct 411) (where agreement shows intent that fund should stand as security for the fee); Costigan v. Stewart, 76 Kan 353, 91 P 83, 11 LRA(NS) 630 (where it is agreed that the attorney shall be paid a specified fraction of the amount recovered); Fairbanks v. Sargent, 117 NY 320, 22 NE 1039, 6 LRA 475 (an equitable assignment results pro tanto where it was agreed that the attorney should have a specified fraction of whatever amount should be recovered): Fairbanks v. Sargent, 104 NY 108, 9 NE 870, 58 Am Rep 490 (where it was agreed that the attorney should have a specified fraction of whatever amount should be recovered); Coughlin v. New York C. & H. R. R. Co. 71 NY 443, 27 Am Rep 75 (intimating that a lien attaches to the fund when it comes into existence if it was agreed that the attorney should receive his compensation from the fund); High Point Casket Co. v. Wheeler, 182 NC 459, 109 SE 378, 19 ALR 391 (agreement that attorney should have specified fraction of any recovery amounted to an assignment pro tanto of the judgment recovered). Button v. Anderson, 112 Vt 531, 28 A(2d) 404, 143 ALR 195.

Anno: 143 ALR 209.

3.57 **Anno:** 143 ALR 212.

3.58 **Anno:** 143 ALR 214.

An equitable lien in favor of attorneys on the amount recovered for and collected by the state is created by an agreement whereby the attorneys, in consideration of a fee equal to 25 per cent of whatever sum of money or evidence of debt shall be awarded to the state, agreed to prosecute a claim of the state against the Federal Government, the inference that the attorneys look to the fund for payment rather than the mere contractual obligation of the state, dependent for its fulfilment upon legislative action, being a natural inference from their assumed knowledge that the governor can make no general promise of payment which can be fulfilled without an appropriation. Button v. Anderson, 112 Vt 531, 28 A(2d) 404, 143 ALR 195.

3.59 **Anno:** 143 ALR 216.

3.6 **Anno:** 143 ALR 217.

3.61 **Anno:** 143 ALR 218.

3.62 **Anno:** 143 ALR 219.

3.63 **Anno:** 143 ALR 220.

But see Button v. Anderson, 112 Vt 531, 28 A(2d) 404, 143 ALR 195.

3.64 Barnes v. Alexander, 232 US 117, 68 L ed 530, 34 S Ct 276; Nichols v. Orr, 63 Colo 333, 166 P 561, 2 ALR 449 (equitable assignment pro tanto); Chattanooga Sewer Pipe Works v. Dumler, 153 Miss 276, 120 So 450, 62 ALR 999; High Point Casket Co. v. Wheeler, 182 NC 459, 109 SE 378, 19 ALR 391 (an agreement that the attorney should "have" specified fraction of "any recovery" held to create an equitable assignment pro tanto).

Anno: 143 ALR 220.

3.65 **Anno:** 143 ALR 224.

3.66 **Anno:** 143 ALR 225.

3.67 **Anno:** 175 ALR 1142.

Under a contract by certain of the next of kin employing an attorney to contest a will, fixing the fee at a stated amount to be paid in case the will was defeated, but providing that as to the contracting heir there was to be no personal obligation in the event the suit was unsuccessful and that in no event should such heir be "obligated except to pay such fee out of the funds secured from the estate," an equitable lien against the respective shares to which the heirs became entitled by reason of the successful outcome of the will contest attaches in favor of the attorney, to the extent of the fee stipulated. Ingersoll v Coram, 211 US 335, 53 L ed 208, 29 S Ct 92.

An equitable lien was held to arise in a Florida case, even though there was no contingent fee contract for the payment of a percentage of the recovery as the attorney's fee. Thus, where an attorney was employed by a widow for the purpose of and was successful in procuring for her a child's part in the estate of her husband, under an agreement with her that the attorney would of necessity have to be paid out of and from any and all property obtained by her for his services in securing such part, it was held in Scott v. Kirtley, 113 Fla 637, 152 So 721, 93 ALR 661, that the attorney was entitled to an equitable lien on the property recovered for reasonable compensation for his services, even though there was no agreement as to the amount of the compensation that should be paid, nor any express agreement as to any lien that the attorney should have to secure the same.

3.68 **Anno:** 175 ALR 1144.

In De Winter v. Thomas, 34 App DC 80, 27 LRA NS 634, cert den 215 US 609, 54 L ed 347, 30 S Ct 411, where it appeared that a legatee agreed to pay to her attorney, contingent upon success, "15 per centum of the sum of money, and a sum equal to 15 per centum of the market value of any other property received by her under the distribution or compromise," it was held that no equitable lien in favor of the attorney arose with respect to the fund distributed to the legatee under the will.

§ 222. Extent of Lien; Taxable Costs.

Am Jur cited in Spethman v. Hofeldt, 141 Neb 83, 2 NW(2d) 620.

p. 395, n. 6. The basis of recovery by an attorney availing himself of the statutory remedy by motion to have a reasonable fee fixed where the parties have settled the action without his consent is the quantum meruit for the services actually rendered. Slayton v. Russ, 205 Ark 474, 169 SW(2d) 571, 146 ALR 64.

§ 223. Limitation of Lien to Services in Suit Wherein Judgment Is Had.

Am. Jur. cited in Chancey v. Bauer (C. C. A. 5th) 97 F. (2d) 293, rehearing denied in (C. C. A. 5th) 97 F. (2d) 994 (notes 10, 13).

Billingham v Thiele (Fla App) 107 So 2d 238, cert discharged (Fla) 109 So 2d 763.

p. 395, n. 10. Morse v. Eighth Judicial Dist. Court, 65 Nev 275, 195 P2d 199, 3 ALR2d 136.

p. 396, n. 14. An attorney who has perfected a lien under the Illinois Attorney's Lien Act, but who is refused the right by the client to participate in the prosecution of the claim, has been held not to be deprived of his right or interest because he is not the attorney of record in the suit brought to recover on the client's claim. Peresipka v Elgin, J. & E. R. Co. (CA7 Ind) 231 F2d 268, 59 ALR2d 554.

§ 224. Lien for Successful Defense of Suit or Right.

Am Jur cited in St. John the Baptist G. C. Church v. Gengor (NJ Eq) 195 A 817 (n. 18); St. John the Baptist Greek Catholic Church v. Gengor, 124 NJ Eq 449, 2 A(2d) 337 (n. 18).

RCL cited in Wessinger v. Sturkie (CCA 4th) 77 F(2d) 751.

p. 396, n. 18.

An attorney performing services in the management of real property, and attorneys who successfully conduct litigation to set aside a will under which the property would have gone into other hands, are without standing to claim equitable liens on the property for their services, relying on oral agreements with the owners, who were hopelessly insolvent, that they should have such liens, where, at the time of the agreements, part payment had already been made for the services, and the claims are only for balances owing thereon. Watson v. Hobson 401 Ill 191, 81 NE2d 885, 7 ALR2d 1156.

Oral agreements that a person performing services in the management of real property, and attorneys who have successfully contested a will under which the property would have gone into other hands, shall have liens on the property for the balances due them for their services, are invalid under the statute of frauds. Watson v. Hobson, 401 Ill 191, 81 NE2d 885, 7 ALR2d 1156.

An attorney hired to assist in maintaining a suit to quiet title to certain lands in the possession of complainants, does not have a lien on the subject matter of the suit, and the fact that the respondents file a cross bill seeking to sell the land for division among alleged joint owners does not operate to create such lien, since the Alabama statute does not give a lien to attorneys defending an action. Ex parte Clanahan, 261 Ala 87, 72 So2d 833, 50 ALR2d 134.

§ 225. Notice of Lien.

Am Jur cited in Todd v Mutual Factors, Inc. 3 App Div2d 537, 161 NYS2d 738, affd 4 NY2d 759, 172 NYS2d 169, 149 NE2d 94.

p. 397, n. 7. Anno: 85 ALR2d 860.

p. 397, n. 10. Anno: 85 ALR2d 860.

§ 226. — Sufficiency of Notice.

Forms: 2 Am Jur Pl & Pr Forms 2:1241.

p. 397, n. 11. Anno: 85 ALR2d 861–872.

A number of statutes expressly require that the notice of lien be in writing, and where no such provision appears, a question of statutory construction arises as to whether oral or other actual notice of claim of lien is sufficient, and it has been both affirmed and denied that such statutes contemplate notice in writing. **Anno:** 85 ALR2d 861.

p. 398, n. 13. Anno: 85 ALR2d 867.

p. 398, n. 15. Anno: 85 ALR2d 865.

An entry reading "notice of 50 percent ownership in the within judgment by virtue of oral assignment," made by an attorney who had secured the judgment has been held not sufficient to create a valid attorney's lien. Lundy v O'Connor, 246 Iowa 1231, 71 NW2d 589, 52 ALR2d 1380.

Page 398. *Add following note* 15: Filing by the attorney of a petition of intervention in the client's suit has been held sufficient notice.[15.5]

[15.5] **Anno:** 85 ALR2d 869.

p. 398, n. 16. Anno: 85 ALR2d 861–872.

It has been held that, under a statute requiring written notice of an attorney's lien on his client's claim against a third person to be served on the third person "by registered or certified mail," such lien may not be enforced against a third person to whom the notice is sent by ordinary mail, at least in the absence of an acknowledgment of the receipt of the notice. Unger v Checker Taxi Co. 30 Ill App 2d 238, 174 NE2d 219, 85 ALR2d 856.

§ 227. Priorities.

Forms: 2 Am Jur Pl & Pr Forms 2:1241.

Am Jur cited in Hanna Paint Mfg. Co. v Rodey, Dickason, Sloan, Akin & Robb (CA10 NM) 298 F2d 371.

Todd v Mutual Factors, Inc. 3 App Div 2d 537, 161 NYS2d 738, affd 4 NY2d 759, 172 NYS 2d 169, 149 NE2d 94; Lexow v Tremaine, 252 App Div 307, 299 NYS2d 412, affd 277 NY 657, 14 NE2d 207 (n. 7) (dissent op).

Page 398. *Add, as the first sentence in the section:* **The lien of an attorney upon a judgment, to the extent of his reasonable fee and disbursements, is paramount to any right of the parties to the suit.**[18.1]

[18.1] **Myers v. Miller, 134 Neb. 824, 279 N. W. 778, 117 A.L.R. 977.**

Page 398. *Add, following note 7:* Where an attorney for a property owner intervenes in a mechanic's lien action and files a notice of attorney's lien against his client's interest in real property involved therein, the attorney's lien attaches from the time of its filing and not from the commencement of the mechanic's lien action as against a mortgagee of the property joined in such action, who without notice has recorded his mortgage subsequent to the commencement of the mechanic's lien action but prior to the filing of the notice of the attorney's lien.[7.5]

[7.5] Axel Newman Heating & Plumbing Co. v. Sauers, 234 Minn 140, 47 NW2d 769

§ 228. — As between Lien and Set-off.

Am Jur cited in Block v. Gates (Mun Ct App Dist Col) 68 A2d 898.

p. 399, n. 11. Sheffield v. Preacher, 175 Ga 719, 165 SE 742, 84 ALR 1159.

p. 399, n. 13. La Fleur v. Schiff, 239 Minn 206, 58 NW2d 320.

§ 230. Waiver or Loss of Lien.

Am Jur cited in Todd v Mutual Factors, Inc. 3 App2d 537, 161 NYS2d 738, affd 4 NY2d 759, 172 NYS2d 169, 149 NE2d 94.

Page 400. *Add at end of section:* The discharge of an attorney by the client without good cause does not defeat a lien for attorneys' fees.[10.5]

[10.5] Peresipka v Elgin, J. & E. R. Co. (CA7 Ind) 231 F2d 268, 59 ALR2d 554.

§ 232. — Compromise or Settlement by Client.

Forms: 2 Am Jur Pl & Pr Forms 2:1243, 2:1254.

RCL quoted in Franklin v. Local Finance Co. 234 Mo App 973, 136 SW(2d) 112.

Page 401. *Add new paragraph at end of section:* Some statutes expressly provide, and others are so construed, that the lien of the attorney cannot be affected by any settlement between the parties without the consent of the attorney, whether before or after the recovery of a judgment.[1.5]

[1.5] **Anno:** 122 ALR 974.

The constitutionality of such statutes has been sometimes attacked on the ground that they deprive the parties of their right to contract and to settle their controversies out of court. But their validity is generally sustained on the theory that they do not have the effect of prohibiting the parties from effecting a peaceful settlement, but merely require them to have in view the attorney's lien, and satisfy the same from the proceeds of the settlement. St. Louis-San Francisco R. Co. v. Hurst, 198 Ark 546, 129 SW(2d) 970, 122 ALR 965 **Anno:** 122 ALR 975.

But the New York statute providing that "if, in an action commenced to recover damages for a personal injury or for death as the result of a personal injury, an attorney having or claiming to have a lien for services performed or to be performed who shall have appeared for the person or persons having or claiming to have a right of action for such injury or death, no settlement or adjustment of such action shall be valid, unless consented to in writing by such attorney and by the person or persons for whom he shall have appeared, or approved by an order of the court in which such action is brought," has been declared beyond the legislative power. **Anno:** 122 ALR 976.

§ 234. Cause of Action.

p. 402, n. 8.

At common law, apart from statute, an attorney's charging lien attaches to the judgment only, and does not embrace the cause of action itself. Norrell v. Chasan, 125 NJ Eq 230, 4 A(2d) 88, 120 ALR 1238.

§ 236. Judgments, Decrees, or Awards.

p. 403, n. 4. Peresipka v Elgin, J. & E. R. Co. (CA7 Ind) 231 F2d 268, 59 ALR2d 554.

p. 404, n. 8. Peresipka v Elgin, J. & E. R Co. (CA7 Ind) 231 F2d 268, 59 ALR2d 554.

§ 238. Property Recovered in Litigation.

Am Jur cited in Chancey v. Bauer (CCA 5th) 97 F(2d) 293, rehearing denied in (CCA 5th) 97 F2d 994.

Billingham v Thiele (Fla App) 107 So 2d 238, cert discharged (Fla) 109 So 2d 763.

Hagearty v. Ryan, 123 Conn 372, 195 A 730 (n. 13).

RCL quoted in Crutchfield v. Foster, 214 NC 551, 200 SE 395.

§ 239. Money and Funds.

Am Jur cited in Brotherton v. Stone, 197 Ga 74, 28 SE2d 467.

p. 406, n. 14. An attorney who was hired by the mother of an illegitimate child to prosecute a claim against father for support money for child, may make legitimate charge against fund recovered. State v Cosby (Okla) 285 P2d 210

§ 240. — Public Funds.

Am Jur cited in Com. v. Gerlach, 347 Pa 385, 32 A(2d) 410

p. 406, n. 10. Peresipka v Elgin, J. & E. R. Co. (CA7 Ind) 231 F2d 268, 59 ALR2d 554.

p. 407, n. 18.

Where an overpayment of social security taxes was refunded to a client with the agreement that

he would immediately return the check to the government for application against an income tax claim, the client's attorney had no lien on the refund. Lyman v. Campbell, 87 App DC 44, 182 F2d 700.

§ 240.5. (New text) Share or Interest in Decedent's Estate, or in Trust.

The right of an attorney to a nonstatutory lien on his client's share in a decedent's estate usually must be determined under the individual facts or contractual provisions involved.[1] So where a testator bequeathed his entire estate to a daughter and son, and expressly excluded his widow under the will, and, after the widow elected to take against the will, the daughter orally employed one attorney to represent her interests, and employed an additional attorney under a written agreement that he should receive a stated percentage "of all that is received or recovered by suit or settlement" after payment of fees to the first attorney, it has been held that neither attorney had a charging lien to protect them after the widow and daughter entered into a private settlement of their differences without notice to the daughter's attorneys and in disregard of her written and oral obligations to them, where, although the attorneys represented her interest and co-operated with the fiduciary in collecting assets and resisting improper claims against the estate, there was no proof that the attorneys either created a fund for distribution or successfully defended the claims.[2] But where an action was brought in behalf of certain heirs, including married women and minors, for the purpose of setting aside certain deeds purporting to have been executed by the deceased conveying his entire estate, which deeds, it was alleged, were procured to be executed by the fraud and undue influence of a son who was the administrator of the estate, and, after protracted litigation, the conveyances made by the deceased during his last days were set aside, it has been held that such attorneys were entitled to a lien on a final recovery in favor of the heirs who were their clients, notwithstanding the fact that other intricate questions remained to be settled.[3]

In some cases the question of an attorney's right to a lien against his client's share in a decedent's estate has been complicated by the fact that the attorney was also employed by the personal representative or that the attorney represented an administrator in both his individual and fiduciary capacities.[4] Thus, in a case which involved the question whether services of attorneys retained by heirs to defend a suit by one claiming the entire estate of a decedent were performed in behalf of such heirs or in behalf of the administrators, by whom the attorneys were also retained, the court, in apparently assuming the right of the attorneys to a lien in the absence of employment by the administrators, has held that the attorneys were entitled to a lien for their services under a contingent fee contract with the heirs for a percentage of the amount received by them, which contract recognized the fact of the attorneys' employment by the administrators, and where the claim of the alleged sole heir was defeated and a partial settlement of the estate was decreed in favor of the attorneys' clients.[5] And where it appeared that the widow of a decedent had been appointed temporary administratrix of his estate and had received, in such capacity, the proceeds of an insurance policy upon the life of her deceased husband, but when other relatives of the decedent claimed the right to administer the estate upon the grounds that she had not been the lawful wife of the decedent, the widow retained attorneys to represent her in the litigation and contracted to pay them a percentage of the total amount of the insurance paid over to her, and in such proceedings the rights of the widow were upheld and she was appointed permanent administratrix, it has been held that the attorneys were entitled to intervene, for the purpose of fixing their lien, in the subsequent action brought by the widow to repudiate a contract of settlement made by her with the other heirs, the court saying that the attorneys had a lien upon at least a part of the funds impounded by the court in the equitable proceeding, since, while a temporary administratrix cannot bind the estate to pay fees to resist setting up a will upon issues devisavit vel non, and a permanent administrator may not ratify such a contract made by the temporary administrator, under the circumstances appearing in the present case, the attorneys would nevertheless be entitled to a lien upon the part of the fund secured for her, not merely as temporary administratrix, but as an individual.[6]

Where an attorney advanced money to a client who was the proponent of a will, under an agreement that whatever costs, fees, or charges of the court in such action that might be required, or advanced, should be paid by the client "out of said estate," in the event of recovery by the client, it has been held that the attorney has to lien upon the costs judgment entered against the contestants upon the upholding of the will.[7] And it has been held that where an attorney, while acting as counsel for a legatee, advanced for him various sum of money in the payment of costs and expenses accruing in the proceedings, no legal lien, either by statute or common law, accrued upon any fund due the legatee as security for the sums advanced, where the attorney never secured actual possession of his client's distributive share of the estate.[8]

Prior to the New York statute declaring surrogate's courts to be courts of record, the view was taken that an attorney had no lien upon a decree procured in such courts directing an executor to pay money to the attorney's client in the proceedings before the surrogate, upon the theory that the surrogate's court was not a court of record, and that in such courts there are no "attorneys," in the sense in which that term is used in courts of record, and that it is only in respect to the party's character as attorney or solicitor that the claim to a lien exists.[9] But after the enactment of a statute establishing such courts as courts of record, and particularly in view of the express provision given the parties therein to appear by attorney, it has been held that, assuming that there is no distinction with respect to a lien arising in proceedings requiring an accounting and distribution by executors, between the claim of an attorney for professional services in the surrogate's court and that for services in any other court, attorneys representing the heirs and next of kin have a lien for their reasonable compensation upon a decree entered by the surrogate, and that the surrogate has power to protect it by vacating the satisfaction of such a decree made in discharge of their rights, independently of the provisions of the Attorneys' Lien Act.[10]

The right of an attorney to a statutory lien on his client's share in a decedent's estate or in a trust is dependent largely upon the provisions of the particular statute involved, but in general the right of an attorney to a lien upon his client's share in a decedent's estate has been allowed under the various lien acts.[11] In particular, such liens have been allowed with respect to proceedings to contest or procure the probate of a will,[12] to proceedings for or against an accounting by the representative,[13] and to proceedings in behalf of trust beneficiaries.[14] The lien has also been allowed in other proceedings of a varying nature instituted or conducted in behalf of a legatee, devisee, or distributee.[15] Under some statutes, however, the lien has not been allowed in connection with these varying proceedings.[16]

Aside from the question whether the proceeding in which an attorney has performed services in behalf of a client interested in a decedent's estate is one in which the statutory lien will attach, the question has arisen in some cases whether the money or property distributed to, or eventually to come into the hands of, the client, is of such character, or is obtained in such manner, as to permit the lien to arise and attach thereto. Determination of this question, of course, rests upon the individual facts. The typical attorney's lien statute provides that the lien shall attach "to a verdict, report, decision or judgment in his client's favor, and the proceeds thereof in whosoever hands they may come." In some cases, the results of the litigation were such as to lead the courts to hold that there were no "proceeds" to which the lien could attach.[17] Under the circumstances existing in other cases, it has been held that the money or property coming to the client was the "proceeds" of the litigation instituted by the attorney, giving him a right to the statutory lien under the provision above noted.[18] Under other forms of attorneys' lien acts, the question has also arisen as to whether the result of the litigation was a "recovery" which would serve as the basis of the attorney's lien, the answer, under the circumstances involved, being in the affirmative.[19]

[1] **Anno:** 175 ALR 1134.

[2] Purman's Estate, 358 Pa 187, 56 A2d 86, 175 ALR 1129.

Anno: 175 ALR 1134.

[3] **Anno:** 175 ALR 1134.

The court in this instance said that even if the services of such attorneys had terminated before the decree in favor of the heirs, or if for any reason they had found it necessary to retire from the case, or from their representation of the heirs, and a decree had been finally rendered in the case, such attorneys, with other counsel representing the heirs at the time of the final recovery, should have been allowed a fee and the whole declared a lien upon the recovery in favor of all the counsel, with the original attorneys participating according to the value of their services rendered up to the time of their discharge or retirement. **Anno:** 175 ALR 1135.

[4] **Anno:** 175 ALR 1135.

[5] **Anno:** 175 ALR 1135.

The court in this instance pointed out that the contract entered into by the parties recognized no inconsistency in the dual employment of the attorneys, and that the administrators were primarily concerned with charges against the estate, and the proper collection of assets, and that while they were also interested in the proper distribution thereof for their own protection in the administration of the trust, as between contesting claimants to an estate, the contestants were the ones primarily interested, and that there was therefore no inconsistency in the dual employment. **Anno:** 175 ALR 1135.

[6–10] **Anno:** 175 ALR 1136.

[11] **Anno:** 175 ALR 1145.

[12] **Anno:** 175 ALR 1148.

Under the Tennessee statute apparently providing that attorneys who bring suit in a court of record shall have a lien on the plaintiff's cause of action from the date of the filing of the suit or subsequent employment of the attorney, it was held in Roberts v. Vaughn, 142 Tenn 361, 219 SW 1034, 9 ALR 1528, that an attorney employed by an infant's next friend to contest the will of the infant's father, which disinherited him, was entitled to a lien for his services on the share of the estate secured to the infant by a compromise judgment.

[13] **Anno:** 175 ALR 1150.

Under the New York statute providing for the attachment of an attorney's lien from the commencement of a "special proceeding" as well as from the commencement of an action or counterclaim, it has been held or recognized that an attorney's lien arises in a successful proceeding brought by an attorney in behalf of legatees, devisees, or other distributees to compel an accounting, settlement, or distribution by the personal representative. **Anno:** 175 ALR 1150

[14] But see Keaton v. Stephenson, 206 Okla 32 240 P2d 1088, wherein an attempted assignment of twenty-five per cent of the income from a spendthrift trust to attorneys who were employed to protect the beneficiary's interest was held not to create an interest in the fund under a statute permitting property in the hands of trustees to be reached for "necessary services."

Anno: 175 ALR 1151.

[15] **Anno:** 175 ALR 1146.

[16] **Anno:** 175 ALR 1146–1151.

[17] **Anno:** 175 ALR 1153.

[18] **Anno:** 175 ALR 1154.

[19] **Anno:** 175 ALR 1156.

§ 242. Generally.

Forms: 2 Am Jur Pl & Pr Forms 2:1242, 2:1243, 2:1245–2:1250, 2:1252, 2:1253; 13 Am Jur Pl & Pr Forms 13:713.

Am Jur cited in Neighbors & Danielson v West Nebraska Methodist Hospital, — Neb — 77 NW2d 667; Marshall v Casteel, 143 Neb 71, 11 NW2d 818.

Crawford v Crane, 204 Or 60, 282 P2d 348.

Turtle Creek Bank & T. Co. v. Murdock, 150 Pa Super Ct 277, 28 A(2d) 320.

Page 407. *Add, following the word* "process" *in the third line of the section:* The proper procedure, where a charging lien has attached to a judgment or where the money has been paid into court, is for the attorney to file an intervening petition and have the amount and extent of his lien judicially determined.[20.1]

[20.1] Myers v. Miller, 134 Neb. 824, 279 N. W. 778, 117 A.L.R. 977.
Annotation: 117 A.L.R. 983.
p. 407, n. 4. Anno: 59 ALR2d 573.

§ 244. Equitable Remedy.

Am Jur quoted in Neighbors & Danielson v West Nebraska Methodist Hospital, — Neb —, 77 NW2d 667.
Am Jur cited in Crawford v Crane, 204 Or 60. 282 P2d 348.
p. 408, n. 8. Norrell v. Chasan, 125 NJ Eq 230, 4 A(2d) 88, 120 ALR 1238.

§ 245. Independent Action at Law.

Am Jur cited in Nichols v. Kroelinger (Fla) 46 So2d 722.

§ 246. Liability of Adverse Party for Destroying Lien.

Forms: 2 Am Jur Pl & Pr Forms 2:1244.
Am. Jur. cited in Heinisch v. Travelers Mut. Casualty Co. 135 Neb 13, 280 NW 234 (notes 15, 16); Spethman v. Hofeldt, 141 Neb 83, 2 NW(2d) 620.

Page 408. *Add, following note* 16: The judgment debtor may, however, pay the amount of the judgment into court; and if he notifies the attorney who claims the lien of the fact of such payment, he is not liable therefor though the judge of the court, upon application of the attorney, refuses to recognize the lien and orders the amount paid to the client.[16.1]

[16.1] Myers v. Miller, 134 Neb. 824, 279 N. W. 778, 117 A.L.R. 977.
Annotation: 117 A.L.R. 983.

Page 408. *Add following note* 17: Depending in any particular case upon the terms of the statute involved and the construction given it by the courts.[17.5]

[17.5] **Anno:** 146 ALR 67.
In some jurisdictions and under some circumstances an attorney who is allowed to prosecute the original action to final judgment even though his client has, without his consent, compromised or settled his cause of action before judgment. Where this remedy is pursued it seems obvious that any recovery by the attorney must be based upon the establishment of the merits of the cause of action of his client. **Anno:** 146 ALR 71.
p. 409, n. 18. Slayton v. Russ, 205 Ark 474. 169 SW(2d) 571. 146 ALR 64.
Anno: 146 ALR 75.
Under a statute providing that if a pending suit is settled without the consent of plaintiff's attorney, the Court shall, upon the attorney's motion, enter judgment for a reasonable fee, lack of merit in plaintiff's original cause of action is no defense to the attorney's motion to have his fee fixed. Slayton v Russ, 205 Ark 474, 169 SW(2d) 571, 146 ALR 64.
p. 409, n. 19. Anno: 146 ALR 69.
The nature of the contract between the attorney and his client as to whether he is employed for a definite fee or on a contingent fee basis, or without any definite agreement as to the amount of his compensation, may also be a factor in determining whether and in what way the merit of the client's cause affects the right of an attorney to recover his fee from an adverse party with whom his client has compromised such cause. Where an attorney has a choice of remedies for enforcing his claim against the adverse party, the effect of the merit or want of merit of the client's cause upon the attorney's rights may depend in some degree upon which remedy he chooses. **Anno:** 146 ALR 67.

Even though proof of the merits of his client's cause may not be essential to the establishment of a prima facie case entitling an attorney to recover compensation from an adverse party who, without his knowledge or consent, has compromised with his client, under some statutes and under some circumstances, it may be necessary, or at least desirable, to give such proof for the purpose of determining the amount recoverable. **Anno:** 146 ALR 78.

§ 247. Vacation of Settlement, Dismissal, or Satisfaction.

Forms: 2 Am Jur Pl & Pr Forms 2:1244.

§ 248. Enforcement against Judgment.

Forms: 2 Am Jur Pl & Pr Forms 2:1250, 2:1251.
Am Jur cited in Billingham v Thiele (Fla App) 107 So 2d 238, cert discharged (Fla) 109 So 2d 763.
p. 410, n. 8.
The charging lien arising under the New York statute is considered a proceeding in rem, enforceable only against the proceeds of a judgment secured in the particular case. Hoxsey v. Hoffpauir (CA5th Tex) 180 F2d 84, cert den 339 US 953. 94 L ed 1366. 70 S Ct 841.

§ 249. Generally.

Am Jur quoted in Application of Harper (Fla) 84 So2d 700.
Re Canzoneri (Mo) 334 SW2d 30.
Re Frankel, 20 NJ 588. 120 A2d 603.
Am Jur cited in Re Stone, 77 Ariz 115, 267 P2d 892.
Re Florida State Bar Asso. 134 Fla 851. 186 So 280 (notes 19–4).
Re Filipiak, 232 Ind 414, 113 NE2d 282.
Re Sympson (Mo) 322 SW2d 808; State Bar Committee v Stumbaugh (Mo) 123 SW2d 51.
Re Beakley, 6 Wash(2d) 410, 107 P(2d) 1097.
RCL cited in Re Sparks, 267 Ky 93. 101 SW (2d) 194.
Re Sparrow, 338 Mo 203, 90 SW(2d) 401.
Re Lane, 176 Okla 60, 54 P(2d) 339.
p. 410, n. 11. Ex parte Thompson, 228 Ala. 113, 152 So. 229, 107 A.L.R. 671; Re Mayberry, 295 Mass 155. 3 NE(2d) 248. 105 ALR 976.
p. 411, n. 14. Re Isserman, 345 US 286, 97 L ed 1013, 73 S Ct 676.
Ex parte Thompson, 228 Ala 113, 152 So 229. 107 ALR 671, 684.
Re Rothrock, 16 Cal(2d) 449. 106 P(2d) 907. 131 ALR 226.
Re Heirich, 10 Ill 2d 357, 140 NE2d 825, 67 ALR2d 827, cert den 355 US 805, 2 L ed 2d 49, 78 S Ct 22.
Toft v Ketchum, 18 NJ 280, 113 A2d 671. 52 ALR2d 1208, adhered to 18 NJ 611, 114 A2d 863, 52 ALR2d 1217, cert den 350 US 887. 110 L ed 782, 76 S Ct 141.
p. 411 n. 15.
A judgment of disbarment is not to be considered in the nature of punishment, though it may have that practical effect, but rather its purpose is to exclude from the office of attorney, for the preservation of the purity of the courts and the protection of the public, one who has demonstrated that he is not a proper person to hold such office. Re Keenan, 310 Mass 166. 37 NE(2d) 516. 137 ALR 766

Page 411. *Add new paragraph at end of section:* It is well understood, of course, that an attorney at law is free to retire from the practice of his profession at any time, subject to existing engagements or commitments. He may also resign his membership in the bar and have his name stricken from the roll of attorneys, although he may not do so as of right, unless it is otherwise provided by statute or rule of court, for the reason that it would be possible for him thereby to prevent the exercise of the court's power, by disciplinary action in a proper case, to enforce the observance of established standards of conduct in the practice of the profession.[16.5] Ordinarily, therefore, the resignation, to be effective, must be accepted or consented to by the court having jurisdiction for such purpose, and such acceptance or consent may be withheld or refused where it would enable the attorney to evade or forestall disbarment or disciplinary action.[16.51] A rule applied in some early English cases was that the name of an attorney would not be stricken from the rolls at his own request, without an affidavit that he did not apply therefor under an apprehension that charges would be preferred against him.[16.52] It has been stated that the basis of this rule was that at the time of its adoption the English courts had the power to punish professional misconduct by imprisonment as well as by reprimand, suspension, or disbarment.[16.53] It is recognized, however, that under some circumstances the purposes of a disbarment or suspension may be fully satisfied, and the ends of justice as well or better served by permitting the attorney to resign, and the decisions in this country are generally to the effect that the pendency or anticipation of disbarment or disciplinary proceedings against an attorney do not necessarily require the rejection of his application for permission to resign or to be stricken from the roll,[16.54] and that the question of acceptance or rejection rests in the judicial discretion of the court.[16.55] It has been stressed, however, that to warrant the acceptance of a resignation where charges against the attorney are pending or apprehended, it should appear that neither the public interest nor the purity of the courts would be adversely affected and that the administration of justice would not be hindered thereby.[16.56]

A resignation does not necessarily connote misconduct.[16.57]

Matters pertaining to the resignation of an attorney are governed in some jurisdictions by statutory provision or rules of court.[16.58] A common practice is to refer the question to some administrative officer or authority, or to a commission or commissioner, for investigation and report or recommendation.[16.59] In some jurisdictions, where the integrated bar system has been adopted, the resignation is submitted to the bar and the question of its acceptance or rejection determined primarily by its governing body or a special committee, subject to final action by the court.[16.6] The finding, determination, or recommendation of such body, officer, committee, or other authority, although not binding on the court, is usually accorded much weight.[16.61]

A resignation filed pursuant to a provision permitting an attorney at any time to file such resignation in the office of the clerk of the county in which he resides has been held effective to relinquish the rights conferred by his admission to the bar and to relieve him of the disabilities incident thereto, but not to effect the removal of his name from the roll of attorneys without the consent or approval of the court.[16.62]

The resignation of an attorney from membership in the state bar has been held not to be within the operation of a statute prohibiting a disbarred or suspended attorney from prosecuting an action in his own behalf in certain cases.[16.63]

[16.5] Ex parte Thompson, 32 Or 499. 52 P 570, 40 LRA 194.

Anno: 54 ALR2d 1280.

[16.51] **Anno:** 54 ALR2d 1280.

[16.52] **Anno:** 54 ALR2d 1280.

[16.53] See Application of Harper (Fla) 84 So2d 700, 54 ALR2d 1272.

Anno: 54 ALR2d 1280.

[16.54] **Anno:** 54 ALR2d 1280.

[16.55] Application of Harper (Fla) 84 So2d 700. 54 ALR2d 1272.

Anno: 54 ALR2d 1281.

[16.56] Application of Harper (Fla) 84 So2d 700. 54 ALR2d 1272.

Anno: 54 ALR2d 1281.

[16.57] **Anno:** 54 ALR2d 1281.

[16.58] Ex parte Thompson, 32 Or 499. 52 P 570. 40 LRA 194.

Anno: 54 ALR2d 1281.

[16.59] **Anno:** 54 ALR2d 1281.

[16.6] **Anno:** 54 ALR2d 1281.

It has been held that the findings and recommendations of committees and officers of a state bar association in disciplinary proceedings against an attorney should be considered as those of an intermediate agency of the Supreme Court of the state, being an arm of that court in the exercise of such functions; they are entitled to receive due consideration and are of persuasive force, although power to render ultimate judgment is vested in the court. Application of Harper (Fla) 84 So2d 700. 54 ALR 2d 1272.

[16.61] **Anno:** 54 ALR2d 1281.

[16.62] Ex parte Thompson. 32 Or 499. 52 P 570, 40 LRA 194.

Anno: 54 ALR2d 1281.

[16.63] **Anno:** 54 ALR2d 1281.

§ 250. Preliminary Inquest.

Forms: 2 Am Jur Pl & Pr Forms 2:1317, 2:1323.

Am Jur quoted in Ex parte Chattanooga Bar Asso. 206 Tenn 7, 330 SW2d 337.

p. 411, n. 17. Ex parte Thompson, 228 Ala 113. 152 So 229. 107 A.L.R. 671

Re Heirich, 10 Ill 2d 357, 140 NE2d 825, 67 ALR2d 827, cert den 355 US 805, 2 L ed 2d 49, 78 S Ct 22.

It has been held that, although any investigation designed to improve the standing of the legal profession should be encouraged, it ought to be carried on by disinterested commissioners of the court and should proceed without financial or other support from any interested party. Re Heirich, 10 Ill 2d 357, 140 NE2d 825, 67 ALR2d 827, cert den 355 US 805, 2 L ed 2d 49, 78 S Ct 22.

§ 251. Power of Courts to Suspend or Disbar.

Am Jur cited in Mullen v. Canfield. 10 App DC 168, 105 F2d 47.

Re Filipiak, 232 Ind 414, 113 NE2d 282; Beamer v Waddell, 221 Ind 232, 45 NE2d 1020.

p. 411, n. 19. Ex parte Thompson, 228 Ala 113. 152 So 229. 107 ALR 671.

Re Heirich, 10 Ill 2d 357, 140 NE2d 825, 67 ALR2d 827, cert den 355 US 805, 2 L ed 2d 49, 78 S Ct 22; People ex rel. Chicago Bar Association v Goodman. 366 Ill 346, 8 NE2d 941, 111 ALR 1.

Re Watson, 71 Nev 227, 286 P2d 254, 53 ALR 2d 301.

Ramstead v Morgan, 219 Or 383, 347 P2d 594, 77 ALR2d 481.

Control of membership in the bar of a state and of removal therefrom. is exclusively in the judicial department. Re Keenan, 310 Mass 166, 37 NE2d 516, 137 ALR 766.

Although the legislature may make reasonable regulations governing the disbarment of attorneys, the ultimate power in such matters is in the courts. Ruckenbrod v. Mullins, 102 Utah 548. 133 P(2d) 325. 144 ALR 839.

English and American courts have for centuries possessed disciplinary powers over members of the bar, incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied. Cohen v Hurley, 366 US 117, 6 L ed 2d 156, 81 S Ct 954.

p. 412, n. 1. Re Watson, 71 Nev 227, 286 P2d 254, 53 ALR2d 301.

p. 412, n. 4. Ramstead v Morgan, 219 Or 383, 347 P2d 594, 77 ALR2d 481.

It has been held that the several county ethics and grievance committees are estab-

lished as arms of the Supreme Court to receive and investigate complaints and present their report to the court, which, although giving due weight to the findings and conclusions of the committee, has the sole responsibility of deciding whether the attorney should be disciplined. Toft v Kechum, 18 NJ 280, 113 A2d 671, 52 ALR2d 1208, adhered to 18 NJ 611, 114 A2d 863, 52 ALR2d 1217, cert den 350 US 887, 100 L ed 782, 76 S Ct 141.

Page 412. *Add, following note* 4: If judicial power constitutionally may be vested in some body other than the courts, such body may rightfully exercise the power to suspend or disbar attorneys and determine whether the charges against any attorney warrant discipline of a particular nature.[4.1] The jurisdiction of the judicial department of a state with respect to membership of a particular person in the bar of the state is not exhausted by a final judgment, favorable or adverse to such person, in a proceeding for his disbarment.[4.5]

[4.1] Ex parte Thompson, 228 Ala. 113, 152 So. 229, 107 A.L.R. 671.

The Alabama statute creating the board of commissioners of the state bar and conferring upon them, inter alia, the power to suspend or disbar attorneys subject to the court's power of review is within the constitutional powers of the legislature, especially in view of the affirmative provision of the Constitution that powers of a judicial nature may be invested in such persons as the legislature may designate. Ex parte Thompson, 228 Ala. 113, 152 So. 229, 107 A.L.R. 671.

[4.5] Re Keenan, 310 Mass 166, 37 NE(2d) 516, 137 ALR 766.

p. 412, n. 5. Anno: 94 L ed 131; 3 L ed 2d 1965.

Disbarment by a state does not automatically disbar members of the bar of the Supreme Court of the United States, but that court will, in the absence of some grave reason to the contrary, follow the finding of the state that the character requisite for membership in the bar is lacking. Re Crow, 359 US 1007, 3 L ed 2d 1025, 79 S Ct 1152; **Anno:** 3 L ed 2d 1965: Re Isserman, 345 US 286, 97 L ed 1013, 73 S Ct 676.

An order disbarring an attorney under former Rule 2, paragraph 5, of the Rules of the Supreme Court of the United States, under which disbarment in a state was ground for disbarment from practice in the Supreme Court unless the attorney showed good cause to the contrary, will be set aside upon rehearing, where, after the entry of the order of disbarment, the Supreme Court has adopted new Rules, which, in Rule 8, adds the provision that "no order of disbarment will be entered except with the concurrence of a majority of the justices participating," and a majority of the justices participating on rehearing find no ground for disbarment. Re Isserman, 348 US 1, 99 L ed 3, 75 S Ct 6.

§ 252. Liability of Attorney to Disbarment or Suspension.

Am Jur quoted in State ex rel. Foster v. Washington State Bar Asso. 23 Wash2d 800, 162 P2d 261, 160 ALR 1366.

p. 412, n. 6.

A license to practice law constitutes no defense in a suit to enjoin the prosecution of actions by an attorney whose employment was procured by solicitation through a family partnership employing "chasers" for him. Atchison, T. & S. F. R. Co. v. Andrews, 338 Ill App 552, 88 NE2d 364, 14 ALR2d 728.

p. 413, n. 10. It has been held that an appointment to the bar is for life, subject to discipline, and is not lost by taking judicial office. Re Watson, 71 Nev 227, 286 P2d 254, 53 ALR2d 301.

Page 413. *Add, following note* 12: The fact that an attorney remaining a member of the bar no longer engages in active practice does not relieve him of the responsibility of adhering to the Canons of Professional Ethics.[12.5]

[12.5] Re Rothman, 12 NJ 528, 97 A2d 621, 39 ALR2d 1032.

p. 413, n. 13. Anno: 54 ALR2d 1285.

§ 253. Discretion of Court in Suspension or Disbarring.

Am Jur quoted in Re Williams, 233 Mo App 1174, 128 SW(2d) 1098.

Re Frankel, 20 NJ 588, 120 A2d 603.

Ingle v. Kivett, 30 Tenn App 1, 201 SW2d 545; Schoolfield v. Bean, 26 Tenn App 30, 167 SW(2d) 359.

Am Jur cited in Re Mason (Mo App) 203 SW 2d 750.

p. 413, n. 14. Cohen v Hurley, 366 US 117, 6 L ed 2d 156, 81 S Ct 954.

The loss of status to the individual disbarred cannot deter the court from its duty to strike from its rolls an attorney who has engaged in conduct inconsistent with the standard expected of officers of the court. Re Isserman, 345 US 286, 97 L ed 1013, 73 S Ct 676.

§ 254. Effect of Suspension or Disbarment.

p. 414, n. 1. See Re Stephenson, 243 Ala 342 10 So(2d) 1, 143 ALR 166.

Page 414. *Add at end of section:* A judgment in disciplinary proceeding against an attorney does not affect the rights of any injured person to maintain a civil action against the attorney, nor prevent the public authorities from the institution of criminal proceedings.[6.5]

[6.5] Application of Harper (Fla) 84 So2d 700, 54 ALR2d 1272.

§ 256. — Right to Practice in Another Jurisdiction.

Am Jur cited in Re Clay (Ky) 261 SW2d 301.

p. 415, n. 15. Anno: 51 ALR2d 1216.

Page 415. *Add, following* "in another state" *in the eighth line in the section:*[15.5] However, the few cases which have considered the matter ordinarily hold that a judgment of disbarment or suspension rendered in one state, should, as a matter of comity, and in order to promote the maintenance of the proper decency and dignity in the legal profession, be recognized, and should be entitled to full faith and credit in a sister state, or states, in which the accused attorney was licensed to practice.[15.51]

[15.5] **Anno:** 173 ALR 298.

[15.51] Copren v. State Bar, 64 Nev 364, 183 P2d 833, 173 ALR 284.

Anno: 173 ALR 298.

A court which in the exercise of comity recognizes the suspension of an attorney from practice by the courts of another state because of acts done in such other state, should suspend him from practice locally merely for the remainder of the term fixed by the judgment of suspension in the other state. Copren v. State Bar, 64 Nev 364, 183 P2d 833, 173 ALR 284.

p. 415 n. 16. Anno: 94 L ed 131; 98 L ed 796.

Page 415. *Add following note* 16: The United States Supreme Court has said that while a lawyer is admitted into a federal court by way of a state court, he is not automatically sent out of the federal court by the same route; the federal and state judicial systems of courts have autonomous control over their officers, among whom lawyers are included;[16.5] while it is not for the United States Supreme Court, except within the narrow limits for review open to it, to sit in judgment on disbarments in state courts,[16.51] disbarment being the very serious business that it is, the federal courts must afford ample opportunity to show cause why an accused practitioner should not be disbarred;[16.52] and has held that when, in disbarment proceedings in a federal court, the accusation rests on disbarment by a state court, the state court's determination is entitled to high respect, but is not conclusively binding on the federal court; in this situation, the federal court should not order disbarment where there exists a grave reason which convinces the federal court that to allow the natural consequences of disbarment by the state court to have their effect would conflict with the federal court's duty not to disbar except upon the conviction that, under principles of right and justice, it is constrained to do so.[16.53]

[16.5-16.53] Theard v United States, 354 US 278, 1 L ed2d 1342, 77 S Ct 1274.
Anno: 3 L ed 2d 1964.

Page 415. *Add, following note* 17: And the fact that attorneys were indefinitely suspended from practice in the court of appeals of another circuit, on the ground that they filed a scandalous and insulting brief, has been held not sufficient to justify disbarment in the Federal district court, the court pointing out that, while the attorneys' professional delinquency was aggravated, it fell short of criminal conduct.[17.5]

[17.5] **Anno:** 94 L ed 131.

§ 257. Generally.

Forms: 2 Am Jur Pl & Pr Forms 2:1311-2:1315.

R. C. L. quoted in Re Brown, 64 S. D. 87, 264 NW 521.

p. 416, n. 18. It has been held that even in the exercise of a privilege, a lawyer should so conduct himself that the work of the courts and the administration of justice will not suffer by reason of his continuing to hold a license to practice law. Re Gorsuch, 76 SD 191, 75 NW2d 644, 57 ALR2d 1355.

Page 416. *Add following note* 2: An attorney may be disbarred for his deliberate refusal to co-operate with the court in its efforts to expose unethical practices.[2.5]

[2.5] See Cohen v Hurley, 366 US 117, 6 L ed 2d 156, 81 S Ct 954, infra, § 296 (Supp).
p. 416, n. 3. Anno: 163 ALR 910.

Page 416. *Add, following note* 3: A statute providing for the revocation or suspension of a legal professional license will be held to violate due process if it appears that the conduct specified in the statute as ground for revocation or suspension is not such that its proscription is reasonably related to the purpose for which the statute itself was enacted.[3.5]

[3.5] **Anno:** 98 L ed 852-855.
p. 416, n. 6. Baker v Miller, 236 Ind 20, 138 NE2d 145, 59 ALR2d 1393.

There is nothing inconsistent or incongruous in following the mechanics and mode of procedure provided for by the statute for the initiation, and conduct of proceedings for the reprimand, suspension or removal of attorneys at the same time enlarging the statutory grounds for such action by the exercise of the inherent powers possessed by the courts in these matters. Re McBride, 164 Ohio St 419 58 Ohio Ops 242, 132 NE2d 113, cert den 351 US 965, 100 L ed 1485, 76 S Ct 1030.

Page 416. *Add new paragraph at end of section:* The grounds of disbarment from practice in Federal courts are not governed by state statutes, but by Federal law.[9.5]

Whether an attorney will be held subject to disciplinary action because of his conduct in connection with a political campaign depends, of course, upon the actual acts or omissions of which he was guilty, in the light of the applicable statutes or court rules relating to the grounds on which an attorney may be disbarred, suspended, etc. Consequently, each case is dependent upon its own facts.[9.52]

[9.5] **Anno:** 94 L ed 131
[9.52] Re Crum, 55 ND 876, 215 NW 682, 55 ALR 220 (suspended).
Re Snyder's Case, 301 Pa 276, 152 A 33, 76 ALR 666 (suspended).
Anno: 57 ALR2d 1363 et seq.

It has been held that financial contributions by lawyers to the campaign of a candidate for judicial office are not improper where in their opinion the candidate merits such support and the expense of the campaign, reasonably conducted, exceeds that which the candidate should reasonably bear himself. Re Gorsuch, 76 SD 191, 75 NW2d 644, 57 ALR2d 1355

It has been held that a lawyer may engage in political activity and speak as freely as any other citizen, but in a contest between lawyers for a judicial office, a lawyer under his oath and the duties imposed upon him by law has an added responsibility and should seek to maintain a higher standard of conduct than can be expected of one who is not a member of a privileged and a responsible profession. Re Gorsuch, 76 SD 191, 75 NW2d 644, 57 ALR2d 1355.

The misconduct of an attorney campaigning for judicial office, in charging his opponent and lawyers supporting his opponent with improper conduct and motives, has been held sufficient to subject him to reprimand, but not to demonstrate an unfitness to practice law after having exercised that privilege for more than 20 years, particularly in view of the defendant's recognition in retrospect that his conduct did not measure up to the standards required of a licensed attorney, and of his promise not to so conduct himself in the future. Re Gorsuch, 76 SD 191, 75 NW2d 644, 57 ALR 2d 1355.

§ 258. Misconduct before Admission.

p. 416, n. 10. Anno: 165 ALR 1140.
p. 416, n. 11. Anno: 165 ALR 1140.

Page 416. *Add, following note* 11: In a number of cases it has been held that misconduct prior to admission to the bar, unconnected with his admission, is not ground for his disbarment.[11.5]

[11.5] **Anno:** 165 ALR 1139.

§ 259. Fraud in Procuring Admission.

Am Jur cited in Re Lane (Ky) 291 SW2d 19.
p. 417, n. 12. Anno: 165 ALR 1141 et seq.
p. 417, n. 13. Anno: 165 ALR 1144.
p. 417, n. 14. Anno: 165 ALR 1149.
p. 417, n. 15. Anno: 165 ALR 1147; 173 ALR 301.

Page 417. *Add, following note* 15: or that he had been charged, with or indicted for, an alleged crime,[15.5] or who falsely denies, in his application for admission, that he had ever been a party to any action or proceeding other than those referred to in his questionnaire,[15.51]

[15.5, 15.51] **Anno:** 165 ALR 1151.

§ 260. Moral Turpitude; Want or Loss of Moral Character.

Am Jur cited in Re Williams, 233 Mo App 1174 128 SW(2d) 1098

p. 417, n. 1. It has been held that although a court does not have the function or right to regulate the morals, habits, or private lives of

lawyers, who like other citizens are free to act and to be responsible for their acts, a duty to suspend or revoke the privilege to practice law may exist where the morals, habits, or conduct of a lawyer demonstrate unfitness to practice law or adversely affect the proper administration of justice. Re Gorsuch, 76 SD 191, 75 NW2d 644, 57 ALR2d 1355.

p. 417, n. 4. Re Burrus, 364 Mo 22, 258 SW2d 625.

p. 417, n. 18. Anno: 64 ALR2d 304.

§ 261. Professional Misconduct Generally.

Am Jur cited in Re Wilson, 76 Ariz 49, 258 P 2d 433.

Re Mason (Mo App) 203 SW2d 750.

Re O'Doherty, 14 App Div 2d 4, 217 NYS2d 961, app & rearg den 14 App Div 2d 848, 218 NYS2d 528, app dismd in part 11 NY2d 767, 227 NYS2d 16, 181 NE2d 761.

Re Damron, 131 W Va 66, 45 SE2d 741.

p. 417, n. 5. Anno: 98 L ed 796.

p. 418, n. 10.

In disciplinary proceedings against an attorney which involve only questions of professional propriety and in which there is no suggestion of fraud or dishonesty, the court will not pass upon practices or methods which have been abandoned. Re Thibodeau, 295 Mass 374, 3 NE(2d) 749, 106 ALR 542.

§ 261.5. (New text) — Heir-hunting.

Participation by an attorney at law, either through so-called "probate research" organizations or acting alone, in the solicitation of heirs, in consideration of an assignment of a portion of their interest in the proceeds of an estate, to engage such organization and attorney to establish such heir's interest in the estate, has been held to be unprofessional conduct and ground for suspension or disbarment.[1]

[1] **Anno:** 171 ALR 352.

§ 262. Perverting or Obstructing Justice.

Forms: 2 Am Jur Pl & Pr Forms 2:1311.

Am Jur cited in Re Taylor, 300 Ky 448, 189 SW2d 403.

Re Wright, 69 Nev 259, 248 P2d 1080.

RCL cited in Re Disbarment Proceedings, 321 Pa 81, 184 A 59.

p. 418, n. 15. Anno: 94 L ed 141 (Federal courts); 3 L ed 2d 1963 (federal courts).

An order of the Commissioner of Patents, disbarring an attorney on the ground of gross misconduct, has been held supported by findings that the attorney, in support of a client's patent application, presented to the patent office an article published in a trade journal and naming as author an apparently disinterested labor leader, in the preparation of which the attorney had participated, and that he concealed from the patent office the fact that the article was prepared, and its publication under the labor leader's name was procured, by and on behalf of his client; and this was held, even though the statements made in the article were true, and the application had been filed nineteen years before commencement of the disbarment proceedings. Kingsland v. Dorsey, 338 US 318, 94 L ed 123, 70 S Ct 123, reh den 338 US 939, 94 L ed 579, 70 S Ct 341.

p. 418, notes 16, 17. Anno: 94 L ed 142 (Federal courts).

p. 418, n. 18. The mere bringing of an ordinary action without consent and even against the directions of a client is not in all cases ground for disciplinary action against an attorney. However, where the nature of the action of the parties defendant is such as to result in widespread publicity and to subject the client to substantial embarrassment, and the action goes far beyond the scope of the client's claim, the attorney then has not only violated his duty to his client but has tended to bring the entire profession into disrepute. Re Edge (Ky) 282 SW2d 830.

Page 419. *Add new paragraph at end of section:* It has been held that an attorney who attempts by personal influence to control a judge or jury in their decision in a pending case, or who merely holds himself out as able to do so, whether or not he actually makes the attempt, and whether or not he succeeds or fails in the attempt, is subject to disbarment.[7.5]

Disbarment of a state district attorney admitted to practice in the Federal district court has been held justified, where the evidence showed that there were widespread, flagrant, open, and notorious violations of the gambling laws in the judicial district over a long number of years and the attorney had made no more than a token effort to discharge his duties and enforce them.[7.51]

[7.5] **Anno:** 94 L ed 142 (Federal courts).

A charge, if proven, that an attorney incited and encouraged his clients to influence improperly the judicial action of the court in pending litigation, by newspaper publications and printed circulars, disparaging the judicial conduct of the court, with intent to intimidate the judges in their action, has been held to support disbarment. **Anno:** 94 L ed 143 (Federal court).

In the absence of any attempt to debauch jurors, the mere fact that an attorney employed another person to find out whether in a prosecution then on trial in which he was counsel the jurors were qualified as to residence and citizenship and otherwise, the agent interviewing the wife of one juror, and the brother of another, with approval of the attorney, has been held not to justify disbarment, althougth justifying some punishment. **Anno:** 94 L ed 143 (Federal court).

[7.51] **Anno:** 94 L ed 134 (Federal courts).

§ 263. — Fabricating or Suppressing Papers or Evidence and Tampering with Witnesses.

Am Jur cited in Re Taylor, 300 Ky 448, 189 SW2d 403.

Re Wright, 69 Nev 259, 248 P2d 1080.

p. 419, n. 12. Anno: 94 L ed 143 (Federal courts).

Page 419. *Add, as new paragraph at end of section:* It has been held that an attorney may assert any inferences from the facts of the case that seem to him arguable, but he cannot present his inferences from the facts as if they were the very facts themselves; counsel is responsible under the canons of professional ethics for making known to the court any decisions in the state adverse to his cause in the event his opponent fails to cite them, and he may not cite authorities which cannot conceivably be taken to stand for the proposition for which he cites them, alrepresent the meaning of such cases.[16.7]

[16.7] Re Greenberg, 15 NJ 132, 104 A2d 46.

§ 264. Misconduct toward Court or Judge.

Am Jur cited in Re Damron, 131 W Va 66, 45 SE2d 741.

p. 419, n. 17. Sacher v. New York Bar Asso. 347 US 388, 98 L ed 790, 74 S Ct 569.

Anno: 98 L ed 796; 3 L ed 2d 1961 (federal courts).

Contempt of court is not an absolute ground for disbarment; on the other hand, the absence of a conspiracy to commit contempt is not decisive against disbarment for recurring acts of contempt. Re Isserman, 345 US 286, 97 L ed 1013, 73 S Ct 676.

p. 420, n. 19. Anno: 94 L ed 138 (Federal courts); 98 L ed 797; 3 L ed 2d 1961 (federal courts).

§ 265. — Abusive Conduct.

p. 420, n. 1. Anno: 94 L ed 139 (Federal courts); 3 L ed 2d 1961.

p. 420, n. 7. Anno: 57 ALR2d 1364.

It has been held that a citizen does not, because he is a lawyer, forfeit his right to criticize a candidate for legal or judicial office. Re

Gorsuch, 76 SD 191, 75 NW2d 644, 57 ALR2d 1355.

§ 266. — Criticism of Judicial Acts.

Am Jur quoted in State Law Examiners v. Spriggs, 61 Wyo 70, 155 P2d 285

Am Jur cited in State ex rel. Florida Bar v Calhoon (Fla) 102 So 2d 604.

p. 421, n. 10. A finding, in support of suspension of an attorney from the practice of law, that a public speach made by the attorney during the pendency of a trial under the Smith Act (18 USC § 2385), in which trial she was defense counsel, impugned the judge's impartiality and fairness in conducting the trial is not supported by evidence that there were references in the speech to "horrible and shocking" things at the trial, the impossibility of a fair trial, and necessity, if the government's case were to be proved, of scrapping the rules of evidence, and the creation of new crimes unless the trial were stopped at once. Re Sawyer, 360 US 622, 3 L ed 2d 1473, 79 S Ct 1376; see annotation 3 L ed 2d 1962.

p. 421, n. 11. See Re Sawyer, 360 US 622, 3 L ed 2d 1473, 79 S Ct 1376; annotation 3 L ed 2d 1962.

p. 421, n. 14. Anno: 57 ALR2d 1364.

p. 421, n. 15. Anno: 57 ALR2d 1364.

It has been held that although a right exists to criticize a candidate for judicial office, or to criticize a judge for his past actions in office, or to comment on completed judicial proceedings, responsibility exists for an abuse of the right and, in the case of a lawyer, an abuse of the right of free speech may be some index of his character or fitness to be a lawyer. Re Gorsuch, 76 SD 191, 75 NW2d 644, 57 ALR2d 1355.

§ 268. Breach of Duties Owing to Client or Former Client.

Am Jur cited in Clark v. State Bar, 39 Cal2d 161, 246 P2d 1.

p. 422, n. 19. Anno: 94 L ed 134 et seq. (Federal courts).

p. 422, n. 20. Gair v Peck, 6 NY2d 97, 188 NYS2d 491, 160 NE2d 43, 77 ALR2d 390, motion gr 6 NY2d 983, 191 NYS2d 951, 161 NE2d 736, app dismd and cert den 361 US 374, 4 L ed 380, 80 S Ct 401.

Anno: 70 ALR2d 965–977.

That an attorney's charge is excessive or unreasonable has been held not to render it a violation of professional ethics; for such conclusion, it must be excessive to a degree which compels a finding that the attorney intended to overreach. Re Quinn, 25 NJ 284, 135 A2d 869, 70 ALR2d 956.

p. 422, n. 1. Anno: 70 ALR2d 965–977.

Page 422. *Add following note* 1: However, in a number of cases where fees charged by attorneys were perhaps unreasonable under the circumstances but not clearly exorbitant, disciplinary proceedings have been dismissed.[1.5] While in a few instances the fact that an attorney had made restitution, or had forgiven a portion, of an excessive fee has been considered as a mitigating circumstance in a disciplinary proceeding,[1.51] it has been held in a number of other instances that restitution would not preclude an inquiry into the initial conduct of an attorney in fixing an exorbitant fee,[1.52] and it has even been held that an attorney's forgiveness of a portion of an exorbitant fee demonstrated that the attorney himself felt that the fee was excessive.[1.53] In some cases where the reasonableness of an attorney's fee has not been free from doubt, it has been held that the attorney should not be disciplined until he had had an opportunity to refund the excessive amount or to have his liability therefor determined in a civil action.[1.54] An attorney's threat to resort to legal process to collect what he believes to be a bona fide fee does not constitute ground for disciplinary proceedings against him.[1.55]

[1.5] **Anno:** 70 ALR2d 977.

It has been held that an attorney will not be held to have acted in bad faith, so as to be subject to discipline, in charging $5,000 under an agreement with his client for a fee of one third of the value of the property recovered for the client where the grievance committee experts valued the property at $18,000 to $19,000, and the attorney's experts reached the sum of $30,000, and $7,000 was paid to the opposing party for his interest, since even upon accepting the figures of the committee experts as the true value, knowledge of the expert's ultimate valuation could not be attributed to the attorney at the time he charged and collected the $5,000 fee. Re Quinn, 25 NJ 284, 135 A2d 869, 70 ALR2d 956.

[1.51] **Anno:** 70 ALR2d 982.

[1.52] Re Quinn, 25 NJ 284, 135 A2d 869, 70 ALR2d 956.

Anno: 70 ALR2d 981.

[1.53] **Anno:** 70 ALR2d 983.

[1.54] **Anno:** 70 ALR2d 983.

[1.55] Re Quinn, 25 NJ 284, 135 A2d 869, 70 ALR2d 956.

p. 422, n. 2. Anno: 94 L ed 136 et seq. (Federal courts).

Where a corporation was formed to get around the usury laws and where the attorney was aware of that fact and also the fact that the borrower had little education or knowledge of business matters and was wholly unrepresented in the transaction, the attorney should have dealt with the borrower frankly and fairly or at least should have advised the borrower to have independent legal advice. Re Greenburg, 21 NJ 213, 121 A2d 520.

p. 422, n. 3. Anno: 194 L ed 138 (Federal courts).

p. 422, n. 4. Re Themelis, 117 Vt 19, 83 A2d 507.

Anno: 52 ALR2d 1276–1279.

A reprimand has been viewed as a sufficient discipline of an attorney who had represented an interest adverse to that of a former client where it appeared that the attorney, after representing his client and appearing for him in litigation, thereafter accepted employment from the client's former adversary and appeared for and represented such adversary in the trial of an action instituted against the former client upon the same controversies as were involved in the former litigation. **Anno:** 52 ALR2d 1279.

p. 423, n. 9. The mere bringing of an ordinary action without consent and even against the directions of a client is not in all cases ground for disciplinary action against an attorney. However, where the nature of the action of the parties defendant is such as to result in widespread publicity and to subject the client to substantial embarrassment, and the action goes far beyond the scope of the client's claim, the attorney then has not only violated his duty to his client but has tended to bring the entire profession into disrepute. Re Edge (Ky) 282 SW2d 830.

§ 269. Conversion or Misappropriation of Client's Property.

Am Jur cited in Re Conner, 357 Mo 270, 207 SW2d 492; State Bar Committee v Stumbaugh (Mo) 123 SW2d 51 (n 14)

Re O'Doherty, 14 App Div 2d 4, 217 NYS2d 961, app & rearg den 14 App Div 2d 848, 218 NYS2d 528, app dismd in part 11 NY2d 767, 227 NYS2d 16, 181 NE2d 761.

§ 270. — When Done by One Member of Law Firm.

Am Jur cited in Re Rosenberg, 413 Ill 567 110 NE2d 186.

§ 271. — Matters in Defense or Mitigation.

Am Jur cited in State Bar Committee v Stumbaugh (Mo) 123 SW(2d) 51 (notes 4–5)

Re O'Doherty, 14 App Div 2d 4, 217 NYS2d 961, app & rearg den 14 App Div 2d 848, 218 NYS2d 528, app dismd in part 11 NY2d 767, 227 NYS2d 16, 181 NE2d 761.

Page 424. *Add, following note* 8: It has recently been held that insanity at the time the attorney received funds from clients which he converted to his own use or which he received for services which he did not perform is not a defense in disbarment proceedings.[8.1] The disbarment is proper notwithstanding the attorney is sane at the time of the hearing, where he has failed to return or promise to return the money or to express regret for his acts.[8.2] The result in such decisions is based upon the necessity of protection of the public, which in disbarment proceedings is of more importance than the matter of punishment of the offender.[8.3]

[8.1] Re Patlak, 368 Ill. 547, 15 N. E. (2d) 309, 116 A.L.R. 627.
Annotation: 116 A.L.R. 632.

[8.2] Re Patlak, 368 Ill. 547, 15 N. E. (2d) 309, 116 A.L.R. 627.
Annotation: 116 A.L.R. 632.

[8.3] Re Patlak, 368 Ill. 547, 15 N. E. (2d) 309, 116 A.L.R. 627.
Annotation: 116 A.L.R. 632.

§ 272. Contracts Contrary to Public Policy.

Am Jur cited in State ex rel. Nebraska State Bar Asso. v Dunker, 160 Neb 779, 71 NW2d 502.

§ 273. Unethical Conduct.

Am Jur cited in Louisville Bar Asso. v. Mazin, 282 Ky 743, 139 SW(2d) 771.
Re Durham, 190 Okla 588, 126 P(2d) 69.

p. 425, n. 10. Re Heirich, 10 Ill 2d 357, 140 NE2d 825, 67 ALR2d 827, cert den 355 US 805, 2 L ed 2d 49, 78 S Ct 22.

p. 425, notes 12–14. Anno: 94 L ed 141 (Federal courts).

Page 425. *Add, following note* 17: And a former attorney of record for judgment debtors, who made an agreement for a settlement with the judgment creditors in the absence and without the consent of the latters' counsel, may be suspended.[17.5]

[17.5] Turner v. State Bar, 36 Cal2d 155, 222 P2d 857.

p. 425, n. 18. Re Heirich, 10 Ill 2d 357, 140 NE2d 825, 67 ALR2d 827, cert den 355 US 805, 2 L ed 2d 49, 78 S Ct 22.

p. 425, n. 19. It has been held that an attorney does not violate the ethics of his profession by acting as local counsel for an attorney of another state whose reputation, although under suspicion, is not definitely shown by the evidence to be objectionable. Re Heirich, 10 Ill 2d 357, 140 NE2d 825, 67 ALR2d 827, cert den 355 US 805, 2 L ed 2d 49, 78 S Ct 22.

Page 425. *Add, following note* 19: And it has been held that it is not sufficient to justify the disbarment of a lawyer that the evidence shows a state of facts discreditable to him, so long as it does not show dishonorable or criminal conduct; that to justify disciplinary action against or disbarment of a lawyer, the case must be clear and free from doubt as to the motive as well as to the act charged.[19.5]

[19.5] Re Brown, 389 Ill 516, 59 NE2d 855, 157 ALR 607.

§ 274. — Solicitation of Business.

Am Jur cited in Louisville Bar Asso. v. Mazin, 282 Ky 743, 139 SW(2d) 771.
Re Randolph (Mo) 347 SW2d 91, cert den 368 US 916, 7 L ed 2d 132, 82 S Ct 196.
Re McCullough, 97 Utah 533, 95 P(2d) 13.

p. 425, n. 1. Re Thibodeau, 295 Mass 374, 3 N E. (2d) 749, 106 A.L.R. 542.
Anno: 94 L ed 132 (Federal courts); 67 ALR 2d 878 (personally), 882–917 (through others).
For a discussion of a number of cases involving the suspension or disbarment, or attempted disbarment of an attorney in the Federal courts for voluntarily defending one accused of a crime, see annotation in 94 L ed 133.

It is not beyond the realm of permissible state concerns to conclude that too much attention to the business of getting clients may be incompatible with a lawyer's sufficient devotion to duties owed to the court, or that the payment of awards to persons bringing in legal business is inconsistent with the personally disinterested position a lawyer should maintain. Cohen v Hurley, 366 US 117, 6 L ed 2d 156, 81 S Ct 954.

p. 425, n. 2. Anno: 67 ALR2d 859.

p. 426, n. 3. Hightower v. Detroit Edison Co 262 Mich 1 247 N W 97, 86 A.L.R. 509
Anno: 67 ALR2d 871, 872.

p. 426, n. 4. Anno: 67 ALR2d 866.

Page 426. *Add following note* 4: Persons engaged in the practice of "ambulance chasing" or similar solicitation of personal injury litigation use many methods and techniques.[4.5] They have various ways of learning about the happening of an accident which results in personal injury or death,[4.51] and usually try to contact the injured party or his relatives as soon as possible in order to solicit possible litigation for an attorney.[4.52] Various devices are used by the solicitor to convince the prospective client that a particular attorney could best handle his case, including such things as newspaper clippings about successful action handled by the attorney, or canceled checks or photostatic copies of checks representing the recoveries in cases recently handled.[4.53] And once the injured party or his relative has been persuaded to hire the attorney, the solicitor usually produces for signature a blank contract of retainer.[4.54] In a few cases it has appeared that an attorney entered into an arrangement with a person known as a "flopper" whose function it is to simulate injuries in order to make a claim.[4.55]

While a finding that an attorney was guilty of "ambulance chasing" or the like necessitates some disciplinary action against an attorney, there are frequently circumstances which justify the court in mitigating the punishment. These circumstances are various and include such considerations as the youth and inexperience of the attorney, the amount of solicitation in the area, the lack of other misconduct on the part of the attorney, and the like.[4.56] Another factor affecting the extent of discipline on the side of reducing the punishment, is the fact that the proceedings against the attorney were instigated, investigated, and financed, by combinations of companies or business interests against whom the particular attorney had many claims, and who were thus antagonistic to him. The courts have carefully examined testimony coming from such sources and have held that its credibility was insufficient to support disciplinary action in some instances.[4.57]

But there are other factors which go to increase the punishment.[4.58] Thus, the fact that the attorney was guilty of misconduct in addition to "ambulance chasing" has been held to warrant increased punishment.[4.59] The same tendency obtains where the attorney either failed to keep, or has destroyed, his financial records, so that it is impossible to determine what his conduct actually was,[4.6] as well as where he wilfully continued to solicit after being warned to cease such activity,[4.61] and where he sought by various means to thwart or impede the investigation into his conduct.[4.62]

4.5 Anno: 67 ALR2d 863, 917.
4.51 Anno: 67 ALR2d 917.
4.52 Anno: 67 ALR2d 919.
4.53 Anno: 67 ALR2d 919.
4.54 Anno: 67 ALR2d 920.
4.55 Anno: 67 ALR2d 921.
4.56 Anno: 67 ALR2d 872.

It has been held that the motive of the solicitation should be considered in determining its propriety. Re Heirich, 10 Ill 2d 357, 140 NE2d 825, 67 ALR2d 827, cert den 355 US 805, 2 L ed 2d 49, 78 S Ct 22.

4.57 Re Heirich, 10 Ill 2d 357, 140 NE2d 825, 67 ALR2d 827, cert den 355 US 805, 2 L ed 2d 49, 78 S Ct 22.
Anno: 67 ALR2d 930.
4.58 Anno: 67 ALR2d 921.
4.59 Anno: 67 ALR2d 921.
4.6 Anno: 67 ALR2d 924.
See Cohen v Hurley, 366 US 117, 6 L ed 2d 156, 81 S Ct 954, infra, § 296 (Supp).
4.61 Anno: 67 ALR2d 926.
4.62 Anno: 67 ALR2d 927.
p. 426, n. 5. Anno: 67 ALR2d 875.

An attorney who conducts an automobile association which in addition to other services to its subscribers pays the fees of lawyers employed by them to defend them in suits for property damage or against charges of violating automobile laws and regulations, but who does not receive, directly or indirectly, any financial benefit from the employment of such attorneys is not guilty of unprofessional conduct in advertising and employing salesmen to procure subscribers to the association. Re Thibodeau, 295 Mass 374, 3 NE2d 749, 106 A.L.R. 542. Annotation 106 A.L.R. 548.

Page 426. *Add paragraph at end of section:* In some instances the courts have enjoined lawyers from prosecuting actions brought to them by runners or "chasers" employed by them[5.1] and such a restraining order is not invalid as constituting a disbarment judgment which only the supreme court of the state can enter where the retainer as attorney was procured by "chasers" as a part of a champertous conspiracy.[5.2]

The reason that injunction has been resorted to so rarely against lawyers is not that the court lacks power to enjoin them, but because it has more expeditious and summary methods of control over the bar.[5.3]

5.1 Atchison, T. & S. F. R. Co. v. Andrews, 338 Ill App 552, 88 NE2d 364, 14 ALR2d 728 (finding the evidence sufficient to show that a family partnership created by an attorney was his agent for the solicitation of business, so as to make him responsible for its acts, where, although he was not a member of the partnership, his brother and wife were, the partnership occupied his offices, the "chasers" employed by it were generally regarded as his representatives, and its only funds, except for an original deposit by the wife, came from him).
Anno: 14 ALR2d 740.
5.2 Atchison, T. & S. F. R. Co. v. Andrews, 338 Ill App 552, 88 NE2d 364, 14 ALR2d 728.

The novelty of the relief sought is no defense to a suit for an injunction against the prosecution of actions by an attorney who procured his retainer by solicitation through "chasers" as part of an extensive conspiracy to induce injured railroad employees, no matter where located, to employ him as their attorney. Atchison, T. & S. F. R. Co. v. Andrews, 338 Ill App 552, 88 NE2d 364, 14 ALR2d 728.
5.3 Anno: 14 ALR2d 741.

§ 275. — Advertising.

p. 426, n. 6. Re Thibodeau, 295 Mass 374, 3 N. E. (2d) 749, 106 A.L.R. 542.
Anno: 39 ALR2d 1057 et seq.

Two attorneys owning and controlling a mortgage corporation have been held not immune from discipline for unethical conduct in connection with its operations because of the advice of counsel, or because other lawyers are guilty of the same offense, or because other financial institutions and attorneys bear a similar relationship. Re Rothman, 12 NJ 528, 97 A2d 621, 39 ALR2d 1032.

Such matters as cessation of improper advertising methods, age, expressions of willingness to conform to accepted standards, good reputation, ignorance of the impropriety of the advertisement, and the lack of precedents in some instances, while not, strictly speaking, defenses, have been held in some cases to be mitigating circumstances justifying a lightening of the punishment to mere temporary suspension or severe reprimand. **Anno:** 39 ALR2d 1059.
p. 426, n. 7. Anno: 39 ALR2d 1062 et seq.
p. 426, n. 8. Anno: 39 ALR2d 1058.

Page 426. *Add, at end of section:* While it is not necessarily improper for an attorney to engage in a business other than the practice of law, the lawyer must conduct such separate business with due observance of the standards of conduct required of him as a member of the bar, and the violation of such standards by means of improper advertising will constitute ground for disciplinary action.[8.5] The practice of offering free advice or information in an advertisement is improper because it encourages resort to litigation and constitutes grounds for disbarment, suspension, or severe reprimand.[8.51] The practice of furnishing or inspiring publication of newspaper comments, photographs, or articles of a laudatory nature, has been held to constitute grounds for disciplinary action against the offending attorney.[8.52] The practice of publishing and circulating summaries of the law on particular subjects has been held to constitute improper advertising warranting disciplinary action by the court, in that they are often inaccurate or misleading, their purpose being to arouse thought and encourage litigation.[8.53] The use of cards and letterheads containing more than a simple statement of the attorney's name, address, and specialty, if he has one which is not prohibited by law, constitutes unethical conduct warranting disciplinary action.[8.54] An attorney's acceptance of the benefit of the advertising of his services by another constitutes a violation of professional ethics punishable by disbarment, suspension, or censure.[8.55]

8.5 Re Rothman, 12 NJ 528, 97 A2d 621, 39 ALR2d 1032 (advertising complete and speedy mortgage service made possible by combination of law and mortgage businesses; severe reprimand).
Anno: 39 ALR2d 1065.
8.51 Anno: 39 ALR2d 1066.
8.52 Re Rothman, 12 NJ 528, 97 A2d 621, 39 ALR2d 1032.
Re Donovan, 43 SD 98, 178 NW 143, 9 ALR 1497.
Anno: 39 ALR2d 1067.
8.53 Re Schnitzer, 33 Nev 581, 112 P 848, 33 LRA NS 941.
Re Donovan, 43 SD 98, 178 NW 143, 9 ALR 1497.
Anno: 39 ALR2d 1068.
8.54 Anno: 39 ALR2d 1069.
8.55 Anno: 39 ALR2d 1071.

§ 276. Misconduct outside Scope of Professional Relation.

Am Jur quoted in Ex parte Montgomery, 244 Ala 91, 12 So(2d) 314.

Am Jur cited in Ex parte Grace, 244 Ala 267, 13 So(2d) 178, appeal dismissed in 320 US 78, 88 L ed 415, 64 S Ct 78.
Thomas v. State, 87 Ga App 765, 75 SE2d 193
Re Lynch (Ky) 238 SW2d 118.
Re McLendon (Mo) 337 SW2d 56. Re Williams, 233 Mo App 1174, 128 SW2d 1098.

State v. Rogers, 226 Wis 39, 275 NW 910 (n. 12).

p. 427, n. 11.

Anno: 59 ALR2d 1401 (income tax conviction).

Misconduct involving moral turpitude on the part of an attorney, even though the derelictions were committed in his personal capacity by his failure to file federal income tax returns, and his professional conduct had always been above reproach, is nevertheless ground for suspension. Re Burrus, 364 Mo 22, 258 SW2d 625.

p. 427, n. 13.

Where an attorney, acting as a guardian, is guilty of gross negligence in the handling of his ward's funds, he may be suspended from the practice of law. Clark v. State Bar, 39 Cal 2d 161 246 P2d 1

p. 427, n. 16. Anno: 59 ALR2d 1398 (federal income tax conviction); 57 ALR2d 1366 et seq.

§ 277. — Personal Vices Not Affecting Integrity.

Am Jur quoted in Re Williams, 233 Mo App 1174, 128 SW(2d) 1098.

§ 278. — Misconduct in Official Capacity.

Am Jur quoted in Gordon v Clinkscales, 215 Ga 843, 114 SE2d 15.

Am Jur cited in Re Titus, 359 Mo 1070, 225 SW2d 715.

State ex rel. Nebraska State Bar Asso. v Butterfield, 169 Neb 119, 98 NW2d 714.

p. 428, n. 6. Anno: 53 ALR2d 306, 308-312.

p. 428, n. 7. It should be noted, however, that in Re Watson, 71 Nev 227, 286 P2d 254, 53 ALR2d 301, the court, holding that it had no authority to discipline a member of the bar who was serving as district judge, for acts committed while he was so serving, since the latter's responsibility for official acts is to the public by whom he is elected rather than to the court, disapproved any implication to the contrary in Re Breen, 30 Nev 164, 93 P 997, 17 LRA NS 572.

Anno: 53 ALR2d 311.

p. 428, n. 8. Anno: 53 ALR2d 308-312.

p. 428, n. 10. Anno: 53 ALR2d 309.

p. 428, n. 15. Anno: 57 ALR2d 1371.

Page 428. *Add at end of section:* The view has been taken in some cases that misconduct of a lawyer-judge in his official capacity could not be the basis for disbarment or other disciplinary proceedings against an attorney,[15.5] theorizing that to allow such proceedings would be to give improper authorities the right to control, supervise, or remove judges.[15.51]

[15.5] **Anno:** 53 ALR2d 307.

It has been held that any disciplinary authority over members of its bar retained by the Supreme Court with respect to one in judicial office would be limited to action outside his official duties. Re Watson, 71 Nev 227, 286 P2d 254, 53 ALR2d 301.

It has been held that disciplinary proceedings against an attorney holding judicial office may not be converted into a review of the manner in which he is conducting his official duties. Re Watson, 71 Nev 227, 286 P2d 254, 53 ALR2d 301.

It has been held that a judge in executing and filing an affidavit of the absence of any matters before him remaining undecided for more than 90 days, as required by statute as a prerequisite to receiving his monthly salary, is performing an official act required of him as a judge, and a false statement therein cannot form the basis for disciplinary action against him as an attorney. Re Watson, 71 Nev 227, 286 P2d 254, 53 ALR2d 301.

[15.51] **Anno:** 53 ALR2d 307.

§ 279. Commission or Conviction of Crime.

Forms: 2 Am Jur Pl & Pr Forms 2:1312.

Am Jur quoted in Gordon v Clinkscales, 215 Ga 843, 114 SE2d 15.

p. 429, n. 16. Re Rothrock, 16 Cal(2d) 449, 106 P(2d) 907, 131 ALR 226

Baker v Miller, 236 Ind 20, 138 NE2d 145, 59 ALR2d 1393.

Page 429. *Add, following the word "profession," in the fourth line from the top:*[16.5]

[16.5] Re Rothrock, 16 Cal2d 449, 106 P2d 907, 131 ALR 226; Re Hallinan, 43 Cal2d 243, 272 P2d 768.

Baker v Miller, 236 Ind 20, 138 NE2d 145, 59 ALR2d 1393.

p. 429, n. 18.

The commission of lesser offenses by an attorney in the heat of anger or as the result of physical or mental infirmities will not ordinarily be deemed to involve "moral turpitude" justifying disbarment. Re Rothrock, 16 Cal (2d) 449, 106 P(2d) 907, 131 ALR 226.

Page 429. *Add, following note* 18: Where it cannot be determined from the nature of an offense, from the record of conviction, or from the statute defining the offense, whether commission of the offense by an attorney would cast discredit upon his moral fitness to practice law, an investigation into the circumstances under which the particular offense was committed will be permitted in disbarment proceedings.[18.5]

[18.5] Re Rothrock, 16 Cal(2d) 449, 106 P(2d) 907, 131 ALR 226.

p. 429, n. 1.

A court rule which, in prescribing standards of conduct for members of the bar, provides that a lawyer shall not by any misconduct commit any offenses against the laws of the state or the United States which amount to a crime involving acts done by him "contrary to justice, honesty, modesty, or good morals,' makes offenses involving moral turpitude a basis for disbarment. Neibling v. Terry, 352 Mo 396, 177 SW(2d) 502, 152 ALR 249.

Page 429. *Add, following note* 1: Under statutes directing the disbarment of an attorney upon conviction or making a conviction grounds for disbarment, it is usually held that conviction must be obtained in a court of record.[1.1] A conviction before a justice of the peace,[1.2] or for violation of a city ordinance, or one rendered in a prosecution in the name of a city has been held not to be within the contemplation of such statutes.[1.3] Nor do admissions, made by an attorney in an answer to a rule to show cause why he should not be attached for contempt for failing to pay into court money wrongfully withheld, satisfy the statutory requirements of a conviction.[1.4] Restraining by injunction from illegally trafficking in intoxicating liquors is not a conviction within the meaning of such statutes.[1.5] The term "conviction" is not restricted to one entered upon a particular plea; conviction upon a plea of nolo contendere renders the attorney subject to disbarment under the statute.[1.6]

[1.1] Annotation: 113 A.L.R. 1180.

A conviction may not be an absolute requirement. An attorney who has been indicted for a felony and who breaks jail and escapes has been held to be subject to disbarment under a statute empowering disbarment upon conviction. **Anno:** 113 ALR 1180.

[1.2–1.6] **Anno:** 113 ALR 1179, 1180.

p. 429, n. 2.

The question whether an offense involves "moral turpitude," within the meaning of a statute making such an offense ground for disbarment, is to be determined by a consideration of the nature of the offense as it bears upon the attorney's moral fitness to continue in the practice of the law. Re Rothrock, 16 Cal(2d) 449, 106 P2d 907, 131 ALR 226.

Page 429. *Add following note* 2: A conviction of an attorney in a federal court for evasion of his own personal income taxes has been viewed most often as one not necessarily involving moral turpitude. For this reason courts have required some further or independent showing, beyond the bare fact of conviction for income tax evasion, that the particular conduct in question was infected with moral turpitude before they would impose discipline appropriate to misconduct of that degree, or they have recognized that the respondent might show himself to have been free of moral turpitude despite his conviction.[2.3] Where the wilfulness of the attorney was apparent in his evasion of income taxes, and there were no substantial mitigating circumstances, the crime has been considered to be one of moral turpitude warranting temporary suspension from the practice of law.[2.31] Where an attorney s general professional reputation and behavior have been good, and he has shown a repentant and co-operative attitude, courts have considered that no moral turpitude accompanied the commission of the offense. This has resulted in the dismissal of disbarment proceedings.[2.32] It has been considered that no moral turpitude existed where no proof of it was offered beyond the fact of conviction for income tax evasion. Only relatively mild professional punishment was found appropriate in such instances.[2.33] Courts have not always concerned themselves with making a characterization as to moral turpitude with regard to the conduct of an attorney convicted of evasion of federal income taxes. They have sometimes approached the problem as being one of whether there had been conduct below the level of behavior required of attorneys, and, if so, to what extent, for the purpose of determining the gravity of the punishment.[2.34] But, conceding that conviction for income tax evasion imported conduct warranting professional punishment of an attorney, courts have emphasized various exculpatory aspects of the attorney's behavior serving to lessen the severity of the punishment that might otherwise have been appropriate.[2.35]

It has been held that the commission of an assault, or conviction thereof, even of assault with intent to commit murder, does not justify disbarment, if the assault was not committed under such circumstances as would indicate the attorney to be unfit for the trust and confidence reposed in him as an attorney.[2.5] On the other hand, the circumstances surrounding the act of violence on the part of the attorney may be such as to indicate clearly his lack of respect for, and his disregard of, law and order, thereby justifying reprimand or disbarment.[2.6]

[2.3] Re Hallinan, 43 Cal2d 243, 272 P2d 768, holding that moral turpitude must be inherent in the commission of the crime itself to warrant summary disbarment under the statute.

The taint of moral turpitude is not implied as a necessary ingredient of a conviction of wilfully attempting to evade and defeat income taxes. People v Fischer, 132 Colo 131, 287 P2d 973.

Anno: 59 ALR2d 1401.

It has been held that, although the wilful evasion of federal income taxes is made a felony by § 145(b) of the Internal Revenue Code, it is not an offense involving fraud or moral turpitude, and conviction therefor does not necessarily call for complete disbarment, as distinguished from suspension, of an attorney. Baker v Miller, 236 Ind 20, 138 NE2d 145, 59 ALR2d 1393.

[2.31] **Anno:** 59 ALR2d 1401.

[2.32] **Anno:** 59 ALR2d 1404.

[2.33] **Anno:** 59 ALR2d 1404, 1405.

Suspension from practice for nine months has been held to be a proper disciplinary measure where an attorney is convicted of a wilful evasion of federal income taxes. Baker v Miller, 236 Ind 20, 138 NE2d 145, 59 ALR2d 1393.

[2.34] **Anno:** 59 ALR2d 1405.

[2.35] **Anno:** 59 ALR2d 1406.

[2.5] Re Rothrock, 16 Cal(2d) 449. 106 P(2d) 907, 131 ALR 226.

Anno: 131 ALR 232.

The crime of assault with a deadly weapon does not involve "moral turpitude," so as to require the disbarment as a matter of course of an attorney convicted of such crime, where the statute provides that conviction of a crime "involving moral turpitude" shall constitute cause for disbarment. Re Rothrock, 16 Cal(2d) 449, 106 P(2d) 907, 131 ALR 226, in which a record of conviction of assault with a deadly weapon was considered, and held not to involve "moral turpitude" justifying disbarment, especially in view of light sentence imposed.

[2.6] **Anno:** 131 ALR 233.

p. 429, n. 6. Vilter Mfg. Co. v. Industrial Commission (Vilter Mfg. Co. v. Jahncke) 192 Wis 362, 212 NW 641, 57 ALR 627.

Page 429. *Add, following note* 6: use of the mails to defraud,[6.5]

[6.5] Neibling v. Terry, 352 Mo 396, 177 SW 2d 502, 152 ALR 249.

Page 429. *Add new paragraph at end of section:* It appears to be a generally accepted view that an attorney's refusal, in good faith, to waive immunity from criminal prosecution is no ground for disbarment or other disciplinary action against him.[11.5] Thus, it has been held that where an attorney refuses, in good faith, to sign a waiver of immunity from criminal prosecution, when called upon to testify in an inquiry into certain alleged unlawful and unethical practices of law impairing the administration of justice, but expresses in open court his willingness to answer all questions at the direction of the court, and to furnish his office records and "everything that the court desires," the attorney's failure to sign such a waiver of immunity and to relinquish in advance his constitutional privilege against self-incrimination does not warrant disciplinary or disbarment proceedings.[11.6] And under a statute providing: "A competent witness shall not be excused from answering a relevant question on the ground only that the answer may tend to establish the fact that he owes a debt or is otherwise subject to a civil suit. But this provision does not require a witness to give an answer which will tend to accuse himself of a crime or misdemeanor or to expose him to a penalty or forfeiture,"[11.7] that a defendant, an attorney, upon being sworn as a witness in a trial for conspiracy against another attorney for whom the defendant worked as a clerk, had the right to refrain from answering any questions which might form the basis of, or lead to, a prosecution of him for the forfeiture of his office of attorney; and that the availing himself of such privilege, and the refusal to waive immunity did not amount to a confession of guilt upon which a forfeiture could be adjudged.[11.8] On the other hand, where an attorney refuses to testify, upon the ground that his testimony will tend to incriminate him, and this is done in bad faith, such refusal may constitute ground for disciplinary action.[11.9]

11.5 Anno: 127 ALR 1280.

11.6 Re Grae, 282 NY 428, 26 NE(2d) 963, 127 ALR 1276.

Anno: 127 ALR 1280.

11.7 New York Code of Civil Procedure, § 837.

11.8 Anno: 127 ALR 1281.

Cardozo, J., speaking with reference to this situation said that there was no occasion to determine whether the attorney's refusal to testify was proper because it tended to expose him to a forfeiture of office; that the attorney had placed his refusal on the ground of a tendency to incriminate him, and that of itself was sufficient to sustain him. **Anno:** 127 ALR 1282.

11.9 Anno: 127 ALR 1282.

§ 281. — Necessity of Prior Conviction or Prosecution.

p. 430, n. 1.

It may be noted that in Re Patlak, 368 Ill 547, 15 NE(2d) 309, 116 ALR 627, it was said that the rule is that a judgment of conviction or acquittal upon the merits, upon a trial on an indictment, will ordinarily be treated by this court as conclusive of the guilt or innocence of an attorney at law upon a subsequent trial upon information for disbarment for the same offense.

Page 431. *Add, following note* 4: It has been held that one is convicted of crime within the meaning of a statute making a conviction ground for disbarment, notwithstanding the judgment of conviction was entered upon a plea of nolo contendere.[4.5]

4.5 Neibling v. Terry, 352 Mo 396, 177 SW2d 502, 152 ALR 249.

§ 282. — Effect of Pending Prosecution.

Am Jur cited in Parker v. State Highway Dept. 224 SC 263, 78 SE2d 382.

p. 431, n. 11. Annotation: 113 A.L.R. 1183.

p. 431, n. 12. Annotation: 113 A.L.R. 1183.

Page 431. *Add, following note* 12: There is authority, however, to the effect that statutes making a record of conviction conclusive evidence in disbarment proceedings contemplate a judgment that has become final, so that pendency of appeal precludes disbarment.[12.1]

12.1 Annotation: 113 A.L.R. 1181.

Page 431. *Add new paragraph at end of section:* It has been held that a State Bar may carry on its own independent investigation of the fitness of any one of its members to practice law, without regard to criminal prosecutions which may be pending.[12.5]

12.5 Re Phillips, 17 Cal(2d) 55, 109 P(2d) 344, 132 ALR 644.

§ 283. — Effect of Failure to Indict, Nol. Pros., or Acquittal.

Am Jur cited in Re Pennica, 36 NJ 401, 177 A2d 721.

p. 432, n. 14.

It is the general rule that the entry of a nolle prosequi, dismissal, discontinuance, or abandonment of criminal proceedings against an attorney at law does not preclude the institution of disbarment proceedings based upon the same conduct involved in the criminal proceedings. **Anno:** 123 ALR 783.

p. 432, n. 15.

It is a general rule that the acquittal of an attorney in a prosecution for criminal acts constitutes no bar to the institution of or an adjudication in disbarment proceedings based upon the same acts or the conduct involved therein. **Anno:** 123 ALR 780.

But see Re Patlak, 368 Ill 547, 15 NE(2d) 309, 116 ALR 627, supra, § 281 (Supp.), in which, it may also be noted, it was held that the reversal of a conviction of an attorney on a charge of larceny of money of clients is not res judicata of a disbarment proceeding based upon similar charges but based upon different transactions occurring at other times.

§ 283.1. (New text) — Effect of Suspension of Sentence.

Although statutory provisions, where applicable, are controlling, the cases in general support the view that the fact that the execution of the sentence of an attorney who has been convicted of a crime has been suspended has no effect upon the question whether the attorney should be suspended or disbarred from the practice of law because of his conviction of a crime.[16.50] Some of the courts in taking this view have distinguished the suspension of the execution of a sentence from the suspension of the imposition of a sentence,[16.51] and from the granting of a pardon to the convicted attorney.[16.52]

16.50 Re Phillips, 17 Cal(2d) 55, 109 P(2d) 344, 132 ALR 644.

Anno: 132 ALR 659.

The California cases have involved the interpretation of a statute authorizing the disbarment of an attorney when a judgment of conviction against him for a crime involving moral turpitude becomes "final." Re Phillips, 17 Cal (2d) 55, 109 P(2d) 344, 132 ALR 644, a judgment of conviction against an attorney was held to be "final" within the meaning of this statute, although the execution of the attorney's sentence had been suspended, and although following compliance with the terms of the order of probation, pursuant to statutory authority, the verdict of guilty had been set aside and the accusation against him dismissed.

16.51 Re Phillips, 17 Cal(2d) 55, 109 P(2d) 344, 132 ALR 644.

Anno: 132 ALR 662.

16.52 Anno: 132 ALR 660.

§ 284. — Effect of Pardon.

Am Jur cited in State v Rogers, 226 Wis 39, 275 NW 910.

p. 432, n. 17. Anno: 143 ALR 172.

This difference in opinion is due not so much to different views as to the nature and effect of a pardon as it is to different views as to the nature of the right to practice law and as to the purpose of and ground for disbarment. **Anno:** 143 ALR 173.

Page 432. *Add following* "are based" *in the fifth line of the section:* The great majority of the cases hold that the granting of a pardon by the executive to an attorney who has committed, or been convicted of, a crime does not prevent the court having jurisdiction from disbarring him because of such conviction or because of the acts upon which the conviction was based.[17.5] In a few cases, however a pardon has been regarded as a sufficient defense against disbarment.[17.6]

17.5 Anno: 143 ALR 173.

The cases which take the position that disbarment on account of the commission of crime is neither prevented nor nullified by a pardon regard the right to practice as an attorney, not as a mere civil right, but rather as an acquired right or privilege extended only to those who have shown themselves mentally and morally qualified to receive and exercise it, and consider disbarment, not as a part of the punishment for the crime committed, but merely as a means of preserving the high character of the bar, by revoking the membership of one who has demonstrated his moral unfitness to possess it; and therefore they reach the conclusion that since a pardon, although effective to prevent further punishment and to restore civil rights to the one pardoned, cannot change the fact that he committed the crime or erase the consequent stain from his character, it cannot restore his moral qualifications for continuance in or restoration to membership in the bar. In some cases it has also been pointed out that attorneys are officers of the courts and that the courts must therefore be the judges of their qualifications to practice and cannot be controlled in this respect by a pardon from the executive. **Anno:** 143 ALR 173.

17.6 Anno: 143 ALR 177.

The cases which have held that a pardon was effective to prevent or nullify disbarment have regarded disbarment as a part of the punishment for the crime or as a direct consequence of the conviction rather than of the moral defect disclosed by the criminal act. **Anno:** 143 ALR 173.

Page 432. *Add, following note* 20: A mere suspension of sentence or a release on parole has been held not to prevent disbarment on the ground of conviction of a felony.[20.5]

20.5 Anno: 143 ALR 179.

p. 432, n. 3. Anno: 113 ALR 1183.

p. 433, n. 4. Anno: 113 ALR 1184; 70 ALR2d 331.

Page 433. *Add, following note* 5: By the great weight of authority, a pardon for a crime for which an attorney has been disbarred neither nullifies the disbarment nor compels the court to nullify it.[5.51] On the other hand, in a few cases a pardon has been held to reinstate, or to require the court to reinstate, an attorney who had been disbarred because of the commission of the act to which the pardon related.[5.53] Although, as has been indicated, a pardon is not generally treated as nullifying disbarment imposed as a consequence of the commission or conviction of the crime pardoned, it may, by reason of a rule or statute or otherwise, authorize the courts to entertain an application for reinstatement and to allow or deny it, depending upon whether on the hearing it appears that the applicant has re-established such a character as makes his reinstatement proper.[5.55]

5.51 Re Stephenson, 243 Ala 342, 10 So(2d) 1, 143 ALR 166 (in which it was held that a full pardon with restoration of civil and political rights granted to an attorney who had been disbarred upon conviction of forgery did not restore him to the office of an attorney).

Anno: 143 ALR 179

5.53 Ex parte Garland (US) 4 Wall 333, 18 L ed 366.

Anno: 143 ALR 182; 70 ALR2d 334.

5.55 Anno: 143 ALR 183; 70 ALR2d 333.

See Re Stephenson, 243 Ala 342, 10 So(2d) 1, 143 ALR 166.

§ 285. Acts or Convictions in Other Jurisdictions.

Am. Jur. cited in Geibel v. State Bar, 11 Cal. (2d) 412, 79 P. (2d) 1073 (n. 7).

Re Porep, 60 Nev 393, 111 P(2d) 533.

R. C. L. quoted in Depew v. Wichita Asso. C. M. 142 Kan. 403, 49 P. (2d) 1041.

R. C. L. cited in Richmond Asso. of Credit Men v Bar Asso 167 Va 327 189 S E 153

p. 433, n. 9. See Baker v Miller, 236 Ind 20, 138 NE2d 145, 59 ALR2d 1393.

Anno: 59 ALR2d 1407 (income tax conviction).

Page 433. *Add, following note* 9: In the construction of statutes or court rules providing for the disbarment of an attorney at law upon his conviction of crime, the position has been taken in many cases that the determination of whether a conviction in a Federal court or the courts of another state was for an offense of the grade or character necessary to disqualify must be made under the laws of the disqualifving state.[9.5] On the other hand, it has frequently been held or recognized that, in determining whether a conviction in a foreign jurisdiction was for an offense of the grade or character necessary to disbar an attorney under an applicable statute or court rule providing for such disbarment upon conviction of crime, the governing law is that of the convicting jurisdiction.[9.51]

9.5 See Re Kirby, 10 SD 322, 414, 73 NW 92, 907, 39 LRA 856.

Anno: 175 ALR 798.

9.51 Re Hallinan, 43 Cal2d 243, 272 P2d 768, holding that in determining whether an intent to defraud the United States is an essential element of the crime of filing a false and fraudulent income tax return as proscribed by the Internal Revenue Code, and thus whether moral turpitude is involved in the commission of such offense, the interpretation given such statute by the United States courts must be accepted.

Re Kerl, 32 Idaho 737, 188 P 40, 8 ALR 1259; Re Minner, 133 Kan 789, 3 P2d 473, 79 ALR 35; see Margolis's Case, 269 Pa 206, 112 A 478, 12 ALR 1186.

Anno: 175 ALR 801.

The taint of moral turpitude is not implied as a necessary ingredient of a conviction of wilfully attempting to evade and defeat income taxes. People v Fischer, 132 Colo 131, 287 P2d 973.

§ 285.1. (New text) Misconduct of Law Partner.

While it is true that a law firm is responsible to a client for the negligent or fraudulent acts of its individual members when acting within the scope of their authority, and each member of the firm, irrespective of his personal participation in the transaction, as well as the law firm itself, is liable to a client for money collected in the course of the firm's business and misappropriated by a member of the firm,[1] it has been held or recognized in a number of cases that one member of a law firm is not subject to disbarment or discipline because of the misconduct of his partner which occurred without his knowledge, consent, or participation.[2] In other cases wherein a member of a law firm has sought to avoid discipline upon the ground that the acts complained of were committed by his partner, the courts, under the facts involved, have held that the respondent was involved in the misconduct of the partner to such an extent as to justify disbarment or discipline.[3]

It has been held that the question whether a lawyer may be subjected to disciplinary action because of his partner's misconduct cannot be determined by application of the principle that a partner is liable for the wrongful acts of a copartner committed in the course of the copartnership business, for the reason that disciplinary action involves the motive with which an act was committed.[4]

[1] See supra, § 134.

[2] **Anno:** 157 ALR 613.

A contrary view has been taken in at least one case. **Anno:** 157 ALR 615.

[3] Re Brown, 389 Ill 516, 59 NE2d 855, 157 ALR 607 (holding that a lawyer who knew that his partner was rendering bills in the firm name against a public utility company for legal services which were never rendered, and who turned over his share of such fees to his partner, with knowledge that the bills were a device to cover up expenditures in lobbying and bribing public officials in the

interest of the utility company, may be subjected to disciplinary action by the court, although he was motivated by his desire to aid his partner in the collection of money advanced by the partner for the above purposes).

Anno: 157 ALR 616.

4 Re Brown, 389 Ill 516, 59 NE2d 855, 157 ALR 607.

§ 286. Generally.

Forms: 2 Am Jur Pl & Pr Forms 2:1311–2:1318, 2:1320, 2:1321, 2:1324–2:1326, 2:1331–2:1333.

Am Jur cited in Re Conner, 357 Mo 270, 207 SW2d 492.

p. 433, n. 11. As to the propriety of the writ of prohibition to prevent the bar authorities from suspending an attorney from the practice of law, see PROHIBITION.

p. 433, n. 14. It has been held that a commissioner, in a disbarment proceeding against an attorney specializing in railroad negligence cases, who is a member of a law firm representing railroads belonging to the railroad association that financed and directed the investigations leading to the disbarment proceedings, should disqualify himself when requested to do so by the attorney's counsel. Re Heirich, 10 Ill 2d 357, 140 NE2d 825, 67 ALR2d 827, cert den 355 US 805, 2 L ed 2d 49, 78 S Ct 22.

§ 287. Nature of Proceeding.

Forms: 2 Am Jur Pl & Pr Forms 2:1318, 2:1320, 2:1321.

Am Jur cited in Re Stice, 184 Kan 589, 339 P2d 29.

Re Edge (Ky) 282 SW2d 830.

Nelson v Hammett (Mo) 189 SW2d 238.

R. C. L. cited in Re West, 212 N. C. 189, 193 S. E. 134.

p. 434, n. 17. Ex parte Thompson, 228 Ala. 113, 152 So. 229, 107 A.L.R. 671.

It has been held that disciplinary proceedings of a state bar association are a function of the state supreme court, and although the board of governors of the association and its local committees technically are not judicial tribunals, their findings are considered to be those of an intermediate agency. Velkov v. Superior Court, 40 Cal2d 289, 253 P2d 25, 35 ALR2d 1348.

It has been held that the object of a disciplinary proceeding against an attorney is not in the nature of punishment for a crime, but rather the preservation of the purity of the courts and the protection of the public from unworthy attorneys. Application of Harper (Fla) 84 So2d 700, 54 ALR2d 1272.

It has been held that disciplinary proceedings against attorneys are instituted in the public interest and to preserve the purity of the courts; no private rights except those of the accused are involved. Application of Harper (Fla) 84 So2d 700, 54 ALR2d 1272.

It has been held that a disciplinary proceeding against an attorney is judicial in nature, although it is initiated by filing a complaint with an ethics and grievance committee. Toft v Ketchum, 18 NJ 280, 113 A2d 671, 52 ALR2d 1208, adhered to 18 NJ 611, 114 A2d 863, 52 ALR2d 1217, cert den 350 US 887, 100 L ed 782, 76 S Ct 141.

It has been held that the suspension or disbarment of an attorney is, like his admission, a judicial act based upon due inquiry into his fitness for the office. Toft v Ketchum, 18 NJ 280, 113 A2d 671, 52 ALR2d 1208, adhered to 18 NJ 611, 114 A2d 863, 52 ALR2d 1217, cert den 350 US 887, 110 L ed 782, 76 S Ct 141.

It has been said that whether denominated judicial or quasi-judicial, disciplinary proceedings against attorneys are carried on as one of the processes of the court. Ramstead v Morgan, 219 Or 383, 347 P2d 594, 77 ALR2d 481.

p. 434, n. 18. State v. Ventola, 122 Conn. 635, 191 A. 726, 110 A.L.R. 578; Re Mayberry, 295 Mass 155, 3 NE(2d) 248, 105 ALR 976.

Annotation: 102 A.L.R. 399.

A disbarment proceeding instituted by the grievance committee of the local bar association is a civil proceeding within the purview of a statute making it an offense to give or offer anything to a person who may be used as a witness "in any civil or criminal proceeding" with intent to influence his testimony. State v. Ventola, 122 Conn. 635, 191 A. 726, 110 A.L.R. 578.

p. 434, n. 19. State v. Ventola, 122 Conn. 635, 191 A. 726, 110 A.L.R. 578 (applying rule as to influencing witness in civil proceeding).

Annotation: 102 A.L.R. 399 (applying rules as to change of venue in civil proceedings).

A disbarment proceeding is one at law and not in equity. Re Mayberry, 295 Mass 155, 3 NE2d 248, 105 ALR 976.

p. 434, n. 1. Ex parte Thompson, 228 Ala. 113, 152 So 229, 107 ALR 671.

State v Ventola, 122 Conn 635, 191 A 726, 110 ALR 578 (see same case, supra, this section).

Re Santosuosso, 318 Mass 489, 62 NE2d 105, 161 ALR 892.

Toft v Ketchum, 18 NJ 280, 113 A2d 671, 52 ALR2d 1208, adhered to 18 NJ 611, 114 A2d 863, 52 ALR2d 1217, cert den 350 US 887, 100 L ed 782, 76 S Ct 141.

Page 434. *Add, following note* 1: Investigations and hearings by the bar committee of a state bar are summary in character and are not adversary in any proper sense.[1.1]

[1.1] Annotation: 114 A.L.R. 171.

§ 288. Time within Which Proceedings Must Be Instituted.

Forms: 2 Am Jur Pl & Pr Forms 2:1318, 2:1320, 2:1321.

Am Jur quoted in State v. Haggerty, 241 Wis 486, 6 NW(2d) 203.

Am Jur cited in Ex parte Dozier, 262 Ala 197, 77 So2d 903.

§ 289. Notice and Opportunity to Be Heard.

Forms: 2 Am Jur Pl & Pr Forms 2:1318–2:1321, 2:1323–2:1327.

Am Jur quoted in Thompson v. State, 72 Ga App 852, 35 SE2d 306; Jacobs v. State 200 Ga 440, 37 SE2d 187, conformed to in 73 Ga App 550, 37 SE2d 438.

Re Metzenbaum, 22 Wash2d 75, 154 P2d 602.

Am Jur cited in Re Rivard, 300 Ky 208, 188 SW2d 325.

Re Rerat, 224 Minn 124, 28 NW2d 168.

p. 435, n. 11. Anno: 98 L ed 855–860.

A court may exercise jurisdiction to inquire into the conduct of members of the bar without compliance with the requirements of formal procedure which must be observed in ordinary litigation; and it is enough if in some proper way, the attorney is reasonably and definitely informed of the matter alleged against him and given an opportunity of being heard in answer. Re Mayberry, 295 Mass 155, 3 NE(2d) 248, 105 ALR 976.

An attorney whose alleged misconduct is under investigation by the court is entitled to a fair trial in the light of the character of the proceeding, and to that end an opportunity to know all that he must meet and the right to present such evidence as he may be able to produce to rebut the representations of alleged misconduct. Re Santosuosso, 318 Mass 489, 62 NE2d 105, 161 ALR 892.

§ 290. In Whose Name and by Whom Proceeding Instituted.

Forms: 2 Am Jur Pl & Pr Forms 2:1311–2:1314, 2:1321.

Am Jur cited in Wilbur v. Howard (DC Ky) 70 F Supp 930

Re Lacy, 234 Mo App 71, 112 SW2d 594.

p. 436, n. 4. Re Phillips, 17 Cal(2d) 55, 109 P(2d) 344, 132 ALR 644

Anno: 105 ALR 1376; 67 ALR2d 867.

Page 436. *Add, following note* 5: Statutes authorizing the institution of disbarment proceedings by the board of governors of an integrated state bar are valid,[5.1] as well as a statute empowering a board of law examiners to initiate complaints.[5.2]

[5.1] See supra, § 2.1 (Supp.).

[5.2] Annotation: 114 A.L.R. 172.

p. 437, n. 6. Anno: 67 ALR2d 867.

§ 291. Charges.

Forms: 2 Am Jur Pl & Pr Forms 2:1311-2:1314, 2:1321.

Am Jur cited in State ex rel. Nebraska State Bar Asso. v Fisher, 170 Neb 483, 103 NW2d 325.

Burns v Clayton, 237 SC 316, 117 SE2d 300.

p. 437, n. 14.

In Florida the verification of a complaint against, or a state's attorney's motion to disbar, an attorney is not required. Richardson v. State, 141 Fla 218, 192 So 876, overruling State ex rel. Wolfe v. Kirke, 12 Fla 278, 95 Am Dec 314.

p. 437, n. 15. See supra, n. 14.

p. 437, n. 17. Ex parte Thompson, 228 Ala. 113, 152 So. 229, 107 A.L.R. 671, 675.

p. 437, n. 18. Ex parte Thompson, 228 Ala. 113, 152 So. 229, 107 A.L.R. 671.

Re Heirich, 10 Ill 2d 357, 140 NE2d 825, 67 ALR2d 827, cert den 355 US 805, 2 L ed 2d 49, 78 S Ct 22.

A complaint in a proceeding before the board of commissioners of the state bar sufficiently alleges a violation of a rule of the board to the effect that no attorney shall misappropriate the funds of his client by failing to pay over money collected by him for his client, provided the circumstances attending the transaction are such as to satisfy the commission that the attorney acted in bad faith or with fraudulent purpose where it avers the violation of that rule, which is referred to by number and section, in that a summary judgment was rendered against him in a specified action for money collected by him as attorney for the plaintiff therein, upon which an execution was issued and returned "No property." Ex parte Thompson, 228 Ala. 113, 152 So. 229, 107 A.L.R. 671.

Common-law rules of pleading, or rules observed in criminal cases, are not controlling in disbarment proceedings. Re Patlak, 368 Ill. 547, 15 N. E. (2d) 309, 116 A.L.R. 627.

p. 438, n. 20. Anno: 67 ALR2d 868.

p. 438, n. 1.

It has been held that an order of a United States District Court, made in proceedings for review of a referee's appointment of a trustee in bankruptcy, prohibiting an attorney who was a creditor of the bankrupt from practicing in that court until an apology was made to and accepted by the referee for charges made by the attorney in soliciting and securing powers of attorney from other creditors is unwarranted, where no formal charge had been placed against the attorney, who was not given a hearing or opportunity to defend himself or to inspect the referee's return upon which the order was based, particularly in view of the record giving considerable support to the charges made. Re Portage Wholesale Co. (CA 7th Wis) 183 F2d 959, 20 ALR2d 189.

§ 292. Demurrer or Answer and Subsequent Pleadings.

Forms: 2 Am Jur Pl & Pr Forms 2:1321, 2:1322.

§ 293. Evidence—Presumptions.

Forms: 2 Am Jur Pl & Pr Forms 2:1330.

Am Jur cited in Re Santosuosso, 318 Mass 489, 62 NE2d 105 161 ALR 892

Re Shufer, 12 App Div 2d 208, 209 NYS2d 545, motion den 9 NY2d 823, 215 NYS2d 769, 175 NE2d 346.

Committee on Legal Ethics v Pietranton, — W Va —, 99 SE2d 15.

Page 438. *Add following note* 6:

In a proceeding for the suspension or disbarment of an attorney, the burden is upon the complainant to establish misconduct on the part of the defendant proving him unfit to be entrusted with the duties and responsibilities belonging to the office of an attorney.[6.5]

[6.5] Re Gorsuch, 76 SD 191, 75 NW2d 644, 57 ALR2d 1355.

p. 438, n. 7. It has been held that the employment of an investigator by an attorney is not unethical, and it cannot be inferred from such employment that he is engaged in "ambulance chasing." Re Heirich, 10 Ill 2d 357, 140 NE2d 825, 67 ALR2d 827, cert den 355 US 805, 2 L ed 2d 49, 78 S Ct 22.

Page 438. *Add new paragraph at end of section:* Under the Rules of the Supreme Court of the United States, an attorney who has been disbarred from practice in a state has the burden of showing good cause why he should not be disbarred from practice in the Federal Supreme Court.[9.5]

[9.5] Re Isserman, 345 US 286, 97 L ed 1013, 73 S Ct 676.

§ 294. — Admissibility of Evidence.

Am Jur cited in Thomas v State, 91 Ga App 804, 87 SE2d 239.

Re Santosuosso, 318 Mass 489, 62 NE2d 105, 161 ALR 892.

Re Shufer, 12 App Div 2d 208, 209 NYS2d 545, motion den 9 NY2d 823, 215 NYS2d 769, 175 NE2d 346.

p. 438, n. 11. Anno: 161 ALR 898.

But see, infra, n. 12.5 et seq. (Supp.).

In Re Santosuosso, 318 Mass 489, 62 NE2d 105, 161 ALR 892, it was said that the considerations of public welfare involved in an inquiry by the court into the alleged misconduct of a member of the bar cannot be defeated by the application to such inquiry of the strict rules of evidence governing the trial of adversary proceedings between parties.

Page 438. *Add, following note* 11: The admission of hearsay evidence is improper in disbarment proceedings before the board of governors of a state bar.[11.1]

[11.1] Annotation: 114 A.L.R. 169.

Page 439. *Add, following note* 12: With respect to the general question of the admissibility of an entire record, as such, in a disbarment or disciplinary proceeding, there appears to be some conflict.[12.5] Thus, the view has been taken that where an attorney is sought to be disciplined because of acts disclosed in the record of a civil proceeding in which he was a party, such record is admissible in the disciplinary proceeding.[12.51] However, a contrary view has also been taken.[12.52] In some cases the "record" of a civil proceeding in which an attorney was a party or was interested has been held to be admissible for a particular reason or purpose.[12.53] As a general rule, in ordinary adversary proceedings, the mere fact that testimony has been given in the course of a former proceeding between the parties is no ground for its admission in evidence, for, if the witness is available, his testimony given at the former trial is mere hearsay. So, in order to prove such testimony which is pertinent or relevant to issues in a later trial, it must appear that the witness is for some reason unavailable at the second trial or hearing, that there is a substantial identity of parties and issues, and that the person against whom the evidence was offered had an opportunity to cross-examine the witness giving the former testimony.[12.54] Although recognizing the foregoing as a general rule of evidence, some courts have nevertheless concluded that the strict rules of evidence are inapplicable in a proceeding seeking the disbarment or discipline of an attorney, and have held as a general proposition that the evidence or testimony adduced at the trial of a civil or criminal proceeding in which an attorney was a party is admissible in a subsequent disciplinary proceeding against such attorney based upon his improper conduct as disclosed by such evidence, particularly where the attorney was afforded or exercised his right of cross-examination in the former trial.[12.55] Some courts have held that the testimony or evidence in a proceeding indicating the misconduct of an attorney is admissible, for a particular reason or purpose, in a subsequent disbarment or disciplinary proceeding against such attorney.[12.56] There appears to be a lack of agreement in the cases involving the question of the admissibility in a disciplinary proceeding of the findings of the court in a former action or proceeding which indicate or disclose improper conduct on the part of the attorney sought to be disciplined.[12.57] It may be observed that with respect to the effect upon a disbarment proceeding of a previous disbarment in another jurisdiction, the United States Supreme Court has regarded the findings of a state court in disbarment proceedings establishing the want of professional character as conclusive, unless, from an intrinsic consideration of the state records, it appears that the state procedure, from lack of notice or opportunity to be heard, was wanting in due process, that there was such an infirmity of proof as to facts as to give rise to a clear conviction that the conclusion of the state court cannot be accepted as final, or that some other grave reason exists leading to the conclusion that to follow the decision of the state court would conflict with the duty not to disbar unless necessary under the principles of right and justice.[12.58]

[12.5, 12.51] **Anno:** 161 ALR 899.

In New York it has been held that the "record" in the action against respondent which had been brought by his former law partner for the purpose of an accounting, and to set aside alleged fraudulent conveyances by respondent, was properly admitted in a disciplinary proceeding initiated upon the petition of a lawyers' association, as against the contention that the association was not a party to the former action, where the charges against respondent in such disciplinary action were based upon the conduct of respondent in the former action, in which he was a party and attorney of record, the court saying that such record was therefore competent proof as to his conduct therein. **Anno:** 161 ALR 899.

[12.52] People ex rel. Chicago Bar Asso. v. Amos, 246 Ill 299, 92 NE 857, 138 Am St Rep 239 (in which it appeared that during the time respondent was handling a client's affairs, the latter executed a note and trust deed in favor of respondent's wife with respondent named as trustee, and that the client was subsequently adjudged insane and a conservator appointed, it was held that the transcript of the record of the action brought by the conservator against respondent and his wife to cancel the note and trust deed was inadmissible in the disbarment proceeding subsequently instituted against respondent charging him with unprofessional conduct with respect to the affairs of such client).

Anno: 161 ALR 899.

[12.53] Fairfield County Bar v. Taylor, 60 Conn 11, 22 A 441, 13 LRA 767 (in which it was held that the record in an action against an attorney to recover money allegedly obtained from plaintiff through fraud, including a copy of the complaint, pleadings, findings of fact, and judgment against the attorney, was admissible in a proceeding by members of the bar, based on the transaction out of which said action arose, to procure his disbarment for unprofessional conduct, where the existence of such record was averred by the complaint and denied in the answer, the court concluding that upon such an issue the members of the bar might offer the best possible evidence there could be of the truth of their allegations, even if the bar committee was to be regarded as a party, and the strict technical rules of evidence were applicable).

Anno: 161 ALR 901.

[12.54] See 20 Am Jur, EVIDENCE, p 578, § 686; p 582, § 689.

[12.55] Re Santosuosso, 318 Mass 489, 62 NE2d 105, 161 ALR 892 (holding that evidence contained in the record of a civil suit to which an attorney was a party defendant, at the hearing of which he was present and represented by counsel, testified, and had opportunity to present and examine witnesses and to cross-examine those called by the plaintiff, is admissible in an inquiry by the court into the attorney's alleged misconduct).

Anno: 161 ALR 901; 70 ALR2d 1188.

See Re Durant, 80 Conn 140, 67 A 497, 10 Ann Cas 539, in which it was held that where a deposition of a witness had been taken in an action by a wife for separate support, and disclosed improper conduct on the part of one who acted as counsel for the wife, and such witness subsequently died, the deposition was admissible in the disbarment proceeding thereafter brought against such attorney upon the basis of his action in the wife's case, where he was present at the deposition, anticipating that damaging testimony might be given against him, and exercised his right of cross-examination through another attorney, who was then representing the client. In answer to the contention that the issues and the parties were not the same in the two proceedings, the court said that the issues were substantially the same, that the topics which were the subjects of examination, in so far as the witness' testimony was concerned, were the same as those under examination in the disbarment proceeding, and that her evidence had the same bearing upon and important relation to the issues in the two cases.

[12.56] **Anno:** 161 ALR 903.

In Illinois it has been held that while the entire record of a civil action against an attorney is inadmissible in a disciplinary proceeding, the testimony given by an attorney in the trial of a public official for income tax evasion indicating that a portion of fees received from the attorney's client was given to such official as an election campaign contribution is admissible, as an admission against interest, in the disciplinary action against such attorney in which he is charged with bribing public officials and conducting himself in such a manner as would tend to defeat the administration of justice and bring the courts and the legal profession into disrepute. In one case, the court, in referring to its decision in People ex rel. Chicago Bar Asso. v. Amos, 246 Ill 299, 92 NE 857, 138 Am St Rep 239, supra, n. 12.52, said: "[In that case] we held that in a disbarment proceeding the entire record made in a previous civil action against the same attorney was inadmissible. The record in that case contained testimony of witnesses concerning the conduct of the attorney, . . . We held he was entitled to be confronted by those witnesses in the disbarment proceeding and the record of their testimony in the previous case was excluded. No such record is offered here. Only the admittedly correct and complete transcript of [the attorney's] testimony as a witness against [the public official] was introduced. Such testimony is competent; it is no more than an admission of the party against whom it is used." **Anno:** 161 ALR 903

See Re Durant, 80 Conn 140, 67 A 497, 10 Ann Cas 539, supra, n. 12.55.

[12.57] **Anno:** 161 ALR 905. See Re Santosuosso, 318 Mass 489, 62 NE2d 105, 161 ALR 892, holding that findings of material facts included in the record of a suit based upon the alleged corrupt conduct of a defendant attorney are not admissible in an inquiry by the court into his conduct.

And see Fairfield County Bar v. Taylor, 60 Conn 11, 22 A 441, 13 LRA 767, supra, n. 12.53.

[12.58] Selling v. Radford, 243 US 46, 61 L ed 585, 37 S Ct 377, Ann Cas 1917D, 569.

Anno: 161 ALR 906.

The application of the rule announced by the Supreme Court noted above, which has been followed in some jurisdictions, would seem to

assume the admissibility of whatever portions of the record of the former disbarment proceedings are necessary to disclose the fact of disbarment in such other jurisdiction. However, in a Massachusetts disciplinary proceeding against an attorney based upon the fact of his disbarment by a Federal district court, the court, although adhering to the rule announced in Selling v. Radford (US) supra, as to the effect of an order of disbarment in another jurisdiction, held that since the petition (alleging the fact of the disbarment in the Federal court proceedings and attaching a copy of the findings of the judge and the decree entered therein) set forth cause for disbarment, the copy of the pleadings and findings of fact in the Federal court proceedings "rightly were received in evidence." **Anno:** 161 ALR 906.

p. 439, n. 13. Anno: 161 ALR 907.

Page 439. *Add, following note* 13: However, a former judgment or decree has been held admissible in a disbarment proceeding.[13.5] Where the disbarment of an attorney was sought upon the ground that he had paid large sums of money to persons employed by various corporations for information about personal injuries sustained by the employees of said corporations in order to enable him to approach them and solicit them to employ him to bring suits in their behalf, and it appeared that in an income tax proceeding such attorney's counsel was called upon to make a statement in his behalf, to the effect that respondent [attorney] secured his business "through information received usually from or through an employee of the company and he reciprocates or pays that employee, as a general thing, for receiving that information, in the form of a commission," such statement was held admissible testimony "made in the presence of respondent and strongly corroborating the charge that respondent had spent sums of money to obtain law business," and that it had great weight to show that respondent spent said moneys to obtain law business, and that respondent did have knowledge of the contents of the petition for appeal when he signed the affidavits to the petition declaring therein that he had read the petition and was familiar with its statements.[13.51] But the unsworn statement made by an attorney in a divorce action, in response to an inquiry of the trial judge, which indicated that he had brought the action on behalf of the wife without her authority, has been held to be inadmissible upon a rule to show cause why his name should not be stricken from the rolls on a charge of malpractice, since such statement amounted to nothing more than a voluntary declaration.[13.52] In a proceeding in in which the court concluded that an attorney could not be suspended or disbarred under the state statutes for the filing of any pleading or exhibit in the courts of the state, it has been nevertheless held that where an attorney filed a petition in his own behalf against certain defendants, including district, superior, and county judges, as well as the judges of the supreme court, the attorney general, and the governor of the state, and in such petition, as well as in an exhibit attached thereto, falsely and maliciously attacked the courts of the state and the judges thereof, such petition and exhibits were competent evidence to be considered along with other evidence in the case as affecting the defendant's mental and moral fitness to continue to practice law.[13.53]

In a disbarment proceedings in which the accused was charged with having, while a member of the state senate, solicited a bribe for promoting a pending bill, it has been held that it was not error to admit testimony of certain persons regarding conversations with the person solicited, made by the latter over the telephone upon and immediately subsequent to the occasion of a meeting with the accused at a hotel, and at his behest, such persons, including the one solicited, being interested in the promotion of the legislation, wherein the person solicited told of the solicitation, to prove the fact that the statements concerning the necessity of raising money for that purpose had been made under those circumstances and at that time.[13.54]

[13.5] **Anno:** 161 ALR 907.
See Re Ebbs, 150 NC 44, 63 SE 190, 19 LRA NS 892, 17 Ann Cas 592.

[13.51, 13.52] **Anno:** 161 ALR 908.

[13.53] State Bar Commission ex rel. Williams v. Sullivan, 35 Okla 745, 131 P 703, LRA1915D 1218.
Anno: 161 ALR 909.

[13.54] **Anno:** 13 ALR2d 1422.

§ 295. — Weight and Sufficiency.

p. 439, n. 14. Annotation: 105 A.L.R. 985.

In a considerable number of cases it has been held that a "preponderance" of the evidence, or a "fair preponderance" thereof, is all that is required to support disbarment charges of a noncriminal nature. Re Mayberry, 295 Mass 155, 3 NE(2d) 248, 105 ALR 976.
Annotation: 105 ALR 985.

Page 439. *Add, following note* 14: In one jurisdiction it has been held that a higher degree of proof should be required in a proceeding to suspend a member of the bar from the practice of law than is required to determine a question of fact in the ordinary civil action, where only a preponderance of evidence is necessary.[14.5]

[14.5] Copren v. State Bar, 64 Nev 364, 183 P2d 833, 173 ALR 284.

p. 439, n. 15. Re Heirich, 10 Ill 2d 357, 140 NE2d 825, 67 ALR2d 827, cert den 355 US 805, 2 L ed 2d 49, 78 S Ct 22.
Re Otterness, 181 Minn 254, 232 NW 318, 73 ALR 1319 (clear and convincing).
Anno: 105 ALR 986.

p. 439, n. 16. Annotation: 105 A.L.R. 986.

"Clear and convincing" proof, which seems to be an even stricter degree than "clear preponderance" and "clear and satisfactory," has been held required in a considerable number of other disbarment cases, even though in most of them the charges have not been of a criminal nature—some of the courts observing that the proceedings are at least quasi criminal. Annotation: 105 A.L.R. 987.

p. 439, n. 17. Re Mayberry, 295 Mass 155, 3 N. E. (2d) 248, 105 A.L.R. 976.
Annotation: 105 A.L.R. 984.

An attorney's disbarment is warranted by evidence that he had committed an act of larceny in removing merchandise, without the consent of the owner, from a store upon which a distress for rent had been levied, that he fraudulently altered the amount of a note made to him, that he had removed and concealed an automobile which he knew was under levy, for the purpose of preventing its sale by a duly authorized officer of the law, that he had suborned perjury, that he had sent an anonymous letter through the mails, containing vulgar, obscene, and scandalous matter, and that he had received money from a woman to rent a house for her to be used as a bawdyhouse. Stone v. Board of Governance, 312 Pa 576, 168 A 473, 90 ALR 1109

A charge as ground for the disbarment of an attorney, that he had obtained money from a client by forging a certificate of nolle prosequendi on a copy of a bill of information charging the client with the commission of a crime, is not established with sufficient certainty by evidence that a certified copy of the bill of information was delivered to him by a deputy clerk without the indorsement of the certificate of nolle prosequendi on it, that the language of the entry was in the customary legal form, indicating that it was made by someone familiar with the records, and by the circumstance that the attorney disappeared from the city about the time of the alleged forgery and has not been seen since, where the client's reputation for truth and veracity is shown to be such that his evidence standing alone is not entitled to weight, and the departure of the attorney may be explained by family troubles and by the fact that he had been humiliated and his professional career injuriously affected by imprisonment for contempt in failing to pay alimony, and he is shown to have entertained the intention of departure prior to the time of the transaction in question. Re Craven, 178 La 372, 151 So 625, 90 ALR 973.

p. 439, n. 18. Re Otterness, 181 Minn 254, 232 NW 318, 73 ALR 1319 (clear and convincing).

Anno: 113 ALR 1184.

Page 439. *Add, following note* 1: The testimony of the respondent, in a disbarment proceeding for obtaining loans from bootleggers while a judge of a court of record before which offenders against the liquor law were brought, that he did not know that persons from whom he obtained the loans were bootleggers, must be accepted as true, unless outweighed by other facts and circumstances presented by the evidence.[1.5] Evidence that a judge of a court of record having jurisdiction of violations of the liquor law, and who was a pronounced dry, obtained a loan from a bootlegger with whom he had no personal relations, but who had a long court record, by going to a section of the community notorious for its bootlegging activities, where none but bootleggers would be likely to have money to lend, sufficiently shows, in a proceeding for the disbarment of the judge in his capacity as attorney, that he knew the character of the person with whom he was dealing, and that he should have known the reasons which prompted the loan.[1.6]

Although evidence of good reputation in a disbarment proceeding will not overcome evidence establishing specific charges, particularly if they involve moral turpitude, nevertheless, where the evidence is conflicting and the charge does not import criminality or moral turpitude, the court should give weight to testimony of good reputation.[1.61]

[1.5] Re Stolen, 193 Wis 602, 214 NW 379, 216 NW 127, 55 ALR 1355.

[1.6] Re Stolen, 193 Wis 602, 214 NW 379, 216 NW 127, 55 ALR 1355

[1.61] Re Heirich, 10 Ill 2d 357, 140 NE2d 825, 67 ALR2d 827, cert den 355 US 805, 2 L ed 2d 49, 78 S Ct 22.

p. 440, n. 2. Anno: 94 L ed 131.

An attorney who has been disbarred in a state because of his conviction on six charges of contempt of court, committed while defending Communists in a Federal District Court, has failed to meet the burden of showing good cause why he should not be disbarred from practice in the United States Supreme Court, where he merely relies upon the fact that he had already been severely punished for his contempt, that he had not been found guilty of a conspiracy to commit contempt, and that, prior to his disbarment from state practice, the Federal District Court in which the contempt had been committed only suspended him for two years. Re Isserman, 345 US 286, 97 L ed 1013, 73 S Ct 676.

§ 296. Trial or Hearing.

Forms: 2 Am Jur Pl & Pr Forms 2:1328, 2:1329.

Am Jur quoted in Re Williams, 180 Md 689, 23 A2d 7.

Page 440. *Add, following note* 3: It is immaterial whether or not the strict rules of procedure adopted by a state bar are followed in a disbarment hearing before the board of governors.[3.1] The only requirement going to the jurisdiction of the court in considering recommendations of the board of governors is that the attorney shall have ample opportunity to be heard.[3.2]

The fact that the hearing afforded one whose legal professional license it is sought to revoke or suspend is held before an administrative board among whose members are the persons who filed the charges upon which the proceedings against the licensee are based is not, it seems, such a badge of unfairness as to warrant a holding that there has been a denial of procedural due process.[3.5]

[3.1] Annotation: 114 A.L.R. 170.

[3.2] Annotation: 114 A.L.R. 170.

[3.5] **Anno:** 98 L ed 864.

p. 440, n. 8. It has been held that an attorney's failure to take the stand to testify in a disbarment proceeding against him justifies the censure of the court, even though it may not be of sufficient weight to change the court's decision. Re Heirich, 10 Ill 2d 357, 140 NE2d 825, 67 ALR2d 827, cert den 355 US 805, 2 L ed 2d 49, 78 S Ct 22.

Page 440. *Add following note* 8: The United States Supreme Court has held that the Fifth Amendment's privilege against self-incrimination is not available to an attorney who is questioned by a state authority investigating alleged professional misconduct;[8.5] that the Fourteenth Amendment does not automatically preclude a state from exacting testimony of an attorney relating to alleged professional misconduct and from attaching consequences to his refusal to respond;[8.51] that the unavailability to an attorney of a state privilege against self-incrimination in judicial inquiries relating to alleged professional misconduct does not involve a distinction from criminal prosecutions so irrational as to suggest either a denial of due process or a purposeful discrimination in violation of the equal protection clause of the Fourteenth Amendment;[8.52] that the due process clause of the Fourteenth Amendment is not violated by the disbarment of an attorney on the ground that by invoking, in good faith, his privilege against self-incrimination under the state constitution for the purpose of justifying his refusal to answer questions in an investigation relating to alleged professional misconduct, he refused to co-operate with the court in its efforts to expose unethical practices, where the unanswered questions were material to the investigation and the attorney was duly warned of the consequences of his refusal to answer; it is not necessary for the state to proceed against him only by way of independent evidence of wrongdoing on his part.[8.53]

[8.5] Cohen v Hurley, 366 US 117, 6 L ed 2d 156, 81 S Ct 954.

[8.51] Cohen v Hurley, 366 US 117, 6 L ed 2d 156, 81 S Ct 954.

The Fourteenth Amendment does not establish a federal constitutional right of a person not to be required to incriminate himself in a state proceeding; to make out a violation of the Fourteenth Amendment, something substantially more must be shown than that the state procedures involved have a tendency to discourage the withholding of self-incriminatory testimony. Cohen v Hurley, 366 US 117, 6 L ed 2d 156, 81 S Ct 954.

[8.52, 8.53] Cohen v Hurley, 366 US 117, 6 L ed 2d 156, 81 S Ct 954.

p. 440, n. 11.

The Supreme Court of Nevada should, in reviewing the findings and recommendations of the Board of Governors of the State Bar and of the Local Administrative Committee in a disciplinary proceeding against a member of the bar, consider and weigh the evidence and arrive at an independent conclusion, giving, however, due consideration and according persuasive force to such recommendations. Copren v. State Bar, 64 Nev 364, 183 P2d 833, 173 ALR 284.

Page 440. *Add, following note* 11: It is not error to refuse to dismiss a count seeking disbarment of an attorney for wilfully misleading the court where the evidence shows that in order to secure an extension of time to file a supersedeas bond, he made and filed his own affidavit to the effect that his client was quarantined in his home and could not attend to the business, which was in fact untrue.[11.1]

[11.1] Re Vaughan, 189 Cal. 491, 209 P. 353, 24 A.L.R. 858.

§ 297. — Right to Jury Trial.

p. 441, n. 12. Ex parte Thompson, 228 Ala. 113, 152 So. 229, 107 A.L.R. 671.

Anno: 107 ALR 692; 98 L ed 860.

If an accused attorney had the right to a jury trial, it would necessarily destroy the inherent power of the court over attorneys. The two rights cannot coexist. Ex parte Thompson, 228 Ala. 113, 152 So. 229, 107 A.L.R. 671.

The conclusion as regards some of the states against the right to jury trial rests upon an inference from the fact that such proceedings seem to have been generally conducted in those states without a jury trial and that no objection appears to have been raised in that respect, rather than upon decisions expressly dealing with the point. Annotation: 107 A.L.R. 692.

The right to jury trial in disbarment proceedings did not receive constitutional sanction placing it beyond the power of the legislature by virtue of a right given by act of the territorial legislature in force at the time of the adoption of the Constitution. Ex parte Thompson, 228 Ala 113, 152 So 229, 107 ALR 671.

p. 441, n. 16. Annotation: 107 A.L.R. 692.

Page 441. *Add, following note* 17: Where such a statute was in force in a territory at the time it became a state and adopted a Constitution, the right to jury trial in disbarment proceedings did not thereby receive constitutional sanction so as to place it beyond the power of the legislature,[17.1] for because of the distinctive character of the proceeding and the fact that the right did not exist at common law the right to jury trial in disbarment proceedings is not guaranteed by the constitutional provision that the right of trial by jury shall remain inviolate.[17.11]

[17.1] Ex parte Thompson, 228 Ala. 113, 152 So. 229, 107 A.L.R. 671.

[17.11] Ex parte Thompson, 228 Ala. 113, 152 So. 229, 107 A.L.R. 671.
Annotation: 107 ALR 692.

This holding seems to be attributable to the view that the suspension or disbarment of attorneys, being an essential and inherent power of the court, is not hampered or restricted by the right to jury trial unless such right is affirmatively granted by statute. The right of the English courts to deal summarily with dishonest and unfit attorneys existed before Magna Charta and was not abrogated or lessened by the provisions of that instrument. Ex parte Thompson, 228 Ala. 113, 152 So. 229, 107 A.L.R. 671. Annotation: 107 A.L.R. 692.

§ 298. — Continuance.

Page 442. *Add, following note* 4: A stay in a disbarment proceeding in which the defense thereto has not been materially affected by reason of respondent's military service has been held properly denied under the Soldiers' and Sailors' Civil Relief Act where it appeared that all of the facts were presented to the trial committee in the presence of respondent and prior to the time he was inducted into the military service.[4.5]

[4.5] **Anno:** 144 ALR 1512.

§ 299. Judgment and Enforcement Thereof.

Forms: 2 Am Jur Pl & Pr Forms 2:1331-2:1333.

Am Jur cited in Re Page (Mo) 257 SW2d 679.

p. 442, n. 7. Re Keenan, 310 Mass 166, 37 NE(2d) 516, 137 ALR 766.

A final judgment of disbarment rendered by a court of competent jurisdiction is binding upon all the courts of the state and constitutes an adjudication that, at the time it was rendered, the person so disbarred was not a proper person to hold the office of attorney. Re Keenan, 310 Mass 166, 37 NE(2d) 516, 137 ALR 766.

p. 442, n. 9.

The contention that a judgment of a state supreme court disbarring an attorney from practice in the "courts" of the state is too broad cannot be raised for the first time in a subsequent independent proceeding by the attorney for readmission to the bar. Re Keenan 310 Mass 166, 37 NE(2d) 516, 137 ALR 766

Page 442. *Add, following note* 9: No rule of the board of commissioners of the state bar or approval by the court of such rule is necessary to warrant a judgment of disbarment by a majority vote of a quorum present, in view of the provision of the act creating the board to the effect that a majority of the board shall constitute a quorum and the majority of those present (if a quorum be present) shall be empowered to act as and for the entire board.[9.1]

[9.1] Ex parte Thompson, 228 Ala. 113, 152 So. 229, 107 A.L.R. 671.

§ 300. Review.

Page 442. *Add, following note* 16: Even though a jury returns a verdict of not guilty, the supreme court may affirm the action of the court in granting a new trial without finding that there was no substantial evidence to support the jury's verdict.[16.1]

[16.1] State Law Examiners v. Phelan, 43 Wyo. 481, 5 P. (2d) 263, 78 A.L.R. 1317.

Page 443. *Add new paragraph at end of section:* Upon review of a state judgment disbarring an attorney on account of his invoking his state privilege against self-incrimination, the scope of review by the United States Supreme Court is limited to the question whether arbitrary or discriminatory state action can be found in the consequences the state has attached to the exercise of the privilege.[19.5]

[19.5] Cohen v Hurley, 366 US 117, 6 L ed 2d 156, 81 S Ct 954.

§ 301. Generally.

Forms: 2 Am Jur Pl & Pr Forms 2:1334–2:1336.

Am Jur quoted in Application of Spriggs, 90 Ariz 387, 368 P2d 456.

Cantor v Grievance Committees, 189 Tenn 536, 226 SW2d 283.

Hankamer v. Templin, 143 Tex 572, 187 SW2d 549

Am Jur cited in Re Dawson (Fla) 131 So 2d 472.

Re Stump, 272 Ky 593, 114 SW2d 1094 (n. 20).

Burns v. State, 129 Tex 303, 103 SW2d 960 (notes 20–2).

RCL cited in Re Oliver, 97 Utah 1, 89 P2d 229

p. 443, n. 20. Anno: 70 ALR2d 276-280, 313.

An attorney disbarred by a final judgment of a state supreme court is not, by force of such judgment, even though unreversed, precluded from applying for readmission to the bar, where the offense for which he was disbarred is of such a kind that, after a lapse of time, he may be able to satisfy the court that he has become trustworthy. Re Keenan, 310 Mass 166, 37 NE(2d) 516, 137 ALR 766.

As to pardon for conviction of crime for which attorney was disbarred as authorizing courts to entertain application for reinstatement, see supra § 284 (Supp.)

It has been held that a disbarred attorney whose petition for reinstatement has been denied is not precluded from again applying for such reinstatement upon a showing of reformation and rehabilitation. **Anno:** 70 ALR2d 279.

p. 443, n. 1. See infra, notes 9.51 et seq. (Supp.).

Anno: 70 ALR2d 316.

p. 443, n. 2.

Anno: 70 ALR2d 320–324.

An application for reinstatement of an attorney after judgment of disbarment has become final must be treated as an application for admission to the practice and not as an application to vacate the order of disbarment. Re Stephenson, 243 Ala 342, 10 So(2d) 1, 143 ALR 166.

p. 443, n. 3. Re Application of Daniel (Okla) 315 P2d 789, 70 ALR2d 265.

Anno: 70 ALR2d 282.

p. 443, n. 4. Anno: 70 ALR2d 283.

p. 443, n 5. Re Stephenson, 243 Ala 342, 10 So(2d) 1, 143 ALR 166

Anno: 70 ALR2d 294–299.

It has been held that the proper method and manner of establishing the character and trustworthiness of one seeking reinstatement to the bar is by presentation of recommendations and statements of those who are in position to know and judge the petitioner. Re Application of Daniel (Okla) 315 P2d 789, 70 ALR2d 265.

p. 443, n. 6. See Re Stephenson, 243 Ala 342, 10 So(2d) 1, 143 ALR 166

Anno: 70 ALR2d 287-293.

Page 443. *Add following note* 6: An attorney's readmission to practice, following a period of suspension involving the charging of an exorbitant fee, has in some instances been conditioned upon his restitution of the excessive amount of the fee.[6.5]

[6.5] **Anno:** 70 ALR2d 983.

p. 443, n. 7. Anno: 70 ALR2d 325.

p. 443, n. 8. Anno: 70 ALR2d 330.

An order of disbarment cannot be vacated by legislative mandate. Re Phillips, 17 Cal(2d) 55, 109 P(2d) 344, 132 ALR 644

p. 443, n. 9. Anno: 70 ALR2d 331.

See supra § 284.

Page 443. *Add new paragraph at end of section:* In some cases it has been held that a petition for the reinstatement or readmission to practice of a disbarred attorney may not be presented to any court other than that which entered the original disbarment order.[9.51] But in other cases it has been held that an application for reinstatement or readmission to the bar need not be presented to the court which entered the disbarment order, such application not being a continuation of the original proceeding for disbarment.[9.53] And a number of cases have held that an application by a disbarred attorney for reinstatement or readmission to the bar should be treated as an original application for admission to the bar rather than as a further application in the original disbarment proceeding.[9.55]

Where an applicant for original admission to the bar must be a resident of the state, a nonresident is ineligible for reinstatement.[9.57] Reinstatement cannot be granted a petitioner whose original admission to practice was null and void because of his lack of citizenship or because of fraud in its procurement, or where his original license had been revoked after the filing of the application for reinstatement.[9.58]

Courts have consistently upheld their inherent power and authority in a proper case to reinstate an applicant previously subjected to disciplinary action.[9.59] It is the duty of the courts in such a case to act with justice to the profession and the public as well as to the applicant, and without regard to mere feelings of sympathy for him.[9.6]

An application for reinstatement is not ordinarily the proper place for an attack on the disbarment of the petitioner or the conviction of crime for which he was disbarred or threatened with disbarment.[9.61]

An application for reinstatement to the bar is, in many instances, under a statute or rule of court to that effect, made or referred to a referee or some committee of the bar for preliminary hearing and investigation.[9.62] An application for reinstatement to practice law may be peremptorily denied, may be granted either with reservations or unconditionally, and may be complete or partial.[9.63] An order in an ex parte proceeding by an attorney for reinstatement to the privilege of practicing has been held to be appealable.[9.64]

The effect of reinstating an attorney is to reinvest him with the right to practice as of the date of the reinstatement.[9.65]

[9.51] **Anno:** 137 ALR 781; 70 ALR2d 314, 316.

This result has been based on the ground that the power to reinstate is based on the continuing jurisdiction of the court over the subject matter and the parties, and that a petition for reinstatement may and must be presented to the court which rendered the judgment of disbarment. **Anno:** 137 ALR 781.

A statement approved in a number of jurisdictions is: "When a member of the bar of the state has been, upon proper proceedings, disbarred, and the judgment remains in full force and unreversed, the only remedy of the party is, at the proper time and on a proper showing, to apply to the court in which he was disbarred to be reinstated. The court rendering the judgment of disbarment retains a continuing jurisdiction over the subject, as in many similar cases, and may, upon a proper showing of reformation of the party, or other satisfactory reasons arising after the disbarment, reinstate him in the practice of his profession. Readmission as upon application and examination in the first instance is not the proper course." **Anno:** 137 ALR 781.

In an application to the Pennsylvania supreme court for readmission, filed by an attorney who had been disbarred by the court of common pleas, it was held that such petition asked the court to reconsider the facts upon which the decree was based and should be made to the court that found those facts and not to the appellate court, although it appeared that when the appellate court affirmed a disbarment order entered by a county court, as it had on the disbarment of the applicant in this case, the effect, under a rule of court, was to strike the name of the attorney from the roll of the supreme court. **Anno:** 137 ALR 781.

9.53 Anno: 70 ALR2d 315, 318.

Re Keenan, 310 Mass 166, 37 NE2d 516, 137 ALR 766, in which it was said that the proceeding for readmission was a new proceeding rather than a continuation of the original disbarment proceeding, and that it was not to be regarded as a continuation of the original disbarment proceeding on the ground that such second admission to the bar would be a modification of the punishment imposed by the jdugment of disbarment since a disbarment is not properly or technically to be considered a punishment although it may have that practical effect.

9.54 Anno: 137 ALR 782.

The fact that under a statute relating to admission to the bar, a petition for admission may be filed in either one of two courts of the state does not establish the inapplicability of the statute to the admission of attorneys previously disbarred, where, under the law of the state, a petition by a disbarred person under the statute is an entirely new and independent proceeding distinct from the proceeding for disbarment. Re Keenan, 310 Mass 166, 37 NE(2d) 516, 137 ALR 766.

9.55 Anno: 137 ALR 783; 70 ALR2d 314, 316.

A disbarment under a section of a statute providing that the name of an attorney who commits any infamous crime or misdemeanor involving moral turpitude shall be stricken from the roll of attorneys and be excluded from practicing as an attorney is permanent and places him in the same position as if he never had a license to practice so that he must seek readmission as any applicant seeking admission to the bar for first time and may not apply for reinstatement through the disbarring court. Cantor v. Grievance Committees, 189 Tenn 536, 226 SW2d 283.

9.57 Anno: 70 ALR2d 280.
9.58 Anno: 70 ALR2d 280.
9.59 Anno: 70 ALR2d 281.
9.6 Anno: 70 ALR2d 282.
9.61 Anno: 70 ALR2d 324.
9.62 Anno: 70 ALR2d 325.

It has been held that the recommendation of a referee or board, while entitled to weight and deference, is advisory only, the final determination resting with the court. **Anno:** 70 ALR2d 326.

9.63 Anno: 70 ALR2d 327.
9.64 Anno: 70 ALR2d 329.
9.65 Anno: 70 ALR2d 335.

AUCTIONS

§ 2. Definition of Terms, and Historical Summary.

Am Jur quoted in ABC Liquidators, Inc. v Kansas City (Mo) 322 SW2d 876.

In B. H. Steif Jewelry Co. v Walker, 36 Tenn App 427, 256 SW2d 392.

Am Jur cited in Hagerman v St. Louis, 365 Mo 403, 283 SW2d 623, 53 ALR2d 1423.

p. 447, n. 9. Perry Trading Co. v. Tallahassee, 128 Fla. 424, 174 So. 854, 111 A.L.R. 463.

§ 3. Generally.

Am Jur cited in Hall of Distributors, Inc. v Bowers (DC Ohio) 139 F Supp 400.

Moore v Thompson (Fla) 126 So2d 543; State ex rel. James v Gerrell, 137 Fla 324, 188 So 812.

Steinberg-Baum & Co. v Countryman, — Iowa —, 77 NW2d 15.

Gilbert v Mathews, 186 Kan 672, 532 P2d 58.

Hagerman v St. Louis, 365 Mo 403, 283 SW2d 623, 53 ALR2d 1423.

Blauvelt v Beck, 162 Neb 576, 76 NW2d 738.

p. 447, n. 14. Annotation: 111 A.L.R. 474.

While an auction sale tends to stimulate buying by the occasional spirit of competition which pervades the prospective purchasers present, it cannot be said that the auctioneer is guilty of dishonest methods by taking advantage of that normal condition and doing what he can to stimulate it. Perry Trading Co. v. Tallahassee, 128 Fla 424, 174 So 854 111 ALR 463.

p. 447, n. 16. Annotation: 111 A.L.R. 473.
p. 447, n. 17. Hagerman v St. Louis, 365 Mo 403, 283 SW2d 623, 53 ALR2d 1423.
p. 447, n. 18. Annotation: 111 ALR 473.

It has been held that Missouri statutes licensing and regulating auctioneers, contemplate auction sales by licensed auctioneers, for others and also at auction stores or rooms. Hagerman v St. Louis, 365 Mo 403, 283 SW2d 623, 53 ALR2d 1423.

p. 447, n. 19. Annotation: 111 ALR 474; 53 ALR2d 1437 (jewelry auctions).

Page 448. *Add, following note* 20: Authority delegated to a municipality to regulate auctions empowers it to act in respect of merchants regularly selling their own goods at auction as well as persons auctioning goods of others,[21] but it does not permit the city directly or indirectly to prohibit the business.[22] It is beyond the power of a city to regulate in any way sales at auction when a statute already completely covers the matter.[23]

An auctioneer's licensing statute may extend to corporations.[24]

[21] Annotation: 111 A.L.R. 475.
[22] Annotation: 111 A.L.R. 474.
[23] Annotation: 111 A.L.R. 475.
[24] **Anno:** 165 ALR 1100.

§ 4. Limitations upon Power to License and Regulate.

Am Jur cited in Steinberg-Baum & Co. v Countryman, — Iowa —, 77 NW2d 15.

Gilbert v Mathews, 186 Kan 672, 352 P2d 58.

Hagerman v St. Louis, 365 Mo 403, 283 SW2d 623, 53 ALR2d 1423.

p. 448, n. 2. Perry Trading Co. v. Tallahassee, 128 Fla. 424, 174 So. 854, 111 A.L.R. 463

Annotation: 111 A.L.R. 473.

p. 448, n. 3. Anno: 111 ALR 473.
p. 448, n. 4. Anno: 111 ALR 479; 53 ALR2d 1438–1442 (jewelry auctions).
p. 448, notes 6, 7. Anno: 111 ALR 479.
p. 448, n. 8. Anno: 111 ALR 473.
p. 448, n. 9. Anno: 111 ALR 479; 53 ALR2d 1436 (jewelry auctions).
p. 448 notes 10, 11. Anno: 111 ALR 479.

§ 5. — Amount of License Fee.

p. 449, notes 14, 15. Anno: 111 ALR 480.
p. 449, n. 17. Anno: 111 ALR 480.
p. 449, n. 18. Anno: 11 ALR 480; 53 ALR 2d 1443 (jewelry auctions).
p. 449, n. 19. Anno: 111 ALR 480; 53 ALR 2d 1444.

§ 6. Effect of Failure to Obtain License.

Am Jur cited in Hagerman v St. Louis, 365 Mo 403, 283 SW2d 623, 53 ALR2d 1423.

p. 449, n. 2. Anno: 118 ALR 654.
p. 449, n. 3. Annotation: 111 A.L.R. 479.

§ 7. Regulation Other than Requirement of License.

Am Jur cited in State v Gordon, 143 Conn 698, 125 A2d 477.

Steinberg-Baum & Co. v Countryman, — Iowa —, 77 NW2d 15.

Gilbert v Mathews, 186 Kan 672, 352 P2d 58.

p. 450, n. 7. Anno: 53 ALR2d 1438–1440 (jewelry auctions).
p. 450, n. 8. Anno: 53 ALR2d 1435, 1440–1442 (jewelry auctions).

The constitutional rights of owners of property are infringed by making the giving of notice a condition of the right to sell merchandise at auction and requiring adherence to the pub-

lished terms and conditions of sale and the acceptance of a bid if at least two bids have been made. Perry Trading Co. v. Tallahassee. 128 Fla. 424. 174 So. 854. 111 A.L.R. 463.

It has been held that an ordinance making unlawful a retail auction sale of jewelry unless the person whose stock is being offered shall have been in the retail jewelry business at the location of the sale for at least 1 year, and shall not have conducted an auction sale at any time within the said 1-year period at the said location or on the said premises, creates classifications which are not authorized by the police power, as affecting the public health, welfare, or safety of the citizens of the community, and which fail to include all who are similarly situated, thus rendering the ordinance a special law. Hagerman v St. Louis, — Mo —, 283 SW2d 623. 53 ALR2d 1423.

p. 450, n. 9. Anno: 111 ALR 477; 53 ALR2d 1442 (jewelry auctions).

p. 450, n. 10. Annotation: 111 A.L.R. 475.

Auctioned sales in a store may be regulated as well as those on the street or in other public places. Annotation: 111 A.L.R. 475.

An ordinance forbidding auction sales in a BA Business District was held unreasonable, arbitrary, and void where the conducting of auction sales was not more obnoxious than many of the other businesses permitted in the district, where permissible areas were either unsuited for auction sales or had been pre-empted, and where the enforcement of the ordinance would in effect suppress and prohibit the conduct of such sales. Miami Beach v Perell (Fla) 52 So2d 906.

p. 450, n. 11. Anno: 111 ALR 476; 53 ALR 2d 1435 (jewelry).

The sale of jewelry by auction has been held not to be a pernicious business subject to prohibition by legislation. Hagerman v St. Louis, — Mo —, 283 SW2d 623, 53 ALR2d 1423.

p. 450, n. 12. Perry Trading Co. v. Tallahassee, 128 Fla. 424. 174 So. 854, 111 A.L.R. 463.

Anno: 111 ALR 478; 53 ALR2d 1433 (jewelry).

p. 450, n. 13. Annotation: 55 A.L.R. 242–244; 111 ALR 477; 53 ALR2d 1442 (jewelry).

p. 450, n. 14. Perry Trading Co. v Tallahassee, 128 Fla 424, 174 So 854, 111 ALR 463.

Anno: 55 ALR 244, 111 ALR 477; 53 ALR2d 1442 (jewelry).

An ordinance requiring auctions to be held between the hours of 8 A. M. and 6 P. M. is void for discrimination where crowded assemblies in places of business after 6 P. M. are permitted without municipal interference and are not productive of either public inconvenience or breaches of the peace. Perry Trading Co. v. Tallahassee, 128 Fla. 424. 174 So. 854. 111 A.L.R. 463

p. 450, n. 15. Annotation: 55 A.L.R. 242.

p. 450, n. 16. Annotation: 55 A.L.R. 242; 111 ALR 476, 477; 53 ALR2d 1436, 1442.

p. 451, n. 17. Anno: 11 ALR 479; 53 ALR2d 1441.

§ 8. Generally.

Forms: 2 Am Jur Legal Forms 2:3–2:8

p. 451, n. 1. Palsey v Ropp (Mo App) 334 SW2d 254, 80 ALR2d 1231.

§ 9. Scope and Extent of Authority.

Forms: 2 Am Jur Pl & Pr Forms 2:1352.

p. 452, n. 10. Supplemental annotation. 105 A.L.R. 724.

§ 10. — Power to Warrant.

Am Jur cited in Lasker v Patrovsky, 264 Wis 589, 60 NW2d 336.

p. 452, n. 16. Anno: 40 ALR2d 313.

p. 452, n. 1. Anno: 40 ALR2d 313.

§ 14. The Advertisement.

Forms: 2 Am Jur Legal Forms 2:9–2:13.

Am Jur quoted in Moore v Berry, — Tenn App —, 288 SW2d 465.

p. 454, n. 15. Anno: 158 ALR 1421.

p. 454, n. 16. Anno: 158 ALR 1421.

p. 454, n. 17. Anno: 158 ALR 1421.

§ 15. Terms and Conditions of Sale.

Forms: 2 Am Jur Legal Forms 2:14—2:16.

Am Jur quoted in Moore v Berry, — Tenn App —, 288 SW2d 465.

Am Jur cited in United States v. Blair (CA10th Colo) 193 F2d 557; Gould v. Hiram Walker & Sons (CCA7th) 142 F2d 544

Continental Can Co. v Commercial Waterway Dist. 56 Wash 2d 456, 347 P2d 887, 354 P2d 25.

§ 16. — Conflict between Printed and Oral Conditions.

p. 455, n. 13. Perry Trading Co. v. Tallahassee, 128 Fla. 424, 174 So. 854, 111 A.L.R. 463.

p. 455, n. 14. Perry Trading Co. v. Tallahassee, 128 Fla. 424, 174 So. 854, 111 A.L.R. 463.

Anno: 158 ALR 1421.

§ 17. The Bidding; Offer and Acceptance; Withdrawal of Property from Sale.

Am Jur quoted in Jones v. Hackensack Auto Wreckers, 124 NJL 289, 11 A(2d) 595.

Zuhak v. Rose, 264 Wis 286, 58 NW2d 693.

Am Jur cited in Jackson v. L. S. Brown Co. 86 Ga App 310, 71 SE2d 521.

p. 456, n. 19. Anno: 37 ALR2d 1052.

It has been stated that an advertisement or announcement of a sale at auction to the highest bidder is a mere declaration of intention to hold an auction at which bids will be received and that until a bid is accepted the property may be withdrawn from the sale. **Anno:** 37 ALR 2d 1052.

p. 456, n. 2.

It has been held that one who, prior to acts of the owner in stopping an auction advertised to be "without reserve" and discharging the auctioneer, had made the highest bid, does not withdraw such bid by making a higher offer to the owner for a private sale, which is refused. Zuhak v. Rose, 264 Wis 286. 58 NW2d 693, 37 ALR2d 1041.

p. 456, n. 4. Perry Trading Co. v. Tallahassee. 128 Fla 424, 174 So 854, 111 ALR 463.

Anno: 37 ALR2d 1049 et seq.

Page 456. *Add, following note 4:* Where the seller reserves the right to refuse to accept any bid made, a binding sale is not consummated between the seller and the bidder until the seller accepts the bid.[4.5] Where the advertisement contains notice of a "reserve price" below which the article will not be sold, the auctioneer may withdraw the property from the sale if there are no bids reaching such publicly announced reserve price.[4.51]

[4.5] **Anno:** 37 ALR2d 1053.

[4.51] **Anno:** 37 ALR2d 1053.

p. 456, n. 5. Anno: 37 ALR2d 1054, 1056.

p. 457, n. 5a. Anno: 37 ALR2d 1054–1056.

It has been held that the specification, in an advertisement of an auction sale "without reserve," of the period during which the real estate would be sold is waived by the continuation of the sale beyond such period, and, even if not so waived, does not give the owner the right to reject the highest bid made after the period. but merely the right to close further bidding. Zuhak v. Rose, 264 Wis 286. 58 NW2d 693, 37 ALR2d 1041.

A contract for the sale of real estate has been held made by an offer to sell the same to the highest bidder at auction "without reserve" together with the highest bona fide bid made therefor at the auction sale, even though the owner stops the auction and discharges the auctioneer before the latter can receive higher bids or accept the highest bid theretofore made. Zuhak v. Rose, 264 Wis 286. 58 NW2d 693. 37 ALR2d 1041.

It has been held that even where the sale is advertised to be "without reserve," the auctioneer may withdraw the property from auction sale before there has been any bidding. **Anno:** 37 ALR2d 1056.

p. 457 n. 6. Anno: 37 ALR2d 1051, 1054.

A provision of the Uniform Sales Acts, which in effect provides for the withdrawal of bids or property until such time as the sale is completed by the fall of the auctioneer's hammer "unless the sale is without reserve" has been construed to preclude a withdrawal of the property in a sale "without reserve" after a bid has been made, although not accepted. Zuhak

v. Rose. 264 Wis 286. 58 NW2d 693. 37 ALR2d 1041.

Page 457. *Add, at end of section:* The owner of property will be permitted to withdraw the property from sale and may legally refuse to comply with the terms of the sale when the auctioneer knocks the property down as a result of a mistake and refuses to resell the property when the mistake is called to his attention.[8.5]

[8.5] **Anno:** 37 ALR2d 1056.

§ 18. Mode of Making Bids.

Forms: 2 Am Jur Legal Forms 2:27

Am Jur cited in Matthews v Linn, 78 SD 203, 99 NW2d 885.

§ 20. Discretion of Auctioneer as to Acceptance of Bids.

Forms: 2 Am Jur Pl & Pr Forms 2:1351.

p. 458. n. 7. Anno: 37 ALR2d 1057.

§ 21. Who May Bid.

Forms: 2 Am Jur Pl & Pr Forms 2:1359.

Am Jur quoted in Combs v. Baker. 203 Ark 602. 158 SW2d 48.

RCL cited in Combs v. Baker. 203 Ark 602, 158 SW2d 48.

p. 459. n 16. UNIFORM SALES ACT, § 21 (3, 4)

§ 22. By-bidding or Puffing—In General.

Am Jur cited in Kenyon v Kenyon, 81 RI 223, 101 A2d 477.

§ 26. Stifling of Competition.

Am Jur cited in Preske v. Carroll, 178 Md 543, 16 A(2d) 291.

RCL cited in Schaefer v. Cousins (La App) 189 So 158, 621.

Detroit Trust Co. v. Agozzinio, 280 Mich 402, 273 NW 747.

§ 27. — Agreements Not to Bid.

Am Jur quoted in Jones v. Clary, 194 Va 804, 75 SE2d 504

Am Jur cited in Roberts v Salot, 166 Cal App 2d 294, 33 P2d 232.

§ 28. Generally.

Am Jur quoted in Brey v. Tvedt, 74 ND 192, 21 NW2d 49.

§ 30. Authority of Auctioneer to Make Memorandum—In General.

Forms: 2 Am Jur Legal Forms 2:28–2:34.

Am Jur quoted in Smith v. Joyce, 214 NC 602. 200 SE 431 (notes 6–7).

Moore v Berry, — Tenn App —, 288 SW2d 465.

p. 467, n. 8.

See Zuhak v. Rose, 264 Wis 286, 58 NW2d 693, 37 ALR2d 1041 (holding that one who offers realty for sale to the highest bidder at auction "without reserve" and, being dissatisfied with the bids, stops the auction and discharges the auctioneer may not, as against the highest bidder assert the claim that no memorandum of sale sufficient under the statute of frauds was given)

§ 31. — When Memorandum Must Be Made; Termination of Auctioneer's Authority to Sign.

Am Jur quoted in Smith v. Joyce, 24 NC 602, 200 SE 431 (n. 14).

Am Jur cited in Faultersack v. Clintonville Sales Corp. 253 Wis 432, 34 NW2d 682.

§ 33. — Necessity that Auctioneer Have Written Authority to Sign Contract.

Am Jur cited in Polka v May, 383 Pa 80, 118 A2d 154.

p. 469, n. 3. Doty v. Wilder, 15 Ill 407, 60 Am Dec 756; Dawson v. Miller, 20 Tex 171, 70 Am Dec 380.

Anno: 131 Am St Rep 482.

§ 35. Form and Contents of Memorandum.

Page 471. *Add, following* "property sold" *in the sixth line of the section:* [16.5]

[16.5] Shy v. Lewis, 321 Mo 688, 12 SW(2d) 719, citing RCL; Dunham v. Hartman, 153 Mo 625, 55 SW 233, 77 Am St Rep 741

Anno: Ann Cas 1912D 1076; 23 ALR2d 70, 71.

The designation "property sold this day at auction—Pawtucket Ave. East Prov.," as contained in a receipt captioned Providence, Rhode Island, September 5, 1918, has been held sufficient to satisfy the statute, since it was not contended that the vendor owned more than one parcel of property on Pawtucket Avenue, or owned on that avenue more than one parcel of property which was sold at public auction on September 5, 1918. **Anno:** 23 ALR2d 70.

Page 471. *Add, following* "terms of credit" *in the seventh line of the section:* [16.6]

[16.6] Norris v Blair, 39 Ind 90, 10 Am Rep 135; O'Donnell v. Leeman, 43 Me 158, 69 Am Dec 54; Mason Motors Spirit Distributing Co. v. Cosden, 105 Okla 244, 231 P 890, citing RCL.

p. 471, n 19.

A memorandum of sale of land which neither names nor describes the vendor, although naming certain persons as auctioneers, is insufficient under the Statute of Frauds. McGovern v. Hern, 153 Mass 308, 26 NE 861, 10 LRA 815, 25 Am St Rep 632.

For a detailed discussion of the sufficiency of a memorandum signed by agents, including auctioneers, of undisclosed principals, see 49 Am Jur 717–721, STATUTE OF FRAUDS, §§ 415–417.

p. 471, n. 20.

For a detailed discussion of the sufficiency of a memorandum signed by agents, including auctioneers, of undisclosed principals, see 49 Am Jur 717–721, STATUTE OF FRAUDS, §§ 415–417.

Page 471. *Add at end of section:* In some states the law is very explicit and in terms requires a subscription at the "end" or "close" of an instrument. Thus, under a statute providing that "when the law requires any writing to be signed by a party thereto, it shall not be deemed to be signed unless the signature be subscribed at the end or close of such writing,' an auctioneer's name printed upon a newspaper clipping which is pasted above the rest of a memorandum in which the price is stated and the purchaser's name signed is not a sufficient signature because not appended to the part of the paper which the purchaser signed, and not subscribed at the end.[4.5]

[4.5] **Anno:** 112 ALR 940.

§ 36. — Inclusion, by Reference of Terms in Separate Writings.

p. 472, n. 6.

A memorandum of an auction sale, signed by the purchaser and describing the property as "the real estate described in the printed advertisement hereto annexed," sufficiently describes the land sold to comply with the statute. **Anno:** 73 ALR 1387.

§ 38. Deposit or Earnest Money.

Forms: 2 Am Jur Pl & Pr Forms 2:1356.

§ 40. Payment of Purchase Price; Vendor's Lien; Sale on Credit.

Forms: 2 Am Jur Legal Forms 2:35–2:38

§ 41. Passing of Title.

Am Jur quoted in State ex rel. Robins v Clinger, 72 Idaho 222, 238 P2d 1145.

Herbert's Estate, 356 Pa 107, 51 A2d 753

Am Jur cited in Stiles v Commonwealth (Ky) 348 SW2d 843.

Yellowstone Livestock Com. v Dupuis, 133 Mont 454, 325 P2d 691.

Page 475. *Add, following note* 17: One who has accepted a bid made for real property offered at auction cannot thereafter enter into a binding contract for its sale to another.[17.5]

[17.5] Atlantic Ref. Co. v. Wyoming Nat. Bank. 356 Pa 226. 51 A2d 719. 170 ALR 1060.

§ 42. Delivery.

Forms: 2 Am Jur Legal Forms 2:39. 2:40.

§ 43. Enforcing the Sale Generally.

Forms: 2 Am Jur Pl & Pr Forms 2:1357. 2:1358; 18 Am Jur Pl & Pr Forms 18:1162.

p. 476, n. 17. Edwards v. Downing, 314 Ky 78, 234 SW2d 305.

Page 477. *Add, at end of section:* Where the sale is "without reserve," and the right to withdraw the property does not exist after a bid has been made, it has been held that the highest bidder may specifically enforce the acceptance of his bid and a transfer of the property pursuant thereto, or may recover damages for breach of contract.[6.5] On the other hand, at least in the absence of a sale "without reserve," it has been held generally that where the property is withdrawn from auction sale before the acceptance of any bid, there is no contract between the parties, and, accordingly, the remedy of specific performance is inapplicable.[6.51]

[6.5] **Anno:** 37 ALR2d 1056.

The court affirmed the trial court's judgment ordering specific performance of a contract to convey realty arising out of an auction sale "without reserve" wherein the owner withdrew the property after plaintiff had bid on it, and retained jurisdiction so that if specific performance should be impossible for any reason, the court might abate the price conformably to what should be conveyed, or allow damages for breach of the contract. Zuhak v. Rose. 264 Wis 286. 58 NW2d 693. 37 ALR2d 1041.

[6.51] Tillman v. Dunman, 114 Ga 406. 40 SE 244, 57 LRA 784. 88 Am St Rep 28.

McPherson Bros. Co. v. Okanogan County. 45 Wash 285, 88 P 199, 9 LRA NS 748.

Anno: 37 ALR2d 1057.

§ 44. Suit by Auctioneer in Own Name.

p. 477, n. 7. It has been held that the operator of a public sales barn who pays to the seller of cattle placed in the barn for sale the purchase price, less commission, agreed upon between the seller and buyer of the cattle, is entitled to recover such purchase price from the buyer who, upon discovering that the cattle had been stolen and that he had no title thereto, refuses to pay. Pasley v Ropp (Mo App) 334 SW2d 254, 80 ALR2d 1231.

§ 45. Resale of Property on Default of Buyer.

Forms: 2 Am Jur Legal Forms 2:41–2:43; 2 Am Pur Pl & Pr Forms 2:1357. 2:1358.

§ 46. Warranties; Claims Based on Defects in Property Sold.

Forms: 2 Am Jur Legal Forms 2:44–2:49.

Am Jur cited in Gould v. Hiram Walker & Sons (CCA 7th) 142 F(2d) 544.

Page 479. *Add, following note* 7: There may of course be an express warranty or a warranty implied in fact from words or conduct.[7.5]

[7.5] **Representations privately made in regard** to property which has been advertised for sale at public auction may become the foundation of an action for breach of warranty in favor of one who, in reliance on them, bids in the property. Crossman v. Johnson. 63 Vt 333. 22 A 608. 13 LRA 678.

§ 50. Damages.

Page 482. *Add, following note* 6: Where the sale of land is public and the resale is also public, is fairly conducted after due notice both to the vendee and to the public, and is made upon substantially the same terms and conditions as the original sale, the amount received is, at least, evidence of the market value of the land at the time of the breach, and in some jurisdictions it is apparently regarded as conclusive; at least, the vendor is permitted to recover any deficiency as an element of his damages for the vendee's failure to perform.[6.5]

[6.5] **Anno:** 52 ALR 1518.

p. 482, n. 8. Anno: 52 ALR 1520.

p. 483 n. 14. Anno: 37 ALR2d 1057.

Damages in the amount of $676 have been allowed the purchaser of several pens of sheep which were knocked down to him as a unit in a sale "without reserve,' where the auctioneer thereafter resold them individually for $676 more than the unit bid. **Anno:** 37 ALR2d 1057.

§ 52. Right to Compensation.

Forms: 2 Am Jur Pl & Pr Forms 2:1355, 2:1362.

p. 483. n. 1. Anno: 37 ALR2d 1057.

It has been held that an auctioneer may recover against an owner who withdraws property from the auction sale for his reasonable compensation or expenses, although he is not entitled to his commissions. **Anno:** 37 ALR2d 1057

§ 53. Right to a Lien; Recovery of Compensation from Purchaser.

Am. Jur. cited in Art Education Press v. Smith, 252 App. Div. 316. 299 N. Y. S. 170 (n. 8).

§ 54. Liability of Auctioneer Generally.

Forms: 2 Am Jur Legal Forms 2:50–2:53.

§ 55. Liability for Custody and Disbursement of Deposit Money.

Forms: 2 Am Jur Pl & Pr Forms 2:1356.

Am Jur quoted in Hicks v Howell, 203 Va 32, 121 SE2d 757.

p. 486, n. 3. Anno: 80 ALR2d 1244.

p. 486, n. 6. Anno: 80 ALR2d 1244.

p. 486, n. 8. Anno: 80 ALR2d 1245.

p. 486, n. 10. Anno: 80 ALR2d 1244.

§ 56. Liability to Seller.

Forms: 2 Am Jur Pl & Pr Forms 2:1352–2:1354.

p. 487, n. 17.

A real estate agent, who bought property from his principal for $6,800 and sold it at public auction for $8,610, was held not liable for the profit realized where it was merely shown that the agent knew the market value to be between $8,500 and $9,000, and where there was no allegation that the agent knew that one or more persons were planning to bid in an amount in excess of $6,800 on the property on the day of the sale. Buchanan v. Fritts (Ky) 240 SW2d 614.

§ 57. Liability to Buyer.

Am Jur quoted in Pasley v Ropp (Mo App) 334 SW2d 254, 80 ALR2d 1231.

State Secur. Co. v Svoboda, 172 Neb 526, 110 NW2d 109.

Am Jur cited in McElroy v. Long (CA5th Ga) 170 F2d 345.

Grace v. Todd, 83 Ga App 684, 64 SE2d 479.

Farmers & B. State Bank v. Folmer, 217 Minn 513. 15 NW2d 13

p. 487, n. 1. Anno: 80 ALR2d 1242.

p. 487, n. 3. Anno: 80 ALR2d 1250.

p. 488, n. 5. Anno: 80 ALR2d 1238, 1249.

p. 488, n. 6. Pasley v Ropp (Mo App) 334 SW2d 254, 80 ALR2d 1231.

Anno: 80 ALR2d 1238.

Where the theory of purchasers of a tract of land at auction sale was that the auctioneer guaranteed the title, in view of the words in the advertisement of sale that "the purchaser makes the price, the owner makes the deed," and where at the conclusion of the sale the purchaser entered into a written contract with the owners of the property, the court affirmed the direction of a verdict in favor of the auctioneer, **Anno:** 80 ALR2d 1243.

p. 488, n. 7. Pasley v Ropp (Mo App) 334 SW2d 254, 80 ALR2d 1231.

Anno: 80 ALR2d 1239, 1251.

p. 488, n. 9. Anno: 80 ALR2d 1239.

p. 488, n. 10. Anno: 80 ALR2d 1251.

§ 58. — Effect of Failure to Disclose Principal.

Am Jur cited in Farmers & M. State Bank v. Folmer, 217 Minn 513, 15 NW2d 13.

Gessler v. Winton, 24 Tenn App 411, 145 SW(2d) 789

p. 488, n. 12. Anno: 80 ALR2d 1251.

The purchaser of stolen goods at an auction can hold the auctioneer responsible to him for the title when the auctioneer was operating for an undisclosed principal. Oliver v. Eureka Spring Sales Co 222 Ark 94, 257 SW2d 367.

p. 488, n. 13. Anno: 80 ALR2d 1250.

p. 488, n. 16. Anno: 80 ALR2d 1242.

§ 59. — Effect of Manner in Which Contract Is Signed.

Am Jur quoted in Gessler v Winton, 24 Tenn App 411, 145 SW(2d) 789

p. 489, n. 19. Anno: 80 ALR2d 1243.

p. 489, n. 1. Anno: 80 ALR2d 1243.

§ 60. Liability to True Owner.

Forms: 2 Am Jur Pl & Pr Forms 2:1360, 2:1361.

Am Jur quoted in Eureka Springs Sales Co. v Ward, — Ark — 290 SW2d 434.

Am Jur cited in United States v Union Livestock Sales Co. (CA4 W Va) 298 F2d 755.

Pasley v Ropp (Mo App) 334 SW2d 254, 80 ALR2d 1231.

State Secur. Co. v Svoboda, 172 Neb 526, 110 NW2d 109.

Morin v Hood, 96 NH 485, 79 A2d 4.

p. 489, n. 2. Pasley v Ropp (Mo App) 334 SW2d 254, 80 ALR2d 1231.

AUDITA QUERELA

§ 1. Definition and General Nature.

Forms: 12 Am Jur Pl & Pr Forms 12:511-12:515.

Am Jur cited in Jones v Watts (CCA5th) 142 F2d 575, writ of certiorari denied in 323 US 787, 89 L ed 628, 65 S Ct 310; Oliver v. Shattuck (CCA 10th Okla) 157 F2d 150.

RCL quoted in Robertson v Com. 279 Ky 762, 132 SW2d 69.

RCL cited in Robertson v Com. 279 Ky 762, 132 SW2d 69.

§ 2. When Available.

Forms: 12 Am Jur Pl & Pr Forms 12:511-12:515.

§ 3. When Not Available.

Forms: 12 Am Jur Pl & Pr Forms 12:511-12:515.

Am Jur quoted in Wintle v Wright, — Me —, 117 A2d 68.

§ 4. Parties to Proceeding.

Forms: 12 Am Jur Pl & Pr Forms 12:511-12:515.

§ 5. As Factor in Modern Practice.

Forms: 12 Am Jur Pl & Pr Forms 12:511-12:515.

Am Jur cited in Jones v Watts (CCA 5th 142 F2d 575, writ of certiorari denied in 323 US 787, 89 L ed 628, 65 S Ct 310: Oliver v Shattuck (CCA 10th Okla) 157 F2d 150.

RCL quoted in Robertson v Com. 279 Ky 762, 132 SW2d 69

p. 494, n. 18. Birmingham v Reed, 35 Ala App 31, 44 So2d 607, cert den 253 Ala 414, 44 So2d 614.

AUTOMOBILES

[For latest developments in the law of AUTOMOBILES and AUTOMOBILE INSURANCE, consult Revised Volume 5A, and the pocket supplement thereto.]